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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZA-
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AND INCLUDING VOLUME 25 OF THE
SOUTH CAROLINA REPORTS

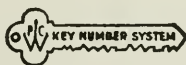
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VOL. 14, RICHARDSON'S EQUITY REPORTS
VOLS. 1 & 2, SOUTH CAROLINA REPORTS



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REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME XIV

FROM JANUARY, 1868, TO MAY, 1868, INCLUSIVE

By J. S. G. RICHARDSON

STATE REPORTER

COLUMBIA, SOUTH CAROLINA
BRYAN & McCARTER, PUBLISHERS
1868

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1916

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LAJ

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUDGES OF THE COURT OF APPEALS.

Hon. BENJAMIN F. DUNKIN,
Hon. DAVID L. WARDLAW, Hon. JOHN A. INGLIS,

CIRCUIT JUDGES.

Hon. THOMAS W. GLOVER,
Hon. ROBERT MUNRO, Hon. THOMAS N. DAWKINS,
Hon. FRANKLIN J. MOSES, Hon. A. P. ALDRICH,

CHANCELLORS.

Hon. JAMES P. CARROLL,
Hon. HENRY D. LESESNE, Hon. WILLIAM D. JOHNSON.

CLERK OF COURT OF APPEALS.

JOHN WATIES, Esq.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON—JANUARY TERM, 1868.

JUSTICES PRESENT.

HON. BENJAMIN F. DUNKIN, CHIEF JUSTICE.

HON. DAVID L. WARDLAW, ASSOCIATE JUSTICE.

HON. JOHN A. INGLIS, ASSOCIATE JUSTICE.

14 Rich. Eq. *5

*MYER STERN v. PHILIP EPSTIN.

(Charleston. Jan. Term, 1868.)

[*Partition* ⇨ 102.]

Where, under a bill for partition of land between two tenants in common, a sale is ordered by the Court, a judgment creditor of the defendant, who has intervened for the protection of his lien and become a party to the cause, has no right to insist that his debtor's interest, to the extent at any rate of the lien, shall be sold for cash. The creditor's rights, in that respect, are the same as the debtor's.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 336; Dec. Dig. ⇨ 102.]

[This case is cited in *Baum v. Stern*, 1 S. C. 420, as to facts.]

Before Johnson, Ch., at Charleston, November, 1867.

David Epstin and Philip Epstin were tenants in common of certain real estate, situated in the city of Charleston, described in the pleadings. By divers mesne conveyances the title of David Epstin in said real estate was transferred to Myer Stern.

On the 10th of August, 1866, Myer Stern

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filed his bill *for partition against Philip Epstin. The commissioners in partition recommended a sale of the premises. On the 23d of October, 1866, Nathan Zemansky entered up judgment in the Circuit Court of the United States for South Carolina, against Philip Epstin and Solomon Zemansky, for \$9,548.90.

On the 12th day of November, 1866, Nathan Zemansky filed his petition in the Court of equity; and reciting in the said petition the filing of the bill, prayed that he "might be made a party to said suit for partition, or be allowed to prove his claim in this Honorable

Court, and protect his interests in said lot of land, and the proceeds of sale thereof."

On the 18th of January, 1867, Nathan Zemansky filed his answer, wherein he states "that he has no objection to the sale of the said premises, but prays that out of the proceeds of sale, of the moiety belonging to the said Philip Epstin, his claim may be paid, and that his interest and lien on said premises may be protected by this Court."

The cause came on to be heard before his Honor Chancellor Johnson, who made the following decretal order:

It is ordered that the Master Gray do proceed, after giving twenty-one days' notice in one or more of the published gazettes, published in the city of Charleston, to sell the premises described in the pleadings, one-third cash, balance in three equal successive annual instalments, with interest at the rate of seven per cent. per annum, payable annually, secured by bond of the purchaser, and mortgage of the said premises, the buildings to be insured and the policy of insurance assigned, and that out of the proceeds of sale the Master do pay the costs of these proceedings, and then pay over one-half to the complainant, Myer Stern, and out of the other half, pay the amount appearing to be due on the judgment in the United States Court, and next to pay the amount that may be due under the

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judgment of Simon *Woolf against Philip Epstin, entered up in the Court of Common Pleas for Charleston District, and hold any surplus subject to the further order of this Court.

The defendant, Nathan Zemansky, appealed on the grounds:

1. That the execution was a legal lien, and

that it can be satisfied only by the payment of money, and that the order of sale should have provided for the payment of the lien in money.

2. That the defendant, by coming into the Court of equity with his lien, and asking that it be protected by the Court, waived no legal right, but is entitled to the same relief in equity that he would receive at law.

Porter & Conner, for appellant.

Macbeth & Buist, and Cohen, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. It does not appear how David Epstin and Philip Epstin became tenants in common. There is an Act of 1748, (3 Stat. 708,) which authorizes partition to be made in the Court of Common Pleas, between partners, joint tenants, or tenants in common, and an Act of 1786, (4 Stat. 742,) concerning admeasurement of dower, contains directions which are referred to by the Act of 1791, (5 Stat. 163, § 7,) concerning intestates' estates. But, as shown in the case of *Pell v. Ball*, (1 Rich. Eq. 388,) the Court of equity, in executing its power of making partition, usually conforms, in all cases of joint tenancy, and tenancy in common, to the Act of 1791. When an actual division cannot be made without injury to one or more of the

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parties, the *commissioners appointed by the writ of partition may certify their opinion that the estate should be sold at public auction, and if a sale appears to the Court more for the interest of the parties, the Court directs it to be made on such credit and such terms as seem right.

It is not suggested that in this case the discretion of the Chancellor was not properly exercised, as to the credit and the terms; but Nathan Zemansky having become a party, for the purpose of preserving his lien upon the moiety of his debtor, Philip Epstin, now says that as a judgment creditor he is entitled to immediate payment in money; that he is not bound to accept bonds, and should not be compelled to await the expiration of the credit which has been directed, nor to give to Philip Epstin the gain which would thence result to him; that at the sale two equal bonds may be taken for each of the three instalments, upon which credit is to be given, and of those bonds, Philip Epstin's half should be sold by the Master, (the market value of good bonds being now about 60 per cent.,) and for the money thus obtained, the judgment of *Zemansky v. Epstin* and another, be paid, the remainder, if any being left, for Woolf, another creditor of Philip Epstin, and Philip Epstin, himself.

The sale of bonds, taken under an order of Court, is a proceeding which, if not beyond the power of the Court, is not justified by any precedent now in mind. For the assignment of the bonds, when they shall have come into

the possession of the Court, suitable orders, upon the proper application may be made; or the Master, having been authorized to collect, may, under directions, pay from the proceeds, the judgment of Nathan Zemansky, with the interest which shall have accrued thereon. Nathan Zemansky is a party who has come in for his own benefit; being, to the extent of his lien, substituted for Philip Epstin, he can have no higher right than

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Philip Epstin had; he must *submit to the terms, which, upon consideration of the rights of all parties, have been imposed; as the debtor could not be allowed to affect injuriously the interest of the complainant, by insisting upon cash to pay his debts, so the creditor cannot subject that interest to his demand of the cash. If there is risk of loss, by failure of the purchaser, at the sale for partition, to pay his bonds, this, the Chancellor has endeavored to guard against, by the securities which have been required; and if unforeseen events should disappoint expectation, this would only add another to the instances too common in human affairs, where good purpose and prudence are baffled by misfortune. The lien of Nathan Zemansky is a lien upon Philip Epstin's undivided moiety, as upon his other property; by bringing his right to the notice of the Court Nathan Zemansky has obtained the advantage of being put in the way to acquire the fruits of his lien upon this moiety, rendered more valuable by partition, whilst his recourse to other property remains undisturbed.

If, as has been suggested, a defect in the title of the complainant, Stern, to the moiety claimed by him, might involve Zemansky in the consequences of an available defence made by the purchaser at the sale for partition to actions on the bonds, these defendants, in such event, would have to blame themselves, for it was their right and duty to resist partition, at the instance of a person not entitled to have it. (*Dorn v. Beasley*, 6 Rich. E. 429; [*Id.*] 7 Rich. E. 94.) It is said, however, that Nathan Zemansky might sell, or have sold Philip Epstin's moiety, under the execution founded on his judgment, and thus obtain immediate payment. A prior judgment, without sale thereunder, might not in this case, perhaps, any more than in cases of the partition of intestate's estates, affect the title of a purchaser, at the sale for partition. (*Keckley v. Moore*, 2 Strob. Eq. 21; *Burris v. Gooch*, 5 Rich. 6.)

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The sale of Philip Epstin's moiety by himself, or by a sheriff, under fi. fa. against him, would, however, have transferred the title of the moiety from Philip Epstin to the purchaser; and such a sale, made before the commencement of proceedings for partition, would have rendered it proper to make that purchaser, and not Philip Epstin, party defendant. But a sale, by either Philip

Epstin or the sheriff, post litem motam, could not have affected the partition. Here the proceedings for partition were pending when Nathan Zemansky obtained judgment. His rights under the judgment are not better than they would have been under a conveyance to him of Philip Epstin's title. Lis pendens gives such notice as to make the decree binding upon persons who acquire interests pending the suit, just as if they had been parties. (*Murray v. Ballow*, 1 Johns. Ch. 565; *Winchester v. Paine*, 11 Vesey, 197.) These are the words of Sir William Grant: "Ordinarily, it is true, that the decree of the Court binds only the parties to the suit. But he who purchases during the pending of the suit, is bound by the decree that may be made against the person from whom he derived his title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, suits would be indeterminable, or which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined." A purchaser pending proceedings in partition is like one who enters, pending an action of trespass to try titles; as the latter would be turned out by the writ of habere facias possessionem, after judgment for the plaintiff, so the former is subject to the decree, as if he had been an original party in the proceedings. (6 Rich. Eq. 422.)

It will thus be seen that Nathan Zemansky is bound by the decree, and has no higher right to special orders in his favor than Philip Epstin has; moreover, that he is in

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no *worse condition, because he voluntarily became a party to the suit. The result of his present motion would have been the same if he had been brought in by the complainant, or if he had never in any way become in form a party. By presenting his rights to the Court he has prevented the loss which he might have sustained, if Philip Epstin had himself received half of the proceeds of the sale for partition.

The decree is affirmed, and the motion dismissed.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Appeal dismissed.

14 Rich. Eq. *12

*RUFUS C. BARKLEY, Administrator of J. L. Barkley, Deceased, v. JOHN BARKLEY and Others.

(Charleston. Jan. Term, 1868.)

[*Specific Performance* ⇐77.]

Where vendor sells lands encumbered by mortgages, and agrees with vendee to procure

the mortgages to be satisfied, and the vendee pays the purchase money, a bill will lie to compel specific performance of the agreement.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 212; Dec. Dig. ⇐77.]

[*Equity* ⇐148.]

A bill by an administrator to enjoin creditors from suing at law and for sale of the real estate to pay debts, is not objectionable for multifariousness, because, besides creditors and heirs, with the usual allegations and prayers as to them, a vendor from whom the intestate had purchased the real estate and certain prior mortgagees of the same, are made parties: the object of making them parties being to remove a cloud from the title, by compelling the vendor to specifically perform his agreement to satisfy the mortgages.

[Ed. Note.—Cited in *Edwards v. Sartor*, 1 S. C. 270; *State v. Foot*, 27 S. C. 348, 3 S. E. 546; *Sheppard v. Green*, 48 S. C. 174, 26 S. E. 224; *Black v. Simpson*, 94 S. C. 317, 77 S. E. 1023, 46 L. R. A. (N. S.) 137.

For other cases, see *Equity*, Cent. Dig. § 354; Dec. Dig. ⇐148.]

Before Lesesne, Ch., at Charleston, November, 1867.

As the questions in this case arose upon the pleadings it is deemed proper to report the bill and demurrer in full.

Bill.

Humbly complaining, sheweth unto your Honors, R. C. Barkley, of the district and State aforesaid, that his brother, James B. Barkley, departed this life on or about the — day of January, 1864, intestate, unmarried, and without issue, leaving surviving him his brothers, John Barkley, David Barkley, William C. Barkley, Hugh Barkley, and your orator, and also a sister, Eliza Ann, the wife of O. R. Thompson, of Winnsboro.

And your orator further shows unto your

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Honors, that *the said Eliza Ann departed this life some time on or about 17th day of March, 1866, leaving surviving her, her said husband, the said O. R. Thompson, and four children, all of whom are infants of tender years, to wit: Mary G. Thompson, of the age of nine years; William L. Thompson, of the age of seven years; Margaret Loss Thompson, of the age of four years; and Nancy L. Thompson, of the age of about one year and nine months.

Your orator further shows unto your Honors, that on or about the 9th of February, 1864, he applied for and received from George Buist, Esq., Ordinary for Charleston district, letters of administration upon the estate of said James B. Barkley, and took upon himself the burden of the administration of said estate.

And your orator further shows unto your Honors, that the said James B. Barkley died seized of a considerable personal estate, which was sold under orders from the Court of Ordinary, for funds of the late Confederate States, which said personal estate has been fully administered and accounted for

before the Ordinary of Charleston district, as will more fully appear by reference to the decree of said Ordinary, a copy whereof is herewith filed and marked Exhibit "A."

And your orator further shows unto your Honors, that certain debts of said James B. Barkley still remain unpaid, to wit: a debt to George F. Meldau, and some other debts to certain persons to your orator not positively known, but who, when discovered, your orator prays may be made parties to these proceedings.

Your orator further shows unto your Honors, that the said James B. Barkley was seized at the time of his death of an estate in fee simple, of all that lot, piece or parcel of land, with the dwellings and buildings thereon, situate, lying and being on the south side of Liberty street, in the city of Charleston, and the State aforesaid, measuring and

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*containing in front, on Liberty street aforesaid, thirty-three feet by the same on the back line, and in depth one hundred and forty-seven feet, be the said dimensions more or less; butting and bounding to the north on Liberty street aforesaid; east, on lands now or late of Mordecai Cohen; south, on lands formerly of William Graham, and more recently of ———; and west, on lands now or late of Mordecai Cohen.

Your orator further shows, that the said lot of land was purchased from Michael McManmon, on the 6th day of January, 1864, as will more fully appear by reference to the deed of conveyance, a copy whereof is herewith filed, and marked Exhibit "B."(a)

Your orator further shows to your Honors, that at the time of the purchase by the said James B. Barkley, there were on record in the office of the Register of Mesne Conveyance for Charleston district, three mortgages on said lot of land and buildings, which are unsatisfied on the record, to wit: a mortgage from Thomas Y. Simons to Elias Horlbeck, dated January 1st, 1861, to secure a bond in the penal sum of \$4,480, conditioned to pay \$2,240, which said mortgage is recorded in the office of the said Register, in Book O, No. 14, page 390; also a mortgage from Michael McManmon to Elias Horlbeck, dated 16th April, 1863, given to secure a bond in the penal sum of \$4,000, conditioned to pay the sum of \$2,000, with interest, which said mortgage is recorded in the office of the said Register for Charleston district, in Book Q, No. 14, page 183; also a mortgage from Michael McManmon to Thomas Y. Simons, dated 28th January, 1863, given to secure a bond in the penal sum of \$5,150, conditioned for the payment of \$2,575, with interest, re-

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corded in the office of the *said Register, in

(a) This deed contained the usual covenant to warrant the title against the grantor and his heirs and all other persons whomsoever.

Book Q, No. 14, page 204, on the 31st day of June, 1863.

Your orator has been informed, and believes, that the mortgage to Elias Horlbeck from Thomas Y. Simons has been paid, though the same remains unsatisfied on the records. And your orator is further informed, that the mortgage from Michael McManmon to Thomas Y. Simons has been assigned to some person to your orator unknown.

And your orator further shows unto your Honors, that at the time of the purchase of said house and lot by the said James B. Barkley from the said Michael McManmon, the said Michael McManmon agreed, and it was understood between the said parties, that he would procure the said mortgage to be satisfied, so that the title to the said house and lot should be without any defect, flaw, or incumbrance, and on this agreement the said James B. Barkley, relying on the good faith of the said Michael McManmon, paid to the said Michael McManmon the whole of the purchase money, and took title for the property.

And your orator further shows unto your Honors, that the said James B. Barkley, at the time of his death, was also seized of all that lot, piece or parcel of land, situate, lying and being in Pitt street, east side, adjoining the premises of Joseph A. Sanders, and known as No. 66, and distinguished in an original plat drawn by Robert A. Payne, known as Duncan Square, by the No. 25, and measuring and containing in front, westwardly on Pitt street, thirty-five feet, more or less, and the same on the back line; on the south line, on a lot now or formerly of Daniel Johnson, ninety-six feet, more or less; and on the north line on a lot now or formerly of Mr. Walding, ninety-nine feet, more or less.

And your orator further shows unto your Honors, that he, acting under a mistake, did, on the 28th March, 1864, as administrator

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of James B. Barkley, convey the said *house and lot on Pitt street, to one Thomas Mulvaney: but your orator having been subsequently advised that his conveyance was not good, and only conveyed the right and title of himself as one of the heirs of his brother, repaid to said Thomas Mulvaney the purchase money, which your orator had received, and took from him a conveyance of the said lot of land to himself, so as to cover the interest which he had by the said deed conveyed.

And your orator would further show, that the said title, a copy of which is hereto annexed and marked Exhibit "C," is dated 20th November, 1864, has never been recorded, and has always been, and still is, held by your orator for the benefit of the estate of his brother, the said James B. Barkley.

And your orator further shows unto your Honors, that there is no personal estate oth-

er than the said Confederate notes, out of which the debts of the estate can be paid; and your orator fears that the said George F. Meldau, and the other creditors of the estate, whom your orator prays may be made parties to this bill, when discovered, with apt and proper words to charge them, will proceed at law to collect their debts to the serious injury of the estate.

And your orator further shows unto your Honors, that he has frequently applied to the said John Barkley, David Barkley, Hugh Barkley, and William C. Barkley, O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson, and Nancy S. Thompson, to join him in executing a conveyance of the said two houses and lots of land, for the purpose of enabling him to pay off the debts and liabilities of the estate, and dividing the remaining portion among them, which your orator had well and truly hoped they would have done.

And your orator further shows unto your Honors, that he has frequently applied to the said Michael McManmon to perform the agreement made with the said James B.

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*Barkley, and to cause the said mortgages to be satisfied on the record of the Register of Mesne Conveyance, and to pay any amount that may be due on any of the same, in accordance with his said agreement, which in justice and equity he ought to have done.

And your orator further shows unto your Honors, that he has frequently endeavored to find and ascertain the party to whom the mortgage from Michael McManmon to Thomas Y. Simons had been assigned, and has failed to discover the person; but your orator prays that the said person, when discovered, may be made a party to this bill, with fit and apt words, to charge him as a party.

And your orator further shows unto your Honors, that he has frequently applied to Elias Horlbeck for the purpose of ascertaining what amount is due on said mortgage, and more particularly also for the purpose of ascertaining the true value and real character of the consideration for which the two mortgages by Michael McManmon and Thomas Y. Simons were given, and what portion, if any of the said value has been paid, and what portion of the real consideration is due, the said two mortgages having been executed between the 1st day of January, 1862, and the 15th May, 1865; and your orator had well and truly hoped that the said Elias Horlbeck would have well and truly complied with this, his reasonable request, as in justice and equity he ought to have done.

But now so it is, may it please your Honors, the said John Barkley, David Barkley, Hugh Barkley, and William Barkley, O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson, and Nancy L. Thompson, Michael McManmon and Elias Horlbeck, combining and confederating

together, with divers other persons at present unknown to your orator, whose names, when discovered, he prays may be herein inserted, with fit and proper matter and words, to charge them as parties hereto, contriving

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*how to injure your orator, absolutely refuse to comply with such his reasonable request. All of which actings and doings, and pretences, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. In tender consideration whereof, and for as much as your orator is remediless in the premises by the strict rules of the common law, and cannot have adequate relief except in a Court of Equity, where matters of this kind are properly cognizable.

To the end, therefore, that the said John Barkley, David Barkley, Hugh Barkley, and William C. Barkley, O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson, and Nancy S. Thompson, G. F. Meldau, Elias Horlbeck, and Michael McManmon, may full, true, and perfect answer make to all and singular the premises, and that as fully as if they had been thereunto specially interrogated. That the said Michael McManmon may be compelled to satisfy the said mortgages. That the said Elias Horlbeck may declare what amount is due on the mortgages held by him, and the nature and true value of the consideration received by him, and whether the said consideration was in specie, bank bills, or notes known as Confederate treasury notes, and that he may be enjoined from foreclosing either of the said mortgages. That the said G. F. Meldau, and other creditors, be enjoined from proceeding at law, but that they present and prove their accounts before this Honorable Court; and after the sale of the said houses and lots, that the surplus, if any, after payment of debts, may be divided among the distributees of the said James B. Barkley, in the shares to which each of them may be entitled; and that your orator may have such further and other relief in the premises as the nature and circumstances of the case may require. May it please your Honors to grant that the writ of injunction may issue out of this Honorable Court, under the seal

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of *the Court, directed to Elias Horlbeck, and enjoining him from proceeding for the purpose of foreclosing the said mortgage; and also to ——— and others when discovered, the creditors of the said James B. Barkley, enjoining them from suing at law for the said debts due to them. And also may it please your Honors to grant unto your orator a writ of subpoena ad respondendum, to be directed to John Barkley, David Barkley, William C. Barkley, Hugh Barkley, O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson, and Nancy S. Thompson, Elias Horlbeck,

Michael McManmon, and George F. Meldau, commanding them, on and by a certain day, and under a penalty to be therein named, to be and appear before this Honorable Court, and then and there, on their several corporal oaths, to the best of their knowledge and belief, full, true and perfect answer to make to all and singular the matters herein contained, and to stand to, abide by and perform such orders and decrees as to your Honors may seem meet and agreeable to equity and good conscience. And your orator will ever pray, &c.

Demurrer of Michael McManmon.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer sheweth that he, said complainant, hath not by his said bill, made such a case as entitles him in a Court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill, or any of such matters; and for further cause of demurrer, this defendant sheweth that it appears by the said bill that the same is exhibited against this defendant and John

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*Barkley, Hugh Barkley, David Barkley, William C. Barkley, O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson, Nancy S. Thompson, George F. Meldau, and Elias Horlbeck, for several and distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, by reason of which distinct matters the said plaintiff's said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together which do not depend on each other in the said bill, the pleadings, orders, and proceedings will, in the progress of the said suit, be intricate and prolix, and this defendant put to unnecessary charges in taking copies of the same, although several parts thereof no way relate to or concern him; wherefore, and for divers other good causes of demurrer, appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable Court, whether he shall be compelled to make any further or other answer to the said bill, and he humbly prays to be hence dismissed, with his reasonable costs in this behalf sustained.

The decree of his Honor, the Chancellor, is as follows:

Lesene, Ch. The bill in this case is filed by the plaintiff, as administrator of James B. Barkley, deceased, for a settlement and

distribution of his intestate's estate, alleging that the intestate's personal estate had been duly administered and accounted for, and was insufficient to pay his debts, and praying a sale of his real estate for that purpose, and for distribution among his heirs and distributees. To this bill the heirs and distributees, and the creditors of the intestate, are made parties defendant, and also

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certain *mortgagees of the mortgaged portion of the intestate's real estate, and likewise Michael McManmon, the vendor and mortgagor of the mortgaged premises.

McManmon demurs to the bill, and shows for cause of demurrer: 1st. That complainant has not by his bill made such a case as entitles him, in a Court of equity, to any discovery or relief from this said defendant; and, 2d. That the bill is obnoxious to the charge of multifariousness, it being exhibited by one complainant against several defendants, and for several and distinct matters, with many of which the defendant McManmon is in no way concerned.

The facts of the case, as set forth in the bill, so far as the defendant McManmon is concerned, are as follows:

On the 6th day of January, 1864, McManmon sold and conveyed a house and lot in "Liberty" street, in the city of Charleston, to the intestate, with a general warranty of title. At the time of the purchase, there were on record, two unsatisfied mortgages of the said property by McManmon, one dated January 28th, 1863, for \$2,575, to Thomas Y. Simons, Esq., and another dated April 16th, 1863, to Dr. Elias Horlbeck; and it was agreed and understood between the intestate and McManmon, that he, McManmon, would procure these mortgages to be satisfied, so that the title to the property should be without any defect, flaw, or incumbrance, and upon that agreement the intestate paid the whole of the purchase-money, and received a conveyance of the property. But McManmon has failed to procure satisfaction of the mortgages. And the prayer, as to him, is, that he be compelled to do so, or in other words, that his agreement be specifically performed.

The allegations of the bill must be taken as true, "pro hac vice." The case before the Court, then, is that of a vendor of land subject to mortgages, to be satisfied. I think the plaintiff is entitled to decree for specific per-

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formance. The case is certainly as strong as if McManmon had covenanted to indemnify Barkley against the claim of the mortgagees. And it is settled that a bill will lie for specific performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bills "quia timet." (Champion v. Brown, 6 John. Ch. 398; see also Story's Eq. Jur. §§ 370, 785, 850.)

I do not think, indeed, that to sustain this bill it is even necessary to show any express agreement, such as is alleged. The question is whether the vendor is bound to remove the liens or incumbrances on the property subsisting at the time of the sale. His deed, I apprehend, obligated him to do that. But it is only in this Court that such an obligation can be adequately enforced, and the authority of the Court is well established. In *Lee v. Rook*, (Moseley, 318,) disencumbering an estate or perfecting the title, is spoken of as a familiar subject of equity jurisdiction; and the doctrine is recognized in the case of *Hodges v. Connor*, (1 Speers, 125.) The action in the latter case was on a note given for the purchase of land, and the defence urged was, that the plaintiff had no title to the land, and there was consequently a failure of consideration. The defendant's possession had not been disturbed or threatened, and it also appeared that the plaintiff had an equitable title.

The Court, under the circumstances, rejected the defence, but in doing so, remarked: "If he (the defendant) feels himself insecure in his possession, let him file a bill in the Court of Equity against the plaintiff, to perfect the title."

It remains to consider whether this bill is justly obnoxious to the charge of multifariousness.

"By multifariousness," says Mr. Justice Story, "is meant the improperly joining, in one bill, distinct and independent matters, and thereby confounding them; as for example, the joining in one bill of several mat-

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ters perfectly distinct *and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Eq. Pl. 271; and in *Dan. Ch. Pl. and Practice*, p. 395, it is said: "From the above cases it may be deduced that a plaintiff cannot join in his bill, even against the same defendant, matters of different natures, although arising out of the same transaction; yet, when the matters are homogeneous in their character, the introduction of them in the same bill will not be multifariousness." The present bill is filed by an administrator, and its purpose is to settle up the intestate's estate. For that purpose, it asks for a sale of the real estate, in aid of the personal assets, which are insufficient for the payment of the debts.

But the real estate is encumbered by certain mortgages, and in order to make a good title, it further seeks the removal of those incumbrances. It cannot be said that the things sought for by this bill are "unconnected," or "of different natures." They aim at one and the same object, and are all necessary to its accomplishment, and are therefore not "multifarious," but homogeneous in their character.

If the demurrer were to be sustained, the effect would be to necessitate several other suits, on questions which are involved in this bill, all of which relate directly to its one object, and may be tried in this cause without any disadvantage to the defendant, McManmon. It is a very proper case for the exercise of the peculiar and very beneficial jurisdiction of this Court, to prevent a multiplicity of suits, and administer suitable and full relief.

It is ordered and decreed, that the demurrer be overruled, and that the defendant, Michael McManmon, answer the bill, or plead to the same within thirty days from the filing of this decree.

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*The defendant, Michael McManmon, appealed on the grounds:

1. That the complainant is not entitled to a decree against McManmon for a specific performance of the agreement alleged in his bill of complaint, because any such parol promise, or undertaking, if made at or before the date of the title deed to the intestate, was merged in the general warranty of said deed; and if made after, could not control, vary, or alter the obligations by way of warranty contained in said previous deed.

2. That the complainant is not entitled to a decree against McManmon, to disencumber the property by virtue of any provisions in the alleged title deed to the intestate.

3. That the complainant is not entitled to equitable relief, because the alleged agreement is so vaguely stated in his bill of complaint, that the defendant, McManmon, cannot know with certainty to what and what kind of contract he is to respond.

4. That the allegations of said bill of complaint do not entitle the complainant to any kind of equitable relief.

5. That the bill is multifarious, inasmuch as it seeks the aid of the Court in a partition and settlement of the intestate's estate, and also seeks to enforce a specific performance against McManmon, of an agreement to disencumber.

Brewster, Spratt, and Burke, for appellant.

Duryea, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. J. The pleadings admit that "at the time of the purchase of the

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house and lot, the defendant agreed, *and it was so understood between the parties, that he would procure the mortgages to be satisfied, so that the title to the said house and lot should be without any defect, flaw, or incumbrance, and, on this agreement, the intestate, relying on the good faith of the defendant, paid him the whole of the purchase money, and took title for the property."

Whatever other covenants or obligations he may have entered into, it is not permitted to him to deny this agreement. He is precluded by the demurrer. Then as to the authority of this Court to enforce the agreement, (at sec. 850, Eq. Jur.) Mr. Justice Story says: "Courts of Equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages only, upon the same principle that they will entertain a bill *Quia timet*; and this not only at the instance of the original covenantor, but of his executors and administrators." The general principle is stated (§ 730.) that the Court will interpose in many cases to decree a specific performance of express, and even of implied contracts, where no actual injury has as yet been sustained, but it is only apprehended from the peculiar relation between the parties.

The fifth and last ground objects that the bill is multifarious, as the purposes sought are different as against the several defendants. The proceedings are instituted for the partition and settlement of the intestate's estate, in which the administrator and heirs are properly parties. The personal assets having been exhausted, it is sought to subject the real estate to the payment of debts, etc., a course sanctioned by the practice and decisions of this Court. The incumbrances, which the defendant agreed to have removed, are a cloud upon the title. Assuming that the administrator, or the heirs, are entitled to implead the defendant in a separate suit, no clear title could be offered until the termination of those proceedings, thus producing unnecessary delay. It is a favorite ob-

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ject of this Court to prevent multiplicity of suits and variety of litigation. Furthermore, "if the nature of the transactions," (says an approved author, Adams' Eq. 310.) "makes a single suit convenient, the objection of multifariousness in such cases will not be sustained." In *Oliver v. Platt*, (3 How. U. S. 333, 411 [11 L. Ed. 622]) the Court say, "Where the interests of different parties are so complicated in different transactions, that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious." And again, "there is no general rule by which to determine whether a bill, in such cases, is multifarious or not; but it must be left to the discretion of the Court, under the circumstances of the case." See also, *Williams v. Neel*, (10 Rich. Eq. 238 [73 Am. Dec. 94].)

It is ordered and decreed that the appeal be dismissed.

WARDLAW and INGLIS, A. JJ., concurred.

Appeal dismissed.

14 Rich. Eq. *27

*ROBERT H. DELAY and SARAH His Wife
v. WILLIAM J. DENNIS and Others.

(Charleston. Jan. Term, 1868.)

[*Husband and Wife* ⇨ 152.]

Testator's widow and executrix, having intermarried a second time, and being by the terms of his will entitled, on her second marriage, to one-third of the estate, for life, to her sole and separate use, bid off a tract of land at a sale of the estate made by order of the Court under a bill for partition: *Held*, that being a married woman, at the time of the sale, neither she nor her husband was bound by the bid, and consequently, that she could not be charged, in the settlement of the estate, with the difference between her bid and the amount realized at a resale of the tract of land.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 596; Dec. Dig. ⇨ 152.]

Before Lesesne, Ch., at Charleston, February, 1867.

This was a bill for partition and settlement of the estate, real and personal, of which William J. Dennis, deceased, the testator in the cause, had died seized and possessed.

The testator's will bore date September 19th, 1853. By it he devised and bequeathed his whole estate to the plaintiff Sarah, his widow, for life, should she so long continue his widow, with remainder to his children; but should she marry again, then, upon such marriage, he devised and bequeathed one-third of his estate to her for life, "not to be subject either as to the body or income, to the debts, contracts," &c., of her husband, with the remainder to his children, and the other two-thirds to his children; and he appointed her and William Ravenel and Charles McBeth, executrix and executors of his will.

She, qualified as executrix, and some time

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after the testator's death, intermarried with the plaintiff Robert H. Delay, and they then filed this bill against the testator's children, of whom there were eight.

A writ of partition was issued, and on the return thereto, Chancellor Inglis, in February, 1860, ordered the property, real and personal, to be sold for one-third cash, and the balance on credit, and in March of the same year the accounts were referred to a master.

The master in his report on sales, dated April, 1860, stated that on the 6th of March, 1860, he had sold the plantation called Hog Swamp to Mrs. Sarah A. Delay for four thousand dollars.

Other proceedings were had in the cause prior to the decree of Chancellor Lesesne hereinafter next mentioned, but none of them is it material to mention.

The case came before his Honor, Chancellor Lesesne, in February, 1867, and he afterwards filed his decree by which, amongst other things, he ordered the plan-

tation called Hog Swamp to be resold, and that the master state an account of the amount which each of the parties in the cause is now entitled to receive, charging the plaintiff, Mrs. DeHay, with the difference between the amount of four thousand dollars, for which the said plantation, Hog Swamp, was sold on the 6th day of March, 1860, and the amount which the same may realize at the sale to be made under this order, and with rent for the use and occupation of the said plantation, Hog Swamp, from the 6th day of March, 1860, to the day of sale to be made, as to which the said master shall take testimony and determine what is a proper amount of rent per annum.

The plaintiffs appealed from so much of the decree as directed the master to charge Mrs. DeHay with the difference between the amount of four thousand dollars and the

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*amount which may be realized at the resale of Hog Swamp ordered by him.

Whaley, for appellants.

Macbeth and Buist, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. We are not satisfied that under the circumstances of this case, the bidder at the sale of 6th March, 1860, whoever he might have been, should be charged with the difference between that bid and the amount for which the land may be sold under the order of 1st January, 1868. But, from the view taken by the Court, it is not necessary to consider that matter. The decretal order, which is the subject of appeal, in effect charges the payment of that difference upon the interest of Mrs. DeHay, in the estate of her deceased husband, Wm. I. Dennis. Under the provisions of his will, and in the events which have occurred, she is entitled to a life-estate in one-third of his property, to her sole and separate use, with remainder to his children. Prior to the sale 6th March, 1860, she had become the wife of the plaintiff, Robert H. DeHay. By law, her bid on that occasion was obligatory neither on her husband nor herself, nor had she specific authority to bind her separate estate, nor did she profess to exercise any such authority.

But it is urged that the parties are precluded by the previous proceedings. It is manifest, however, that the question has never been subjected to the consideration and judgment of the Court. All the orders in relation to the sale of the plantation were of an administrative character, and have never yet been carried into effect. In the report of Mr. Gray, 7th August, 1860, he refers to the liability of Mrs. DeHay as hy-

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pothetical. And Chancellor Carroll, in *his decree on the exceptions, October, 1861, uses this language: "The contract of purchase,"

(referring to the bid of Mrs. DeHay, of March, 1860,) "if obligatory at all, binds only Mrs. DeHay or her husband." No subsequent proceedings were had from that time until the report and decree of February, 1867, which are now submitted to the consideration of the Court. For the reasons which have been stated, the bid of Mrs. DeHay was obligatory neither upon her husband nor herself individually, nor could it charge her separate estate. It is, therefore, ordered and decreed that so much of the decretal order of January, 1868, as charges the plaintiff, Mrs. DeHay, with the difference in the sales, be rescinded.

WARDLAW and INGLIS, A. JJ., concurred.

Appeal sustained.

14 Rich. Eq. *31

*JOSEPH COHEN v. AUGUSTUS HABENICHT.

(Charleston. Jan. Term, 1868.)

[*Arbitration and Award* ⚡57.]

Award impugned on the grounds, that it exceeds the submission and determines matters not referred; that it does not conclude the matters referred, and so is not final; and that it professes on its face to be founded on reasons of law that are not law. These several grounds considered and overruled by the Court, and the award held good.

[Ed. Note.—Cited in *Rounds & Hagler v. Aiken Mfg. Co.*, 58 S. C. 313, 36 S. E. 714.]

For other cases, see *Arbitration and Award*, Cent. Dig. § 281; Dec. Dig. ⚡57.]

[*Arbitration and Award* ⚡65.]

Where an award purports to determine matters not referred, and is therefore in excess of the submission, it is not necessarily wholly void. If the excess can be separated from the other parts, the former will be rejected as surplusage, and the latter will stand good.

[Ed. Note.—Cited in *McCall v. McCall*, 36 S. C. 86, 15 S. E. 348; *Rounds & Hagler v. Aiken Mfg. Co.*, 58 S. C. 334, 36 S. E. 714.]

For other cases, see *Arbitration and Award*, Cent. Dig. §§ 328-332; Dec. Dig. ⚡65.]

[*Landlord and Tenant* ⚡154.]

In an action, during the term, by a tenant against his landlord for breach of a covenant to repair, the plaintiff may recover damages to the whole estate and not merely for so much of the term as had expired before action commenced.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 558-566; Dec. Dig. ⚡154.]

[*Arbitration and Award* ⚡63.]

The error of law which will avoid an award must appear on its face and be very clear, and be such as has plainly conducted the judgment of the arbitrators to a wrong conclusion.

[Ed. Note.—Cited in *Bollmann v. Bollmann*, 6 S. C. 43.]

For other cases, see *Arbitration and Award*, Cent. Dig. § 314; Dec. Dig. ⚡63.]

[*Landlord and Tenant* ⇨154.]

In an action for breach of a covenant to repair, how the damages may be estimated.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 558-566; Dec. Dig. ⇨154.]

[*Arbitration and Award* ⇨59.]

An award is bad if it be not final and does not dispose of all the matters submitted.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. § 291; Dec. Dig. ⇨59.]

[*Arbitration and Award* ⇨52.]

[Where a claim of a lessee against his lessor for damage for failure to put the premises in "tenantable repair" was submitted to an arbitrator, the award of a reduction in the rent until the premises were put in "tenantable repair" need not describe in detail the work necessary to comply with these terms.]

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. § 264; Dec. Dig. ⇨52.]

Before Lesesne, Ch., at Charleston, November, 1867.

This was a bill for foreclosure of a mortgage. The facts are stated in the plea of the defendant to the further maintenance of the suit, a copy of which is as follows:

Augustus Habenicht, of the city of Charleston, in the district and State aforesaid, in

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the way of plea to the bill *of complaint of Joseph Cohen, brings to the attention of this Honorable Court, the following facts:

On the day on which the bill was filed in the office of the Register of this Court, to wit, on the 5th day of October, 1866, this defendant commenced, through his solicitors as attorneys in the Court of Common Pleas for Charleston district, an action of covenant to recover damages to the amount of five thousand (\$5,000) dollars, against the complainant; and on the original writ which is now in the possession of his said solicitors, the solicitors of the complainant on the same day entered an appearance for the said complainant.

The said action of covenant as well as this bill arose out of an indenture of lease, executed between the said complainant and this defendant, on the 21st day of March, 1866, the original of which is in the hands of his solicitors, and a copy of which is herewith filed and marked Exhibit A, and to which reference is craved.

On the 9th day of October, 1866, an agreement was entered into between this defendant and complainant, through their solicitors, which is in the following words, to wit:

"Charleston, S. C., October 9, 1866.

"It is agreed between us, as the counsel of Messrs. Augustus Habenicht and Joseph Cohen, that all matters now pending between them arising out of the lease of the French Coffee House on East Bay, dated the 21st day of March, 1866, including the suit in equity and at law, commenced by the said parties respectively, as well as all questions

as to the duties and obligations of the said parties, arising out of the said lease, and their responsibility for the non-observance of the covenants of the same, or under the said covenants, up to this time, shall be referred to the Hon. W. A. Pringle, as a referee,

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and that he shall hear the evidence which may be adduced, and submit his award in the premises, which shall be final and conclusive upon the said parties.

(Signed) Macleth & Buist,
For Augustus Habenicht.
(Signed) J. Barrett Cohen,
For Joseph Cohen."

Shortly after this agreement, this defendant and the said complainant, each in his own person, attended by his solicitor, appeared before Hon. W. A. Pringle who for two days was engaged in hearing evidence and argument on the matters submitted to him, and on the 1st day of November, 1866, rendered an award, which is in the words following, to wit:

"On the 21st March, 1866, Mr. Joseph Cohen leased to Captain Augustus Habenicht the premises on East Bay, known as the French Coffee House. The lease was to commence on the 1st July, 1866, and was to continue for the term of ten years. The covenant on the part of Mr. Cohen was, that he was to put necessary repairs on the premises as soon after the 1st day of July, 1866, as possible, 'the said necessary repairs to consist of such work as will make the said premises thoroughly tenantable.' The covenants on the part of Captain Augustus Habenicht were, that he would pay this yearly rent of \$2,000, in gold or its equivalent in currency, in quarterly payments, on the 1st days of October, January, April, and July; that he would keep the premises painted and in good order: that is to say, free from ordinary leakage, and the shutters, sashes, blinds, glasses, cisterns, privies, pumps, roofs, floors, and so forth, in good order and condition, excepting such damage to the joists and flooring as may occur by rotting; that he would not sublet the premises,

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and if he failed to keep any of *the covenants, it should be lawful for the said Joseph Cohen to repossess the premises as of his former estate.

"To secure the payment of the rent, Captain Habenicht executed a bond of indemnity in the penal sum of \$4,000, together with a mortgage of his house in Church street. On or after the 1st of July, Captain Habenicht entered upon the premises under the lease, and Mr. Cohen employed Mr. Lopez, a master mechanic of large experience, to put the premises in the repair required by the lease. On the 1st day of October, Captain Habenicht failed to pay the quarter's rent of \$500 in gold then due, and on the 5th, Mr. Cohen fil-

ed a bill in equity to foreclose the mortgage given to secure the rent. On the same day Captain Habenicht issued a writ in covenant against Mr. Cohen for the breach of his covenant, on the ground that the premises were not in thoroughly tenantable order. The parties have agreed to submit all the questions as to their respective duties and obligations to my award, after hearing the evidence which may be adduced.

"On the part of Mr. Cohen, it is contended that he has complied with his covenant, that the premises are thoroughly tenantable, that he is entitled to the first quarter's rent in gold or its equivalent, with interest from the 1st October, together with the costs of the proceedings which have been commenced in the courts of law and equity. On the part of Captain Habenicht, it is contended, that Mr. Cohen has not complied with his covenant; that the premises are not in thorough tenantable condition; that the repairs were a condition precedent to his payment of any rent; and that he is entitled to a discount for the price of a pump which he furnished on the premises.

"The first question to be decided is, whether Mr. Cohen's covenant to repair is a condition precedent to Captain Habenicht's liability for rent.

"I do not think that it is. There is no

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word used in the lease which expresses or implies that the parties understood it as a condition precedent. Mr. Cohen does not covenant to put the premises 'previously' in repair, or that they shall be 'first' made thoroughly tenantable. On the contrary, the stipulation is that Captain Habenicht was to enter upon the premises on the 1st July, and as soon after as possible, they were to be made thoroughly tenantable. Whether a condition shall be considered as precedent or not, depends not on the form or arrangement of the words, but on the manifest intention of the parties, on the fair construction of the contract.

"And as Captain Habenicht was to enjoy the premises immediately after the 1st July, and before the repairs were made, it can hardly be regarded as the intention of the parties, that he was to occupy the premises and pay no rent until the repairs were made.

"The fair conclusion is, that Mr. Cohen's covenant to repair was not a condition precedent to the payment of the rent, but an absolute and independent covenant on his part to make certain repairs, for the breach of which he is liable for such damages as may be legitimately proved against him. And we are next to inquire, has he complied with his covenant? Are the premises thoroughly tenantable? I have been able to find no direct definition of the expression, tenantable repairs. In an English book of authority, Platt on Leases, 2 vol., page 197, it is stated, that a covenant to put premises into 'habitable

repair,' imports a state that they may be used and dwelt in, not only with safety, but with reasonable comfort by the class of persons by whom and for the sort of purposes for which they are to be occupied. This definition of the word habitable, recommends itself by its propriety and fairness. In *Belcher v. McIntosh*, Mr. Justice Alderson says, that the term 'tenantable repair,' may have a somewhat different meaning to the term 'habitable repair.' But he does not explain

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in what the difference consists. But I apprehend if there be any, that the expression tenantable, is rather the stronger of the two. The ordinary definition of the word habitable, is such as may be inhabited, suitable for an inhabitant. That of the word tenantable, such as may be tenanted, suitable for a tenant. And when a house is to be leased to others, the word tenantable would seem to imply something beyond its being merely such as may be inhabited or fit for habitation, something in fact which would exceed a mere habitation, and offer an inducement and attraction to a tenant.

"Fuller, speaking of Colchester in his History of the Worthies of England, says in his quaint old English, 'all men beheld it as tenantable full of houses.' This I suppose may be what Mr. Justice Alderson means, when he says that there is difference between the terms tenantable and habitable. But allowing that there be no substantial difference between the words tenantable and habitable, I suppose it is fair to assume that when Mr. Cohen covenanted to make the premises thoroughly tenantable, he undertook to put them in a condition that they might be used and dwelt in, not only with safety, but with reasonable comfort by the class of persons by whom and for the sort of purposes for which they were to be occupied. And the premises in question have been long well-known as a first class restaurant, a sort of establishment used for purposes requiring more embellishment, and attraction, and repair, and equipment, than a mere habitation. A man who goes to a hotel or eating house, expects to find something better than he has at home. The modern drinking houses of the world are made gorgeous by every display and embellishment of art.

"The gin palaces of London and the saloons and restaurants of Paris are adorned by everything that can attract the eye and captivate the senses. I do not for a moment

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*presume that it was within the contemplation or the contract of the present parties to attempt to vie with such establishments as these. But in endeavoring to fix a definite interpretation to the expression thoroughly tenantable, which was used in reference to these premises, leased as the French coffee house, there must be some reference to the class of persons by whom, and the sort of

purposes for which they were to be occupied; and looking at them, I must come to the conclusion that the words thoroughly tenantable, must be construed to mean something beyond their being merely air-tight and weather-tight, something if not of ornament at least of decency and cleanliness. But whatever illustrations I may use, I do not mean to extend the term in reference to a building in Charleston, beyond these requisites. In determining whether Mr. Cohen has come up to the standard, as laid down in Platt, I have no other guide or light than the testimony which has been produced before me. I have not inspected the premises, and must depend upon the description of the witnesses. And here I meet the difficulty that the testimony is contradictory. On the part of Capt. Habenicht, it is testified to by the Rev. Mr. Yates, Wm. C. Lowndes, Mr. Hargrave, Mr. Gruber, Mr. Coogan, Mr. Kenake, Mr. Torch and Mr. Purcell, that the premises are not in tenantable order; that the billiard room has a pile of rubbish in it; that the walls are stained, and that there is a large hole in the roof. Mr. Lowndes describes the upper rooms as being in an abominable condition; that he would not put a decent person in them, and that there are marks of leaks down the walls. Mr. Lopez, on the contrary, a contractor and builder of large experience, produced on the part of Mr. Cohen, testifies that under the direction of Mr. Cohen, he put the premises in thorough tenantable order, stopped all the leaks, and did all, and more than he thought the lease called for, and as much he thought as Capt. Habenicht required. In this conflict

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*of testimony I can only decide according to the greatest weight of the evidence. But it is said that the condition of the premises is a matter to be decided by the opinion of experts, and that Mr. Lopez's opinion, on account of his profession, is entitled to a greater consideration than that of the other witnesses. I might agree to this proposition, if the question were confined merely to the safety of the building, and the substantial character of the joiner's or carpenter's work. But the question here is not merely as to the quality, but the quantity of the work. I am to decide not merely as to how the work was done, but whether it was done, not merely how, but how much. It is a question not merely of opinion, but of fact: not merely whether a leak was substantially and expertly stopped, but whether it was stopped at all. The word expert is derived from the Latin expertus, which signifies instructed by experience. Now the question as to whether a house is tenantable or habitable, does not require for its solution that a man should have served his time as a mechanic. It is not necessary that he should be able to project a spiral stair, or turn an arch, to enable him to say whether a roof leaks or

not, or whether a house is in that condition that it may be dwelt in with reasonable comfort, by the class of persons by whom, and for the purposes for which it is to be occupied. To know whether a house is tenantable is not a matter of learned and instructed information, but of common intelligence and ordinary experience. Every householder is an expert in such a case; it is a matter which lies within and not without the knowledge of ordinary people, and the ordinary experience of life. I must here remark that Mr. Lowndes, Mr. Kenake and Mr. Purcell, all of whom inspected the premises after Mr. Lopez had completed the repairs which he thought necessary, testified that there is a hole in the roof. Mr. Lowndes said it was six or eight inches in diameter, and Mr. Kenake, as large as my

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clock. *I am therefore constrained from the weight of the testimony to conclude that Mr. Cohen has not complied with his covenant, to make the premises thoroughly tenantable, and that they are not in such a state that they may be used, and dwelt in with reasonable comfort, by the class of persons by whom and for the sort of purposes for which they are to be occupied. The next point is the amount of damages, if any, to which Capt. Habenicht is entitled for the nonperformance of the covenant by Mr. Cohen. I quite agree that mere speculative damages are not to be allowed, and if the contract were merely executory, as it was in the case of Hunt ads. Dorval, in Dudley's Reports, 180, I would regard the authority of that case as decisive. But the present is not an executory contract. Mr. Cohen has put Capt. Habenicht in the possession of premises, which he has covenanted to put in a certain condition of repair. If they are not in the condition which his covenant calls for, clearly he cannot demand of his tenant payment of the same rent that he would have been entitled to if he had put the premises in the condition which he had covenanted to do. It would be difficult to determine, from the condition of the premises given by the witnesses, what deduction should be made from the reserved rent. The only guide before me is what in the opinion of the witnesses who have testified, would be a fair rent for the premises in their present condition. The only witness produced by Mr. Cohen on this point, is Mr. Lopez, as he is of opinion that the premises are in the condition in which Mr. Cohen covenanted to place them, it must be his opinion that the premises are worth the whole rent reserved in the case. But as I am obliged to adopt the opinion of the witnesses produced by Capt. Habenicht as to the condition of the premises, I must also determine their value from their testimony, rather than from that of Mr. Lopez. These witnesses say that the premises are worth from \$1,280 to \$1,560 per annum in cur-

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rency, and *taking the opinion of Mr. Torch, who seems to have an interest in the lease, I must fix the rent of the premises, in their present condition, at \$1,500 per annum in currency. Capt. Habenicht, however, claims a discount from the rent of \$65, on account of a pump which he claims was provided by him; to this Mr. Cohen objects, that by an understanding with Capt. Habenicht, he had agreed that Capt. Habenicht might purchase certain fixtures of the outgoing tenant, which he, Mr. Cohen, thought he had a right to, and that he, Mr. Cohen, would not follow them up if purchased by Capt. Habenicht. Mr. Cohen contends that this agreement referred only to his not claiming any of the fixtures of Mr. Coogan, which Capt. Habenicht might purchase, and that it was not his intention that he should be called on to pay for anything which Capt. Habenicht might buy. But as it does not appear that Mr. Cohen made any obstacle or objection to the removal of the other fixtures of Mr. Coogan, which Capt. Habenicht did not purchase, and as a pump is one of the indispensable and necessary fixtures, which Mr. Cohen is bound by his contract to furnish, whether purchased by Capt. Habenicht or not, I cannot think that it should be regarded as included in the agreement in relation to the fixtures of Mr. Coogan. If it had been removed by Mr. Coogan, Mr. Cohen would have been bound to replace it. I therefore think that the value of the pump is a legitimate discount, to be deducted from the amount of the rent. It is proved by Mr. Torch and Capt. Habenicht, that Capt. Habenicht retained the pump, and replaced it by another given to Mr. Coogan, for which he paid \$65. This seems to be a large price, and as Mr. Lopez has testified that \$20 is the usual price for a pump, proper for the premises, I fix that sum, as the one to be deducted from the rent. The next point is the costs of the proceedings in equity and at law.

"Upon this point I am of opinion that as

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the first default *was on the part of Mr. Cohen, the costs of the proceedings in equity, and of the writ issued in the law Court, in the nature of a cross action, should be borne by him. To recapitulate my opinion on the whole case is, that Capt. Habenicht shall pay rent for the premises until they are made thoroughly tenable, at the rate of \$1,500 per annum, in currency; that from this rent the sum of \$20 should be deducted for the pump, and that Mr. Cohen should pay the costs of the legal proceedings which have been instituted. After the premises are repaired, in accordance with the covenant of the lease, Capt. Habenicht should pay the rent he has covenanted to pay, during the continuance of the term. I do not think that I need say more, as to the condition in which I think the premises should be put, except

that the general rule seems to be, that the expression, "good repair," has relation to the age of the building, and is different with respect to old and new houses. It does not mean that the tenant is to have a new house, but having relation to the age of the building, implies a state that they may be used and dwelt in, with reasonable comfort, by the class of persons by whom, and for the sort of purpose for which they are to be occupied.

(Signed) W. Alston Pringle."

November 1st, 1866.

[Here followed copies of certain notes which passed between the solicitors of the parties, which it is deemed unnecessary to publish, and the plea concluded as follows:]

And this defendant doth aver that all the matters and things herein set forth are true, and pleads the same, and more particularly the award of the Hon. W. A. Pringle, referee, herein set forth to the whole of the said bill, and humbly demands the judgment of this honorable Court, whether he ought to be compelled to make any answer to the bill of complaint, and humbly prays to be hence dis-

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*missed with his reasonable costs and charges in this behalf most wrongfully sustained.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. By indenture between these parties, dated March 21, 1866, the plaintiff leased to the defendant, the establishment on East Bay street, in the city of Charleston, known as the French Coffee House, for ten years from the 1st day of July, 1866, at the yearly rent of two thousand dollars in gold or its equivalent, payable quarterly. The plaintiff covenanted as soon as possible after the date last mentioned to put necessary repairs on the premises, so as to make the same thoroughly tenantable. And the defendant on his part covenanted, among other things, to pay the rent, as aforesaid, in quarterly payments of five hundred dollars on the 1st day of October, January, April, and July, during the continuance of the lease. And to secure the payment of the rent, the defendant also executed a bond to the plaintiff and a mortgage of certain real estate.

The defendant entered upon the occupancy of the premises under this lease, and on the 5th day of October, 1866, the quarter's rent, made payable on the first day of that month being unpaid, this bill was filed to foreclose the defendant's mortgage. And on the same day the defendant instituted an action of covenant against the plaintiff in the Court of Common Pleas for alleged non-performance of his covenant to repair.

In this condition of things the matters in dispute between the parties were referred by them to the arbitrament of the Hon. W. A. Pringle, and a paper was drawn up and signed by their solicitors in the following terms: "Charleston, S. C., October 9, 1866. It is

agreed between us the counsel of Messrs. Augustus Habenicht and Joseph Cohen, that all matters now pending between them, arising out of the lease of the French Coffee

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House on East Bay, dated the 21st day of March, 1866, including the suit in equity and at law commenced by the said parties respectively, as well as all questions as to the duties and obligations of the said parties arising out of the said lease, and their responsibility for the non-observance of the covenants of the same, or under the said covenants up to this time, shall be referred to the Hon. W. A. Pringle as a referee, and that he shall hear the evidence which may be adduced, and submit his award in the premises, which shall be final and conclusive upon the said parties."

Judge Pringle proceeded to hear evidence and argument, and soon after made his award in writing. He discusses fully what is meant by thoroughly tenantable repair, with reference to the establishment in question, and decides that the work put on it by the plaintiff does not come up to what was intended. And his judgment is in these terms: "To recapitulate, my opinion on the whole case is that Captain Habenicht shall pay for the premises, until they are made thoroughly tenantable, at the rate of one thousand five hundred dollars per annum in currency; that from this rent the sum of twenty dollars should be deducted for the pump, and that Mr. Cohen should pay the costs of the legal proceedings which have been instituted. After the premises are repaired in accordance with the covenant of the lease, Captain Habenicht should pay the rent he has covenanted to pay during the continuance of the term."

The defendant has pleaded the said award in bar of this proceeding, and has set it forth in full. The plaintiff contends that the award is not binding on him, because it is not final and certain as to the matters referred, is founded on mistake in law, is in excess of the authority conferred, and it is not pleadable as aforesaid, because there was no agreement to stay this proceeding.

The reference embraces expressly "the suits in equity and law." It is moreover as

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comprehensive as language can make it with respect to the entire controversy between the parties growing out of the lease. And it does not appear to the Court that a decision based on the conclusions of fact arrived at by the referee could have been more conclusive or appropriate than his award. He has declared the defendant entitled to damages, and awarded them in the form of a reduction of rent, at the same time giving the plaintiff opportunity, by performing his covenant, to qualify himself for receiving the rent agreed on. The case then does not seem to be distinguishable from the case of Mitch-

ell and DesChamps, [13 Rich. Eq. 9] decided recently by our Court of Appeals, in which the Court says: "As between these parties the award of the arbitrators is the law of the case, and must be regarded as final and conclusive."

In that case the Circuit decree had set aside the award, as being founded on mistake in a question of law. And it is worthy of remark, that the same question afterwards came before the Court, or rather the Court of Errors, in another case, and was decided unanimously in accordance with the view taken in the Circuit decree. It is the judgment of the Court that the plea must be sustained, and it is ordered and decreed that the bill be dismissed.

The plaintiff appealed on the following grounds:

1. Because his Honor erred in deciding that the award of the arbitrator did not exceed his authority when in fact under the words of the agreement to arbitrate, to wit, the words "up to this time," the arbitrator had no right to decide any question beyond October 9, 1866, the date of said agreement.

2. Because an arbitrator is limited by the terms of the agreement to arbitrate, and any award exceeding those terms is void.

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*3. Because the award is not final, it leaves open the very question in dispute by declaring that the rent shall be changed from the terms of a sealed lease until such time as the building should be placed in tenantable repair, thus leaving open the question between the parties as to what constituted tenantable repair.

4. Because the conclusions of the award not being warranted by the law by which the arbitrator intended to decide, the award should be set aside.

5. Because the arbitrator having decided that the covenant in the lease to repair was not a condition precedent to the payment of rent, he was bound to award to Cohen, the entire rent called for by the lease, and could only award to Habenicht such amount as damage as had been clearly proven to have been lost by him.

6. Because, there having been no agreement to discontinue the suit in equity, even if the award had been final, the plaintiff was entitled to a decree for the amount acknowledged to be due by the plea; and his Honor erred in ordering the bill to be dismissed.

7. Because the bond secured by the mortgage being conditioned for the payment of rent quarterly, and whereas a large amount of rent was due, the plaintiff was entitled to a decree for foreclosure on failure of defendant to pay the said rent.

Cohen, for appellant, cited on 1st, 2d, and 3d grounds, Adams Eq. 192; Billings on Awards, 132; Barpole's Case, 8 Co. 98; Gibson v. Broadfoot, 3 Des. 11; Randall v. Ran-

dall, 7 East 81. On 4th ground, Kyd on Awards, 351; Redout v. Payne, 3 Atk. 494; Comeforth v. Geer, 2 Vern. 708; Delwer v.

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Barnes, 1 Taunt. 52; Kent v. Estob, 3 *East, 18; Young v. Walter, 9 Ves. 365; Bonner v. Carleton, 5 East, 140; Alwyn v. Perkins, 3 Des. 305; Haltner v. Etinaud, 2 Des. 571; Bouteler v. Thrick, 1 D. & R. 366, 2 Story Eq. 676. On 5th ground, Sedg. on Dam. 36-7, 71, 170, 337; Hunt v. Dorval, Dud. 180. And on 6th ground, 2 Ld. Ray. 789; Rowe v. Wood, 1 Jac. & W. 325; Markley v. Amos, 8 Rich. 468.

Macbeth and Buist, contra.

The opinion of the Court was delivered by

INGLIS, A. J. The plaintiff by lease in writing, let certain premises to the defendant for a term of years, and covenanted that presently after the commencement of the term he would put the demised premises, in "thoroughly tenantable repair," and the defendant covenanted to pay a certain annual rent therefor, in quarterly instalments, and to secure the payment according to his covenant executed a penal bond, and a mortgage of real property. Upon the expiration of the first quarter, the defendant refused to pay the stipulated instalment, on the ground that the plaintiff had not performed his covenant to repair. The plaintiff thereupon filed his present bill, on 5th October, 1866, to enforce the mortgage security by foreclosure and sale. The defendant immediately thereafter, on the same day, apprehending that the covenants of the respective parties to the lease might be regarded as independent, brought an action in the Common Pleas to recover damages for the plaintiff's breach of his covenant to repair. In this state of the controversy between them, these parties with a view, it is presumed, to arrest the litigation, came to an agreement, which was duly reduced to writing on 9th October, 1866, to submit their respective suits and the subject-matter of each to the arbitrament of

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the Hon. W. A. Pringle, and *to abide by "his award in the premises as final and conclusive upon the parties." On the 1st November following, the arbitrator rendered his award, finding that the plaintiff had not performed his covenant to put the premises in "thoroughly tenantable repair," but that such performance was not a condition precedent to the defendant's liability for the payment of the instalments of the rent, at the days limited therefor in the covenants of the lease. Estimating the damages to the defendant, from the plaintiff's breach of his covenant, in the form of a diminution of the annual value to the defendant, and directing as his adjustment of "all matters then pending between them, arising out of lease," "including the suit in equity and at law commenced by

the said parties respectively," that until the plaintiff should repair as required by his covenant, the defendant should pay him a rent reduced to the annual value as so diminished, and that the plaintiff as first in default upon the whole contract, should pay all costs of the pending suits. The plaintiff declining for reasons stated, to stand to the award, the same with the submission has been pleaded by the defendant to the further maintenance of the suit in equity, and upon the hearing, the plea was sustained and the bill dismissed. The appeal calls in question the judgment sustaining the plea, by impugning the legal validity of the award, on the several grounds, that it exceeds the submission and determines matters not referred; that it does not conclude the matters that were referred and so is not final, and that it professes on its face to be founded on reasons of law, which are not law; and also insists that even if valid, its legal effect was not to dispose of the suit, and it therefore constitutes no sufficient reason for dismissing the bill, but could only avail at most, for ascertaining the amount due by the defendant at the institution of the suit, or at the hearing, for payment of which, the plaintiff was entitled to enforce the mortgage security.

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*If the award exceeds the submission, and brings into the adjustments made by it, matters not referred, it is, at least to the extent of the excess, void. But it is not necessarily wholly void. If the decision which it contains of matters not referred can be disengaged, and separated without impairing or disturbing the determination therein of the matters which were referred, the excess may be rejected as surplusage and the award so far as supported by the submission will stand. (Billings on Awards, 96, 148.) The submission here was, in effect, of the suits in equity and at law, which had been then just instituted by the parties respectively, and the matters of dispute involved in them. Neither of these suits could, at the time of submission, involve any default of the defendant therein, which had not accrued prior to its institution. The complaint is that the award, not content with ascertaining the defendant's damages theretofore, by reason of the plaintiff's breach of his covenant to repair, by a reduction of, or discount against the rent then due, directs a continuing reduction after the same rate, until the covenanted repairs shall be made, thus embracing time then to come, and matters not yet brought into controversy. If there be herein really an excess, it is yet one that may be readily separated and rejected, without at all impairing the effect of the award proper. In any future suit for foreclosure, founded upon the failure of the defendant to pay the instalments of rent falling due after the submission, it will only be necessary to reply to a plea of the award, by showing that herein

the award goes beyond the submission, and that the arbitrator was not thereby authorized to determine such matter. But does the award in this respect exceed the submission? It must be remembered that the defendant had an estate for a term of years in the premises, and was entitled in his action upon the plaintiff's covenant to repair, to recover compensation for the damage to his

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whole estate by the *breach of this covenant. This the award gives him. The discontent is with the method of computing the compensation. Is this method justly liable to exception? The solution of this inquiry involves the consideration of another of the objections, made by the appeal to the validity of the award, that professing on its face to conform to the law, it departs therefrom.

Every controversy touching civil rights, necessarily involves questions both of law and of fact, and the ordinary tribunals are so organized as to provide for determining each according to strict rules of right. Arbitration is a method of settling their disputes which parties choose to substitute for the regular tribunals. By a submission of matters in controversy, which does not clearly provide otherwise, arbitrators are therefore invested with at least as large powers of investigation and determination as are possessed by the tribunals which they supplant. But more than this, the very purpose in transferring the controversy to such private forum is, that its fair adjustment may not be obstructed or trammelled by the technical rules of legal science, that considerations may be admitted as elements both in the matter and mode of composition, which could not find access to the judgments of the regular Courts. The aim is that substantial justice between the parties may be effected. To reach this result, uncertainties and doubts of law are to be solved by the arbitrators and their conclusions herein become law to the parties, *pro hac vice*. The rigor of extreme rules may be moderated by the requirements of fair dealings and good conscience. (2 Story's Eq. 1454; *Nichols v. Roe*, 3 Mylne & Keene, 438; *Billings on Awards*, 55-58.) The terms of submission may indeed more or less confine the range of the arbitration, as for example to the finding of the facts alone, or the facts being conceded to the application of the law thereto, and in any case to a strict observance of technical rules. In the

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*present instance there is no such restriction. It is true however, as contended, that even under a general submission, if the award professing on its face to conform to the law, clearly departs therefrom,—if volunteering to disclose the grounds of law upon which its conclusions rest, it manifestly mistakes the law, and the conclusions fail, with the reasons assigned therefor, it cannot be sustained. "If arbitrators," says Mr. Justice Story, "re-

fer any point of law to judicial inquiry, by spreading it on the face of their award, and they mistake the law in a palpable and material point, the award will be set aside." (2 Eq. Jur. 1455; and see also *Richardson v. Nourse*, 3 Barn. & Ald. 240; *Cramp v. Symons*, 1 Bing. 104; *Bennet et al. v. Wilson*, 3 D. P. C. 220; *Archer v. Owen*, 9 D. P. C. 341.) It is not enough, however, that their mode of reaching a determination is different from that which is usual with the regular Courts, if the determination itself in its substance and on the merits seems to be fair and just. The reasoning may be unsatisfactory, and yet the conclusions thereby attained be correct. (*Vivian v. Champion*, 1 Ld. Raym. 1125.) The error of law, which will avoid an award must be very clear, and such as has plainly conducted the judgment of the arbitrator to a wrong conclusion, one but for which he must have made an award, different in its substantial results. Has any such error been committed here?

It was necessary that the arbitrator should determine, not only whether the plaintiff had broken his covenant to repair, but also if he had, what damage the defendant had sustained thereby. How did the law require that this damage should be estimated? In an early case Lord Holt said, "we always inquire in these cases, what it will cost to put the premises in repair, and give so much damages." And this is perhaps the more usual mode of estimation. But in a recent case it

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has been suggested that the "true *rule would be, the loss which the party damaged would sustain if he sold his estate in the market." (*Smith v. Peat*, 9 Excheq. R. 161.) The present defendant had a term of state for years in these premises. The difference which the want of the covenanted repairs would make between the annual rent which he could get in the market, if he desired to transfer or assign his lease, and that which he had covenanted to pay, fairly represents his damage. In other words, the excess of the rent which he had agreed to pay, for the repaired premises over the annual value in the market of their use and occupation in their unrepai red state, was in fact the damage he had suffered. This mode of making the computation has this advantage, that it gives to the plaintiff the option of arresting the damage, and the compensation therefor, at any time by making the covenanted repairs, and furnishes an incentive to do so, that the agreement may be thus restored to its original operation. The arbitrator's plan of adjustment in this particular effects substantial justice, and in a manner convenient to both parties. It does not appear to this Court that the award herein exceeds the submission, or that there is any such palpable or material error of law as must appear on the face of the award in order to the successful impeachment of its validity. The arbitrator had by

the terms of submission ample authority to solve for the purposes of the case the doubts, arising out of the diversity of judicial decisions, as to the correct rule of estimating and providing for the compensation to which the defendant was entitled, and was at liberty to adopt any fair and equitable plan that would in this particular effect substantial justice. The suits at law and in equity concerned the same subject-matter—the lease and its covenants; and the reference of both in the one submission—consolidated them into one, and this rendered a blended adjustment eminently proper.

But, as an award may go beyond the sub-

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mission, it may, *on the other hand, fall short of its requirements. "And if the arbitrator does not decide all the matters submitted to him, and over which he has jurisdiction, his award is bad." (Billings on Awards.) So it is further objected here that the award is not final. This is a mistake: it concludes and finally disposes of all the matters that were referred—the pending suits, and the rights and duties to be enforced in them. Though the quarter's rent was in arrear, and the plaintiff's performance of his covenant to repair was not a condition precedent to the defendant's liability, and the condition of defeasance in the mortgage was therefore forfeited, yet, inasmuch as the plaintiff was "first in the transgression," the arbitrator considered that he ought not further to maintain his suit in equity, and should pay such costs as had already been incurred therein. This disposed of the equity suit, and all that was involved in it at the time of submission. The whole compensation sought by the defendant in his action of covenant is ascertained, the mode of its payment by an annual discount against or reduction of the rent is prescribed, and the costs of the action are provided for. Thus, this action, with all that was involved in it, is finally disposed of. And these constituted the only matters referred by the terms of the submission. There was nothing in these terms which required the arbitrator to prescribe in detail the particulars of the work which is implied in the description, "thoroughly tenantable repair." The verdict of a jury or the degree of a Court, would not, in either of the suits referred, have done this. It was essential for the purposes of his award that the arbitrator should ascertain whether the plaintiff had put the premises in "thoroughly tenantable repair," and, if not, then in some way satisfactory to his own mind, how far he had failed to do so. But it was neither necessary, nor expected, that he should have a professional survey of the premises and a plan and

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specifications of *repair prepared. The arbitrator does, in fact, state his judgment as to the import of the description, "thoroughly

tenantable," in as definite terms as, without such details, is practicable. Nor is it any just exception that he has not precluded the possibility of future controversies to arise out of the mutual covenants of the lease, inasmuch as only existing controversies were embraced in the submission. There seems indeed an inconsistency in complaining now that the award does not adjust or prevent disputes afterwards to arise, and so is not final, and, a little while since, that it does devise, and embrace in its provisions, a scheme for precluding such controversies by contriving a mode of adjustment that it is to run with the currency of the lease itself, and so exceeds the submission. In the judgment of this Court, it is not open to either exception.

Upon the sixth and seventh grounds of appeal it is only necessary to say that the present suit was itself one of the matters referred to the arbitrator, and his award would not have been complete if he had not finally disposed of it. The instalments of rent, fallen due in the interval between the submission and the hearing of the cause, constituted no part of the default upon which the suit was brought; and in directing the disposition of the suit, the arbitrator could not, without exceeding the submission, take into consideration the convenience of allowing it to stand for enforcing the plaintiff's rights in the contingency of such default. It is considered that the award was designed to put an end to the existing litigation, as it ought to have done, and that such was its effect. And being here pleaded against the further maintenance of this suit, the dismissal of the bill followed as the logical result. The Circuit decree is affirmed, and the appeal is dismissed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Decree affirmed.

14 Rich. Eq. *54

*MARY ANN ROYE and Others v. THE CHARLESTON SAVINGS INSTITUTION.

(Charleston. Jan. Term, 1868.)

[*Banks and Banking* ⇨ 309.]

Where a bill is filed by depositors of an incorporated savings institution, on behalf of themselves and all other depositors, against the corporation alone, alleging that the corporation had failed, and praying that its affairs be wound up, other depositors, who are opposed to the winding up, have the right to be heard; and, if the plaintiffs neglect to procure and publish the usual order for depositors to come in and establish their demands, they may, even after a decree for the transfer of the assets into Court, intervene by petition in the cause, and compel the plaintiffs to make them, or a sufficient number to represent them all, parties defendants, with leave to plead, answer or demur by

a certain day, and that other proceedings in the mean time be stayed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1201; Dec. Dig. ~~309~~.]

Before Johnson, Ch., at Charleston, October, 1867.

This case will be understood from the statements of the Circuit decree, and the opinion of the Court of Appeals.

The Circuit decree is as follows:

Johnson, Ch. A bill was filed on the 29th day of March, 1867, in which it is stated that the Charleston Savings Institution was incorporated for the purpose of receiving on deposit, from any person or persons disposed to enjoy the advantages of the Institution, all sums of money that might be offered for that purpose; and that the deposits were to be used for the purposes and according to the directions of the charter; and that the income and profits arising from the same, should be applied and divided among the persons making the deposits, or their legal representatives, after making such reasonable deduction as might be necessary for expenses,

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in proportion to *the sums deposited, and to the length of time during which they might remain in the Institution. And that the principal of such deposits should be paid to each depositor, at such times and under such regulations as the corporation should prescribe.

It is also stated that the Institution did, for many years, carry on prosperously the business of a savings institution, but that owing to the various alleged losses during the late war they had for nearly two years suspended business, and had refused to receive any further sums of money on deposit, and to pay on demand either the principal or interest due to their depositors, or in any manner to discharge the duties imposed by their charter.

It is also stated that the complainants are severally depositors of the amounts specified, and that they sue on their own behalf, and that of all other depositors and creditors.

The bill prays that an account be taken, under the directions of this Court, of the amounts due to the complainants, and to all others by the Institution, and that all the depositors and creditors, except the complainants, may be summoned and notified, by the order of this Court, to come forward and establish their claims; and that an account be taken of the assets of the Institution, that the same may be administered by the Court and applied to the payment of the depositors; that a receiver may be appointed to take charge of the affairs of the Institution, and that an injunction may be issued to restrain them from disposing of the real estate, and from collecting and disposing of their assets.

The defendants in their answer admit that at the close of the late war, from causes over which they had no control, they were unable to pay their depositors, and that they re-

solved to receive no more deposits. They also admit that they have no hope of resum-

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ing a solvent condition, and *that their utmost hopes at any time, since their suspension, has been to pay their depositors, who are their only creditors, about fifty per centum of their claims. And they submit that the affairs of the Institution can be more economically and successfully arranged by the trustees, with such orders and directions as the Court shall from time to time make, than in any other way; and that there is no equity by which the management of the Institution can be taken out of their hands.

On the 8th August, 1867, after a good deal of deliberation and consultation among the parties, an order was made by the consent of the solicitors representing the complainants, the defendants and a large number of the depositors, whose names do not appear on the record, and without objection from any source, which is as follows, to wit: "The bill, and answers, and report of Master Tupper having been read and considered, and the solicitors of the complainants and defendants having been heard, it is ordered and decreed, that the Trustees of the Charleston Savings Institution transfer and deliver over to Mr. Tupper, one of the Masters of this Court, all the assets and securities enumerated in the schedule filed with the answer, and which now remain in their possession and under their control, and any money they may have received since the coming in of their answer, and that they do convey the lot of land in Meeting street, and any other real estate belonging to the said Charleston Savings Institution, under the seal of the corporation, to two or more persons to be named by the said Master, to be held for the use of such person or persons as may become the purchaser or purchasers thereof, for such purposes and estates as the said James Tupper, or his successor in office, under the sanction of this Court, shall declare, touching the same, and thereupon the Trustees and officers of said Institution be discharged from all further liability and account.

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*"And it is further ordered that the said Master do proceed to collect the moneys due on the securities so transferred to him, and to hold the same, subject to the future order of this Court.

"And it is further ordered, that the said Master do report a scheme for the settlement of the affairs of the said Institution, having first published, in two or more of the daily gazettes of the city, notice of a reference to be held for that purpose, at least twenty days after the date and publication of the said notice, at which reference the depositors may be represented."

Master Tupper prepared and filed the following report, to wit:

"Pursuant to this order, notice of the above

reference was given for the time prescribed in the daily papers of this city. In response to this notice, the Master was attended, on the 21st and 25th days of the present month, by a large number of depositors in person or by their solicitors. At those meetings two schemes for winding up the affairs of the Institution were submitted. One was presented on behalf of the plaintiffs, and of others who advocate the sale of the entire assets of the Institution and a distribution of the proceeds of sale among the depositors.

"The other was presented by a large class of depositors, who oppose a sale of the entire assets, and claim that such portion of the securities as they may be found jointly entitled to, should be assigned to them in kind. Some of the details of these two schemes prevent my adopting either of them as a whole; but I am happy to acknowledge my indebtedness to both of them, and to the able arguments by which they have been sustained, before me, for the following plan, which may meet the desire expressed by all, that the most 'simple, speedy, and economical' mode of settlement should be adopted by the Court:

"1. That in order to ascertain the amount

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due to each *depositor, the Master cause all the deposits made between the 1st January, 1862, and the 15th day of March, 1865, to be scaled according to the tables in his office, fixing the value of Confederate notes in gold; and that all other deposits be taken as they stood upon the books of the Institution on the 19th day of April, 1865.

"2. That the Master sell at auction, after the usual notice, the real estate for one-fourth cash, and the balance in one, two, and three years; and the personal assets, (except such as may be partitioned in kind under the next paragraph,) on or after the first Tuesday in December next, for cash.

"3. That the depositors represented at the reference held on the 21st and 25th instant, who desires a partition in kind, may designate, on or before the 15th day of November next, one or more persons as Trustees, to whom shall be assigned on or before the first Tuesday in December next, and subject to such trusts as may be declared, the proportion of each species of security held by the Institution as the aggregate as ascertained to be due to the said depositors, considered as a unit, would entitle them to, out of the whole securities, upon a ratable division of the same.

"4. That the Master, after providing for an equitable division of the costs and expenses between the two classes of depositors, do pay to the Trustees, provided for in paragraph three, the proportion of the net proceeds of the sales of the real estate to which the depositors represented by the said trustees may be jointly entitled, and that he distribute the fund arising from the balance of

the proceeds of sales of the real estate, and from the net sale of the personal assets, among the other depositors, and to pay to each the sum to which he may be found to be entitled upon a pro rata proportionment of the said fund among the said depositors,

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*according to the amounts ascertained to be due to them respectively under this scheme, October 28, 1867."

Soon after the filing of the above report a motion was made before me to file a petition in the cause, by a large number of the depositors whose deposits in the aggregate amount to \$550,000. In their petition it is stated that they "are advised that they stand in the same right in regard to the said Institution as the complainants" and "that they have good right to be parties to any proceeding in this Court for the winding up of the affairs of the said Institution, either as complainants or defendants; that they have had no such opportunity hitherto, unless they united with the complainants, thereby accepting and professing the facts and views expressed in the bill, and uniting in the prayer thereof. This they could not do, because they differed very widely from the complainants in reference to the mode of settlement. And some of the depositors, they respectfully submit, should have been made parties defendant to the said call, to afford those who might differ from the complainants some opportunity for recording their views of their rights and interests in the pleadings in the cause; that orders have been passed already in the cause without their assent and without an opportunity for them to object, by which they must be bound, and their interests, as they understand them, injuriously affected unless they or some of them, in behalf of themselves and the rest, be allowed to become parties thereto."

And the prayer of the petitioners is that an order be made in the cause requiring the complainants to make six of the depositors therein designated, parties defendant, in behalf of themselves and of all the petitioners, and of all others who may choose to come in under the petition, with leave, notwithstanding the orders heretofore made in the cause, to plead, answer or demur to the bill by a certain day, in the order to be mention-

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ed, and that, in the meantime, no *further proceedings be had in the cause, and that none of the orders heretofore made be carried into execution.

From the statements made at the bar it appeared that the claims of all the depositors amounted to about \$2,400,000, and that there were three thousand eight hundred depositors whose claims had not been paid.

The application was simply to file a petition, but in the argument of that question the merits of the petition was so thoroughly considered that the real question before the

Court is, shall the prayer of the petition be granted?

In point of form, is there any objection to the bill? Are all necessary parties before the Court? Or should all the depositors by name have been made parties either as complainants or defendants?

The general rule in this Court is "that all persons materially interested in the subject matter, ought to be made parties to the suit, either as plaintiffs or defendants, however numerous they may be, in order that complete justice may be done, and that multiplicity of suits may be prevented." But to this rule there are many exceptions, which are as old and as well founded as the rule itself. One of the these exceptions is, that where the parties are so numerous, that it would almost amount to a denial of justice to require them to be brought before the Court, and there is a community of interests between them, a few may sue in their own names for the benefit of all. (*Wallworth v. Holt*, 4 M. & C. 619; *Story's Eq. Plead.* 74-113; *Hichings v. Cosgrove*, 4 Russ. 577; *Johnston v. S. W. R. R. B.* 3 Strob. Eq. 329.) In this case the parties are numerous, and there can be no question about the community of interests between the complainants and the other depositors. The petition states that "they stand in the same right in regard to the said institution as the complainants," and that the difference between them is only as to "the mode of settlement." But it is insisted that the depositors are

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*cestui que trusts and not creditors, and that the same rule does not apply that does in bills filed by creditors. But in all the cases referred to, in support of this position, there is that want of identity of interest, which is essential to support the exception to the general rule, and it is on that ground alone the decisions stand. My opinion is, that, in matter of form, no objection against the bill can be sustained.

Sometimes this Court does, for the purpose of protecting the rights of all parties interested in the subject matter, order some of the quasi complainants to be made defendants. (*Richardson v. Larpout*, 2 Younge & C. 514.) But in that case, the interests of all the parties were not identical, as they are in this.

The Court is always anxious to protect the rights and interests of parties brought before it in this way, and they are permitted to enjoy the privileges, not only of complainants, but many of those enjoyed by the defendants, as, for instance, in filing cross bills and not being bound by the allegation of the bill, &c. But if the practice was sanctioned in such cases as that now under consideration, I would be very reluctant to grant the prayer of the petitioners because I have been unable to see any benefits that could accrue to the petitioners by being permitted to record "their views of their rights and interests in

the pleadings in the cause." And if granted in this instance, other depositors might hereafter become dissatisfied with some of the proceedings in the cause, and make similar applications which might produce great and unnecessary delay in winding up the affairs of the Institution.

The motion to file the petition is refused.

The petitioners appealed on the grounds:

1. Because it is respectfully submitted, his

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Honor erred *in assuming that the interests of the complainants and petitioners were identical, whereas their interests are diverse, contrariant and conflicting, while their rights are the same, and entitle them to be heard in their own behalf.

2. Because equity cannot be administered in this cause without a full hearing of the merits of the differences between the complainants and the petitioners, one of which is about the execution of the decretal order, made in this cause on the 8th August, 1867, whereby it is contemplated to discharge the common trustees against the will of the petitioners.

3. Because his Honor erred in supposing that the bill in this case was a proper bill for administering a trust, or calling trustees to account, whereas, it was a creditor's bill, and unsuited to the present case, and cannot be sustained or proceeded in after it is made apparent that there are conflicting interests among the cestui que trusts, until some of the parties representing the interest opposed to that of the complainants are made parties to the cause.

Story's Eq. Pl. Sec. 207; *McBride v. Lindsay*, 9 Hare, (41 Eng. Ch.) 574; *Holland v. Baker*, 3 Hare, (25 Eng. Ch.) 68; *Taylor v. Salmon*, 4 Mil. & Cr. 142; *Richardson v. Hastings*, 7 Beav. 330 and 331; *Note* 7, 4 Mil. & Cr. 640-1.

4. That the Court of Equity cannot proceed to final judgment in a cause where it is made manifest at any time during its progress, that other parties having equal rights and a different view of their interests, cannot come in with full liberty to assert their own views of those rights and interests in the manner in which the cause is presented; and this is the condition of the petitioners, who cannot come in as complainants in this cause.

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**Adams' Eq.* 319 and 320; *Hawkins v. Hawkins*, 1 Hare, 543; *Hichings v. Cosgrove*, 4 Russ. 562, (3 Con. Eng. Ch. 803); *Richardson v. Larpent*, 2 Y. & Col. 507, 512 to 514.

5. That it is the practice of this Court to compel the complainants to make additional parties whenever it is shown to the Court that others have rights and interests in the subject matter of a suit before it, which practice grows out of the principles of equity itself, and it matters not how or where the Court becomes informed of this want of par-

ties, provided its decree has not been fully executed.

Jones v. Jones, 3-Atk. 111; Holdsworth v. Holdsworth, 2 Duk. 799; Clayton v. Executors of Heng, 3 Des. 345; Holland v. Baker, 3 Hare, 74, 75; Cockburn v. Thompson, 16 Ves. 321, 327; West v. Randall, 2 Mason, 193 [Fed. Cas. No. 17,424].

6. Because the difference presented by the petitioners, as existing between them and the complainants, is no less than as to the discharge of common trustees, and the destruction of a chartered institution intended for their benefit and the benefit of the whole community.

7. Because the petitioners, although numerous, offered to avoid the difficulty or impracticability of making them all parties, by offering to conform to the rule, that a few might represent many, and asked only to be represented by a limited number who could easily have been made defendants.

McCrady & McCrady, for appellants.

Porter, for corporation.

Macbeth & Buist, Simons & Seigling, Whaley, Mitchell, and Clancy, for appellees.

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*[Authorities cited for appellees, Wallworth v. Holt, 4 M. & C. 619; Johnston v. S. W. R. R. Bank, 3 Stro. Eq. 329; Boyce v. Boyce, 3 Rich. Eq. 263.]

The opinion of the Court was delivered by

DUNKIN, C. J. Although the amount involved in this litigation is large, and the parties interested very numerous, the questions to be adjudicated relate rather to the general principles and practice of this Court, in the institution and carriage of causes.

The general and familiar rule, in Courts of equity, is that all persons materially interested in the subject matter, ought to be made parties to the suit, either as plaintiffs or defendants, however numerous they may be, in order, not only that complete justice may be done, but that multiplicity of suits may be prevented. And so solicitous is the Court, not to proceed to judgment in the absence of a party interested, that it will sometimes suspend further proceedings of its own motion, until an opportunity is afforded of having such interests represented. But this general rule, as remarked by Mr. Justice Story, however useful and valuable as a practical guide, is still open to exceptions, and qualifications, and limitations, the nature, and extent, and application of which are not, and cannot, independently of judicial decision, be always clearly defined.

One of the recognized exceptions is where the parties are exceedingly numerous, and it would be impracticable to join them without almost interminable delays, and other incumbrances which would obstruct, and probably defeat the purposes of justice, (1 Story Eq. § 94.) In this class may be included a credi-

tor's bill. In such proceedings, according to the practice of this State, public notice is given to all creditors who may desire to make themselves parties in the cause. Upon the

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same principle, where there are numerous shareholders of a voluntary association, some are permitted to file a bill on behalf of themselves and others, having a common interest. If the object (says the Commentator) were to enforce some interest common to all the shareholders, such bill would be sustained. But if the object be to dissolve the company, or subvert its articles, he doubts if, upon the authorities, the bill would be allowed, without making the other shareholders, however numerous, actual parties to the suit. He seems to think, however, that the purposes of justice, even in such cases, would be best subserved "by allowing all persons to become parties, either by a bill on behalf of all, or by coming in and resisting the objects of the bill, under the interlocutory proceedings." Why, he adds "the same proceedings might not have been permitted, even to the extent of binding unrepresented interests, after due notice to the parties to appear and represent them, as is done in the ordinary cases of creditors against the estates of persons deceased, it is not very easy to state in a satisfactory manner." Upon the rules themselves, there exists discrepancy in the authorities; but the principal difficulty is in the application to the circumstances of each particular case.

This bill was filed 29th March, 1867, by the plaintiffs, "on behalf of themselves and all others who are creditors of, and entitled to share in the assets of the Charleston Savings Institution," against the said corporation.

They charge, among other things, that the defendants had suspended business, and had failed, and that the assets are insufficient to satisfy the just claims of the depositors and creditors of the Institution. The prayer of the bill is, among others, that the defendants may account for their transactions; that an account may be taken under the direction of the Court, of the debts due to the plaintiffs and others, and that the creditors, other than the plaintiffs, may be summoned and notified

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by the order of the Court to come forward, according to the course and practice of the Court, to establish the claims due by the said Institution to them, and that an account may be taken of the assets, and the same be administered by the Court, that a receiver may be appointed, and the officers of the Institution be restrained from collecting or parting with the assets, &c.

The answer of the corporation by their officers and trustees was filed 25th May, 1867, in which they admit that the Institution was last incorporated in 1856, for fourteen years: that at the close of the late war, being satisfied that they could not pay their

depositors in full, the trustees resolved to receive no more deposits, but to apply themselves to the collection of such assets as they found available; that, for the reasons stated in their answer, it would be disastrous at present to throw the securities on the market, or make a general foreclosure of their mortgages; that it is the opinion of the trustees, and is confidently believed by a very large majority in interest and in numbers of the persons interested, that the affairs of the Institution can be more economically and successfully managed by the trustees than in any other way; and they submit to the Court, whether there is any equity set forth in the bill, upon which the management of the Institution can be taken out of the hands of the trustees.

On 25th of July, 1867, one of the Masters granted an injunction, as prayed by the bill, and also an order to account; but it does not appear that an order was at any time made or published for the depositors and other creditors of the Institution to come forward and establish their claims against the Institution according to the course and practice of this Court, and as prayed by the bill.

Under the order to account, a statement was rendered by the trustees, by which, as the Master reports, the assets, not worthless, amounted to \$1,171,183.11, of some but uncertain value, and the amount due depositors

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(who were the *only creditors) was \$2,371,041.51. This report bears date 5th August, 1867, and on 8th August an order was passed by the Chancellor that the defendants should transfer to the Master the assets and securities of the Institution, and convey to the trustees, to be named by the Master, the real estate, and that thereupon the trustees and officers should be discharged from further liability; directed the Master to collect the securities, and report a scheme for the settlement of the affairs of the Institution, having first published a notice for twenty days of a reference to be held for that purpose. On 28th October, the Master reported his compliance with the order, and presented a scheme for the settlement of the affairs of the Institution. "Soon after the filing of the report, (says the Chancellor in his decree) a motion was made before me to file a petition in the cause by a large number of the depositors, whose deposits, in the aggregate, amount to \$550,000." The purpose and object of the petitioners is then stated: and, for the reasons set forth in the decree, the motion to file the petition was refused.

It is not proposed to consider the several grounds of appeal, or to discuss the general principles in such cases. It is manifest that, although the plaintiffs and petitioners had a common interest in the assets of the Charles-

ton Savings Institution, they differ materially as to the mode in which that interest would be promoted or subserved. When the plaintiffs instituted their proceedings, they may well have anticipated no such diversity of opinion on the part of the other shareholders. Only the corporation were therefore made defendants. But in order to prevent surprise or injustice, and in conformity with the approved practice of the Court, the bill prayed that notice might be published for all shareholders and creditors to appear and establish their demands. The Court does all that is in its power in such cases, and although in some instances, as in *Hurt v. Hurt*,

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*(6 Rich. Eq. 114.) injustice is sometimes done, notwithstanding every precaution; the administration of the law cannot be impeded because of possible individual hardship. But no such notice was ever published; and on 8th of August, 1867, the order was made which transferred the assets to the Master, and discharged the trustees. That order substantially adjudicated a material point of difference by transferring the administration of the Institution, three years prior to the expiration of the charter, from the trustees to the officers of the Court. The question is not as to the expediency or propriety of the adjudication, but whether the petitioners were not entitled to a hearing prior to such judgment. When the bill seeks to dissolve a company, or subvert its articles, Mr. Justice Story suggests as a means of obviating the necessity of making every shareholder a party in the bill, that they should be called on by notice and under interlocutory proceedings, and have the opportunity to come in and resist the objects of the bill. (§ 136.) The petitioners are entitled to the judgment of the tribunal in the last resort upon the matters determined by the decretal order of 8th August, but they cannot appeal from a decision in which they were not parties, and presented no issue.

When the scheme prepared under order 8th August, was presented to the Court, or soon afterwards, the petition was preferred asking that the petitioners might be made parties defendant in the manner therein set forth. In the opinion of this Court, the petitioners were not concluded by the previous proceedings and leave should have been granted to file the petition, and an order according to the prayer thereof, should have been passed by the Court. It is now so ordered and adjudged.

WARDLAW and INGLIS, A. JJ., concurred.

Motion granted.

14 Rich. Eq. *69

***JOSEPH J. POPE v. WILLIAM H. CHAFEE.**

(Charleston. Jan. Term, 1868.)

[*Principal and Agent* ⚡42; *Vendor and Purchaser* ⚡89.]

A., being an officer in the Confederate army on service out of the State, by his agent, C., offered for sale at auction, for cash, in Charleston, on the 9th November, 1864, A.'s house and lot in that city, and it was bid off by B. for \$71,500. On the 21st November A. executed a conveyance of the house and lot, and sent it to C., who, on the 27th December, 1864, received payment in Confederate treasury notes, and delivered B. the conveyance. A. became a prisoner of war on the 20th December, 1864, and remained a prisoner until May, 1865. On bill filed to set aside the sale, *held* that A. was not entitled to relief in equity.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 64; Dec. Dig. ⚡42; *Vendor and Purchaser*, Cent. Dig. § 149; Dec. Dig. ⚡89.]

[*Auctions and Auctioneers* ⚡7; *Frauds, Statute of* ⚡139.]

If there was no contract to sell binding upon the purchaser, because no proper entry in writing had been made, that did not invalidate the executed contract afterwards made between the parties.

[Ed. Note.—For other cases, see *Auctions and Auctioneers*, Cent. Dig. § 24; Dec. Dig. ⚡7; *Frauds, Statute of*, Cent. Dig. § 340; Dec. Dig. ⚡139.]

[*Vendor and Purchaser* ⚡168.]

There was no renunciation by A.'s wife of her right of dower, and C. had agreed to retain \$20,000 of the purchase-money until dower should be renounced: *Held*, that this arrangement did not invalidate the sale. B. had the right to insist on indemnity, and that agreed on was not unreasonable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 342, 354; Dec. Dig. ⚡168.]

[*Vendor and Purchaser* ⚡186.]

The delay from 9th November to 27th December, was caused by B. taking time to have the title investigated, followed by C.'s absence: *Held*, that the delay was not unreasonable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 341, 373; Dec. Dig. ⚡186.]

[*Principal and Surety* ⚡103.]

Held, that C. was A.'s agent to receive the purchase-money.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 186–218; Dec. Dig. ⚡103.]

[*Contracts* ⚡133.]

Held, that the contract being executed was not void because the consideration was paid in Confederate treasury notes.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 676; Dec. Dig. ⚡133.]

[*Alteration of Instruments* ⚡17.]

Words which should properly have been inserted in a blank in the conveyance, were inserted after the conveyance left A.'s hands, and before it was delivered to B.: *Held*, that this did not invalidate the deed in equity.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. § 122; Dec. Dig. ⚡17.]

[*Evidence* ⚡419; *Vendor and Purchaser* ⚡44.]

The ordinance of September, 1865, which permits a party to show the true value and real character of the consideration, does not apply where the proceeding is to set aside an executed contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1922; Dec. Dig. ⚡419; *Vendor and Purchaser*, Cent. Dig. § 72; Dec. Dig. ⚡44.]

[*Principal and Agent* ⚡14.]

[Sending a conveyance containing a receipt for the consideration to a person for the purpose of completing a sale of the land described in the deed, and calling on the grantee to settle with such person, constitute the latter the grantor's agent.]

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 29; Dec. Dig. ⚡14.]

Before Lesesne, Ch., at Charleston, February, 1867.

The decree of the Chancellor is as follows:

Lesesne, Ch. On the 9th day of November, 1864, the plaintiff's mansion on Bull street,

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in the city of Charles*ton, was put up for sale at public auction by John S. Riggs, auctioneer, and set down to the defendant as the highest bidder, at seventy-one thousand five hundred dollars, (\$71,500.) Terms cash. The defendant employed John Phillips, Esq., to examine the title. The records belonging to Charleston District being at that time in Columbia, under the charge of R. S. Duryea, Esq., Mr. Phillips wrote Mr. Duryea for the proper certificates as to encumbrances, having previously received from the plaintiff his muniments of title. On the 21st of November, the plaintiff executed at Savannah a conveyance of the property to the defendant, and sent it to Charleston to Mr. Riggs. On the 29th of November, Mr. Duryea sent his certificate to Mr. Phillips, who (having previously satisfied himself as to the derivation of title) called, the day after its reception, with the defendant at Mr. Riggs' office, for the purpose of closing the transaction. But Mr. Riggs was in Columbia, attending to his duties as a member of the Legislature, and his clerk, Mr. Chamberlain, was unable to act for him, as there was no renunciation of dower, in the deed of conveyance by plaintiff's wife, and he, Chamberlain, had no instructions on the subject. Chamberlain said he would write to Riggs about it, and after that the defendant and Mr. Phillips called several times at Riggs' office to know when the business could be settled. At length the Legislature adjourned, and Mr. Riggs came to Charleston on Saturday, the 24th of December. The defendant and Mr. Phillips called at his office on the 26th, but did not find him in. On the 27th, they called again and saw him. It was then arranged that twenty thousand dollars (\$20,000) of the purchase-money should be retained by Mr. Riggs, until the renunciation of dower by Mrs. Pope should be obtained. Thereupon, the defendant paid Riggs

sixty-one thousand five hundred dollars, (\$61,500,) having at his request paid ten thousand dollars (\$10,000) about the time of the sale,

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and took a receipt in these terms: "Received, Charleston, December 27th, 1864, of Mr. W. H. Chafee, the sum of seventy-one thousand five hundred dollars, (\$71,500,) being the purchase-money for Major J. J. Pope's residence, No. 46 Bull street, twenty thousand of which I hereby agree to hold, until the dower is properly renounced by Mrs. Pope," and Mr. Riggs delivered the plaintiff's conveyance to the defendant, who has also had possession of the premises since that time.

The prayer of the bill is that the conveyance of the plaintiff to the defendant may be set aside and declared void, that possession of the property be restored to the plaintiff, and that the defendant account to him for rents and profits of the same.

It was proved at the hearing that the plaintiff, at the time of the sale, was a major in the army of the Confederate States, on duty at or near Savannah; that he became a prisoner at the fall of that city, on the 20th of December, 1864, and continued so, until he was paroled on the 2d of May, 1865, and during all that time was in very feeble health; that soon after being paroled, he went to Augusta; thence to Milledgeville, where his family was, and arrived in Charleston in the autumn of that year, still in very impaired health.

It was also proved that though the auction sale was conducted by the auctioneer, the entry in his sale book was not actually made by him, but by his clerk, Chamberlain, who stood by his side.

It also appeared by the evidence that after sending the title to Mr. Riggs, the plaintiff wrote to him to hasten the settlement, and that on the 27th of November, having heard from him that it awaited Mr. Phillips' approval of the title, he wrote the latter to arrange the matter with as little delay as possible. The letter adds that there could be no renunciation of dower at that time, but it

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"need not delay the settlement. One-sixth may be retained, or security given for this amount, or what is better than either, (as some of the money will be invested in securities,) a sufficient amount of securities be deposited as a pledge until the renunciation can be given." Mr. Phillips acknowledged this letter on the 1st of December, saying: "We will settle," or "are ready to settle, except the dower." And on the 3d of December, the plaintiff replied, and proposed that instead of withholding the amount of the dower, he should invest more than would cover it in railroad stocks, and deposit them as security for the same. He added: "If the agents who represent me will not press this matter to a conclusion, will you act so far a

friendly part to me, as to press the matter yourself to an immediate conclusion." And Mr. Riggs testified that when the business was closed on the 27th December, Mr. Phillips suggested that the \$20,000 should be invested in railroad bonds, but he, Riggs, said he would not undertake to invest in anything but Confederate bonds.

There was some discrepancy in the testimony as to the conversation which attended the arrangement for retaining \$20,000, to meet the claim of dower. Mr. Riggs, who was examined by the plaintiff, says that Mr. Phillips alluded to his correspondence with plaintiff, and the anxiety of the latter to have the sale closed, said they were authorized to set apart a sum to meet the dower, and suggested \$20,000 as a proper sum. Mr. Chamberlain too, testified that the sum of \$20,000 was suggested by Mr. Phillips. Mr. Phillips, who was examined on behalf of the defendant, testified that he asked Riggs what about the dower, and Riggs replied, I don't know; I will retain any amount you desire; there will be no difficulty about it. Witness said, we will retain \$20,000, and Riggs assented.

The plaintiff testified that when the conveyance was executed by him, and returned to Mr. Riggs, the words "and all other per-

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sons," which are now in the warranty, were not there; the blank intended for them had not been filled. And Mr. Phillips testified that when the said deed was delivered on the 27th of December, those words were in it.

I have endeavored to recite, in brief, the substance of the evidence which bears on the points which were discussed at the hearing. But the evidence itself will accompany this decree.

It was contended by the plaintiff that there was no legal contract between these parties, because the entry by the auctioneer's clerk did not bind the purchaser. But it is enough to say that, even admitting that to be so, the purchaser bound himself, by a part performance, directly after the sale, and actually executed the contract as soon as it was practicable for him to do so. Then it is objected that in executing the contract, he required security to be provided for the wife's renunciation of dower, thereby introducing a "new term." But he had a good right to such security, and the plaintiff admits it in his letters to Mr. Phillips.

Again, it was contended that there was unreasonable delay on the part of the defendant. But, in the judgment of the Court, there is no good ground for such a charge. He was entitled to a reasonable time to examine the proper records, and ascertain whether there were encumbrances on the title, and seems to have lost no time in doing that. He was ready by the second of December, and the plaintiff made no objection then on account of delay. On the contrary, in his letter to Mr. Phillips, of the third

of December, he expressed an anxious desire that the contract should be consummated. For the delay which took place after the second of December the defendant is clearly not responsible.

Again, it was urged that the contract never was in fact performed; that Riggs' agency for the plaintiff as auctioneer and broker did

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not extend to the receiving of the price, *and therefore, the payment to him was not a legal payment. Even admitting that to be the law of South Carolina, it would be a sufficient answer, that by placing the conveyance in his hands (which contained an acknowledgment of the receipt of the price) for the purpose of completing the transaction, and by calling on the defendant, through the defendant's solicitor, to settle with him, he made him his agent. Indeed, in the letter of December 3d, he refers to him as his agent in terms.

Again, it was insisted that the deed was altered in a material particular, after it passed out of the plaintiff's hands, and is, therefore, void. The alteration certainly occurred before it reached the defendant's hands. And in the interval, it was in the possession of the plaintiff's agents. No such alteration could have been made by the defendant. But the reason of the rule for avoiding instruments on account of such alterations is to punish the fraud of the perpetrator, and the rule, therefore, is not applicable to this case.

Lastly, it was contended that the defendant had no right to require so large a sum as \$20,000 to be set apart on account of the dower. That moreover, his solicitor knew, through plaintiff's letters to him, that the plaintiff was not willing that any sum should be held for the purpose mentioned, but proposed that a sufficient amount should be invested in railroad bonds, and those bonds deposited as a security for the renunciation of dower; that by withholding that information, and at the same time leading Riggs to believe that he was possessed of plaintiff's views and was carrying them out, he obtained from him the settlement which was made, and which was contrary to plaintiff's proposal; that the deed was an escrow in Riggs' hands, and the delivery of it by him to the defendant being consequent on a modification of the contract, effected in the manner above mentioned, and to which the plaintiff's as-

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sent was *essential, was not a valid delivery, and the contract must be regarded as still executory.

If through fraud on the part of the defendant a modification of the contract had been effected, the delivery would not have been valid. But there was certainly no fraud, and I do not think it can properly be said that there was a modification of the contract. The contract was that plaintiff

should convey his house to the defendant, and the defendant on his part should pay the amount of his bid. It implied that the title should be free from incumbrances, including, of course, all right of dower. But when the plaintiff's agent met the defendant for the purpose of closing the transaction, there was an outstanding right of dower, which it was not then practicable to extinguish. The defendant had a right to an indemnity. The plaintiff's letters admit it. The agent agreed that the indemnity should consist in the retention of \$20,000 until the renunciation of dower should be effected. And the transaction was closed accordingly. The defendant paid the whole price, the agent delivered the plaintiff's conveyance, and gave a receipt embodying a provision for the admitted indemnity. Surely in the contract thus closed there was no modification of the original contract. The purchaser was legally entitled to an extinguishment of the right of dower or an indemnity against it. The latter was provided.

But it is said that the sum to stand in the place of the dower should have been only one-sixth of the purchase-money, that is about \$12,000 in place of \$20,000, and that instead of being held in the shape of money it should have been invested. It cannot be doubted, I think, that if those points had been insisted on by Mr. Riggs, they would have been yielded; and it was the plaintiff's part to give Riggs his instructions regarding them, if he was not willing to leave them to his discretion.

But the defendant's solicitor, it is urged,

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was in the *possession of the plaintiff's views on these points, and failed to disclose them. Before considering what they were, I will remark that it was natural to suppose the plaintiff communicated directly to his agent all such instructions as he deemed material; it would have been very unreasonable for the purchaser's solicitor to suppose it was intended to make him the medium of communication. And it appears that, in fact, the plaintiff, about the time he wrote to Mr. Phillips, also wrote a letter to Mr. Riggs, which has been mislaid. What then did the plaintiff say on this subject in his letters to Mr. Phillips? In the letter of November 27th, he says, one sixth may be retained, or security given for that amount, or some of the money be invested and a sufficient amount of securities deposited in pledge. And in the letter of December 3d he says, he proposes to make an investment in railroad stocks, more than will cover the dower, and deposit them as security. Now it is manifest that the writer's great object was to effect a settlement, without delay, through the instrumentality of a portion of the purchase-money, to be used as an indemnity against the dower claim. The amount to be so used was a very subordinate considera-

tion. To say that one-sixth was his ultimatum seems to me to give a forced construction to his letters. And I do not suppose that Mr. Phillips had the least idea that he was contravening the plaintiff's views when he suggested \$20,000. The investment of the sum to be set apart was a matter of more importance. But the plaintiff did not design or expect that it was to be done by Mr. Phillips. He or his agent was the proper person to attend to that, and the defendant interposed no objection to its being done. On the contrary, his solicitor in his presence, suggested to Mr. Riggs to invest in railroad bonds, and Riggs declined to do it. Mr. Riggs says that in making the settlement of the 27th December, he was influenced by the be-

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lief that Mr. Phillips had authority *from the plaintiff to name the terms. But there does not seem to have been anything to make Mr. Phillips suppose that he was so influenced. And moreover, the settlement, so far as Mr. Phillips was concerned, was substantially in accordance with the letters to him.

What was said by the plaintiff's counsel as to payment in Confederate notes not being a legal payment, could only apply to an executory contract. In my judgment this contract was validly executed. The loss the plaintiff has suffered is hard to be borne, but it is one of the many grievous results of a ruinous war, and not ascribable to any such cause as entitles him to the relief he asks for.

It is ordered and decreed that the bill be dismissed.

The complainant appealed and now moved this Court to reverse the decree on the grounds:

1. Because there was not any agreement between the plaintiff and defendant which made a binding and conclusive contract enforceable on either side, and if there were, defendant has not complied with it.

2. Because the evidence proved that the agreement for the sale was not executed but executory.

3. Because the settlement by the auctioneer, J. S. Riggs, was outside of and beyond the authority he had as agent for the seller, and did not bind his principal.

4. Because the settlement was made by J. S. Riggs upon the representations of the attorney for W. H. Chafee, which were accepted by J. S. Riggs as the directions of his principal and which were not.

5. Because the settlement was made after

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and when it *was known that the complainant was a prisoner of war, and that such captivity suspended if it did not terminate the agency of J. S. Riggs.

6. Because the deed, when received by J. S. Riggs, was an escrow, and there was not and could not be under the circumstances of the case a valid delivery thereof.

7. Because the pretended consideration for the purchase of the house and lot of the complainant was Confederate treasury notes, which was not a lawful consideration.

8. Because, according to the terms and considerations of the ordinance of the State of South Carolina, the complainant was entitled in consideration of his property, if he was held to have transferred the same to the defendant, to an enquiry as to the true value and real character of the consideration, so that regard being had to the circumstances, there should be substantial justice rendered to the complainant.

9. Because the Chancellor should at least not have dismissed the bill without making some provision for the payment of the amount retained against the contingent claim of dower.

Simons & Simons and Magrath, for complainant.

Phillips, Memminger, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. Concurring with the Chancellor in all parts of his decree, not mentioned below, this Court will notice only the objections, which the appellant has here most strenuously urged.

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*The contract was executed, and the bill itself seems to have been framed with that understanding. The advertisement for sale intimates no exception to a perfect title, and the contingent right of dower, which the wife of a living husband has, is an incumbrance which one bound to make a perfect title must remove. (*Polk v. Sumter*, 2 Stro. 81; *Jeter v. Glenn*, 9 Rich. 380.) So the complainant seems to have regarded his duty under the contract. The acts and letters of the complainant furnished evidence that Riggs was his agent, authorized to deliver the deed and to secure the purchase-money. The arrangement by which Riggs retained \$20,000 as a pledge to secure the renunciation of dower, was comprehended amongst the "so many ways of fair arrangement" which the complainant entrusted to the discretion of Mr. Phillips and the "agents who represented" him. If the pledge has proved insufficient, that constitutes no ground for complaint on the part of the complainant. The deed was not delivered as an escrow. If alteration in it was made after it left the hands of complainant, that has not been done since it came to the hands of the defendant; the alteration can be imputed to no evil motive, if it was made by Riggs, and in that case being conformable to the complainant's duty, might well be supposed to have been made by his agent with his authority, (*Duncan v. Hodges*, 4 McC. 239 [17 Am. Dec. 734]); but if it was the unauthorized act of a stranger, it would in equity be struck out, rather than allowed to destroy the deed in the hands of an innocent grantee. (6 East, 310.)

The captivity of the complainant might require special caution in guarding against duress, in reference to all acts done by him subsequent to his capture, but cannot affect power given or other act done by him when he was free.

The Act of Congress, July, 1862, Statutes at Large, U. S. 591, by its sixth section makes void "sales, transfers, or conveyances of property" by other persons than "those

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*named as aforesaid;" and the complainant being a major in the army of the Confederate States, was in one of the classes "named as aforesaid." If that section, or any other part of the Act, embraces transfers by him, it had regard to the seizure there contemplated, and proceedings had thereunder, not to transfers made by one of the persons meant to another of them, unconnected with the offences intended to be punished.

The illegality imputed to Confederate treasury notes affects not an executed contract between persons in *pari delicto*, at a time when, and place where, the only government and only currency were those of belligerents engaged in hostility to the United States, if the contract was, as in this case seems to have been, in no way intended to aid the cause of those belligerents. (Phillips v. Hooker, Supreme Court of North Carolina, Amer. Law Register, Nov. 1867.)

The ordinance of the convention of September, 1865, which permits the true value and attendant circumstances to be shown for affecting substantial justice, is suitable to a case where the aid of a Court is sought to enforce a contract, but not to one where a contract has been executed and power is invoked to set it aside.

The motion is dismissed.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Motions dismissed.

14 Rich. Eq. *81

*WILLIAM M. BAILEY and Others v.
CHARLES J. WHALEY and Others.

(Charleston. Jan. Term, 1868.)

[Infants \hookrightarrow 105.]

An infant defendant who is absent from the State, cannot be made a party by publication of notice under the Act of 1866.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 307; Dec. Dig. \hookrightarrow 105.]

Before Johnson, Ch., at Charleston, November, 1867.

The decree of his Honor, the Chancellor, is as follows:

Johnson, Ch. An order in this cause was proposed yesterday, by Messrs. Whaley,

Mitchell, and Clancy, to the following purport.

The infant defendant, Sarah Ann Whitehead, being absent and beyond the limits of this State, it is ordered on motion of Whaley, Mitchell, and Clancy, complainants' solicitors, that the register of this Court do make publication of the said infant defendant, to answer the said bill of complaint, in pursuance of the Act of the General Assembly, passed December, 1866, entitled "An Act to shorten and regulate the publication of notices of absent defendants in equity."

It is my opinion, that the Act of Assembly of 1866, only applies to persons against whom a decree *pro confesso* may be taken by the practice of this Court; and the motion proposed, therefore, is refused.

The plaintiffs appealed on the ground:

That the Act of the General Assembly passed December, 1866, comprehends all defend-

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ants who are absent *and beyond the limits of the State, whether infants or adults, and repeals any law, usage or practice to the contrary.

Whaley, for appellants.

The opinion of the Court was delivered by

INGLIS, A. J. The Act of December, 1866, (13 Stat. 425,) under the supposed authority of which the motion was made in the Court below, authorized the entry of an order *pro confesso* against an absent defendant, upon his failure to appear and defend within the time limited in the publication therein prescribed, and the notice advertises him of this.

According to the well established rule of equity practice, infants are not permitted to defend themselves. (1 Danl. Ch. Pr. 203.) When a defendant to a suit is an infant, the Court appoints a proper person to put in his defence for him. The omission to do that which he is not permitted to do cannot be imputed to him as a default, nor his silence under such circumstances be interpreted into an admission of the truth of the plaintiff's allegations. If, however, it could be so regarded, the plaintiff would not thereby be relieved from the necessity of proving as against the infant the whole case, upon which he relies. For an infant is not bound by any admissions, however made, except such as are for his benefit. (1 Danl. Ch. Pr. 216, 219.) An order *pro confesso* against an infant defendant would, therefore be a nugatory act such as the Court will never do.

The Act is, it is true, general, in its terms, making no distinction between adult and infant defendants. In this respect it does not differ from the earlier statutes on this subject. (A. A. 1784, sec. 12, 7 Stat. 210; A. A. 1808, sec. 12-14, 7 Stat. 306.) From an examination of these Acts it seems very clear

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that in the enactment of no one of *them was

the disability of infancy present to the mind of the Legislature, or any purpose entertained to alter, in so important a particular, the rules of equity practice. To substitute for the old methods of compelling appearance and defence, a formal judgment that the defendant has, by his default, admitted the plaintiff's case as stated; or to supply the want of actual service of process where a defendant is out of the jurisdiction by publication of notice; or to shorten the time of publication and notice in such case, seems manifestly to have been the single end proposed. The publication, which the motion in the Court below claimed, embraces, as has been stated, a notice that upon the expiration thereof without defence made, a decree pro confesso will be entered of record against the defendant, and the terms of the Act, where applicable, expressly entitle the plaintiff to such decree. Such a proceeding cannot be accorded against an infant, without the clearest demonstration of the legislative will to this effect.

This Court concurs in the opinion of the Chancellor that "the Act of Assembly of 1866, only applies to persons against whom a decree pro confesso may be taken by the practice of the Court;" and discovers no error in his refusal of the order proposed.

The appeal is dismissed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Appeal dismissed.

14 Rich. Eq. *84

*WILLIAM PEARCE v. WILLIAM VENNING.

(Charleston. Jan. Term, 1868.)

[Powers ⇨22.]

Testatrix devised and bequeathed the sum of \$7,500, some real estate, and certain slaves to V. in trust, to pay the income to P. for life, with limitations over, and declared that it should be lawful for the trustee, with the consent in writing of P., "to dispose of the whole or any part of the said real estate and other property, and to substitute other property, real or personal, in the stead thereof." Held, that the power had relation only to the real estate and slaves, and not to the pecuniary legacy of \$7,500, and therefore, that as to the latter, V. could receive and invest the same without the consent in writing of P.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 68; Dec. Dig. ⇨22.]

Before Lesesne, Ch., at Charleston, February, 1867.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. Mrs. Ann Venning died in 1854, leaving a will, whereby she gave and

devised to the defendant, William L. Venning, the sum of seven thousand five hundred dollars, (\$7,500,) some real estate, and certain slaves, in trust, to receive and pay over to the plaintiff, during his life, the rents and profits, interest and income, and upon his death, in trust for his children, with contingent limitations over; and declared that it should be lawful for the said trustee, with the consent in writing of the said William Pearce, "to dispose of the whole or any part of the said real estate and other property, and to substitute other property, real or personal, in the stead thereof," to be held for the same uses.

The legacy of seven thousand five hundred dollars, (\$7,500,) was paid in a bond of William Lucas for two thousand five hundred dollars

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(\$2,500,) and a bond of T. *D. Wagner for five thousand dollars, (\$5,000,) secured by a mortgage of a plantation in Christ Church parish. Wagner's bond being past due, was paid in 1859, and the money invested in a bond of P. P. Bonneau, secured by a mortgage of the same plantation. In January, 1863, Bonneau's bond being past due, was likewise paid to the trustee and the money invested in eight per cent. bonds of the Confederate States of America, at par.

The bill is for an account. The defendant has filed his account with his answer, and the plaintiff objects to the receipt of payment of Wagner's bond, and investment of the money in Bonneau's bond, and the subsequent receipt of payment of Bonneau's bond, and investment of the money in eight per cent. Confederate bonds, as changes of investment made without the compliance of the condition required by the will. In all other respects the account is satisfactory to him.

The plaintiff has three children, named Thomas, Harriet, and Ann, but they are not parties to this proceeding.

Receiving payment of the two bonds in question was not, in my judgment, what was contemplated by the will, in the provision made for disposing of the settled property, to which the written consent of the cestui que trust, was made necessary. When Wagner's bond became payable, the trustee, so far from needing the consent of the cestui que trust, was bound to receive payment, and the money so received was money in his hands to be invested according to the rules and responsibilities which appertain to the subject. The investment in Bonneau's bond, secured by mortgage of real estate, seems to have been a very proper one. So, too, when Bonneau's bond became payable, he had a right to require the trustee to receive payment, but only in lawful currency, to wit, gold or silver coin. The trustee received payment, in fact, in Confederate States treasury notes, and the question, and the only ques-

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tion in the case is, whether the Court will

sanction the act, or regard it as a nullity, and hold him liable to the trust estate for the amount.

I do not think the consent of the *cestui que trust*, to his receiving payment in Confederate currency, was a *sine qua non*. If under the circumstances it was right and proper, that is enough.

Now the evidence (which is reported by the Master) shows, and all of us remember, that in January, 1863, and for months after, the banks received Confederate currency in payment of old debts, the most prudent individuals did the same; it was very unusual to refuse to do so, and the witnesses, Messrs. Stoney and Haskell, say of the debt in question, that they would have thought it proper to receive payment of it in that way. This trustee, then, seems to have done no more than he, or any other prudent man would have done in his own case, than thousands of prudent men did. And that is the standard by which the law judges a trustee's conduct.

Had there been any ground for imputing an interested or corrupt motive to the trustee, the case would be liable to a different judgment. But there is not the least. He appears to have acted in perfectly good faith in the line of his duty. So too if the *cestui que trust* had objected to payment being received in Confederate currency, and the trustee notwithstanding, had persisted in taking it, he would have done so at his peril. But he knew of no such objection on the part of the plaintiff. It is plain, I think, that he regarded the receiving of that currency so much a matter of course, that it did not occur to him to mention it to the plaintiff. The plaintiff's objection was not expressed until he called to pay him his interest, six months after the thing had been done. And then, according to the trustee's version, the plaintiff only said: "I had rather that the money on Bonneau's bond had not been

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*paid," but at the same time agreed to the investment. Plaintiff says he told Bonneau in January, 1863, that he was not willing for the bond to be paid in Confederate currency. It would have been more to the purpose if he had so expressed himself to his trustee, who alone had the right to receive payment.

Payment having been, in my judgment, rightfully received by the trustee in Confederate currency, the investment of the same in eight per cent. Confederate bonds was proper. *Haile v. Shannon*, MS. 1866.

It is ordered and decreed that the bill be dismissed.

The complaint appealed on the grounds:

1. That the power contained in the will of Mrs. Venning authorizing the trustee to sell or change investments of the trust property, with the written consent of Mr. Pearce, is a power dependent upon a condition precedent and equally applicable both to the sales and the reinvestments, and that in the exercise

of the power, the conditions must be strictly complied with.

2. That when Wagner's bond was paid, that it required the written consent of Mr. Pearce to invest in the bond of Bonneau, and that not having been obtained, the fund must be regarded as now in the hands of the trustee, and in the like manner as to Bonneau's bond.

3. That it was in the evidence that Mr. Pearce objected to the payment of Bonneau's bond in Confederate currency.

4. That the decree is contrary to law and evidence.

Whaley, for appellant, cited *Fronty v.*

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Fronty, Bail. *Eq. 518; *Sugden on Powers*, 20, 210, 212, 261 to 286, 319. *Dillit v. Whitner*, Cheves, 213; 4 Kent, 320 to 334.

Simons & Simons, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. By the will of Mrs. Ann Venning, she devised and bequeathed to her nephew, the defendant, the sum of seven thousand five hundred dollars, and her house and lot at Mount Pleasant, and certain slaves (by name), in trust to receive and pay over to testatrix's son, William Pearce, during his natural life, the rents and profits, income and interest thereof, and to take his receipt therefor, and upon his death in trust for his children, &c., as therein provided, and it was declared to be lawful for the trustee, "with the consent in writing of the said William Pearce, to dispose of the whole or any part of the said real estate and other property hereinbefore mentioned and to substitute other property, real or personal, in the stead thereof," and so on, from time to time, to sell the said property and to substitute other property in lieu thereof. The pecuniary legacy was paid in the bond of William Lucas for two thousand five hundred dollars, and of Theodore D. Wagner for five thousand dollars. No objection is made that the trustee, instead of requiring payment in cash from the executors of Mrs. Venning, as he had the right to do, received payment in these bonds. Wagner's bond being past due, was paid in 1859, and the money invested in a bond of P. P. Bonneau, secured by a mortgage of the same plantation. In January, 1863, Bonneau's bond being past due, was paid to the trustee, and the money invested in eight per cent. bonds of the Confederate States of America at par. No charge of negligence, or want of caution or of judgment in this trans-

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action is alleged *against the trustee. But the objection is, that the power to sell and dispose of and reinvest, given by the will of the testatrix, applies as well to the pecuniary legacy of seven thousand five hundred dollars as to the house and lot and slaves devised and bequeathed for the use of the

plaintiff. The Court is unable to recognize the soundness of this construction. The terms "sell and dispose" are not properly applicable to money. The testatrix exhibited no want of confidence in the judgment or discretion of the trustee; but the contrary. He was authorized to receive the pecuniary legacy, and pay over the interest to her son during his natural life. No directions were given to invest the funds. That may have been left to the discretion of the trustee, but the interest was made payable to her son during his natural life. But the testatrix had also provided for the use of her son, a house and lot and certain slaves. To part with any part of this for other property, was not merely a matter for the exercise of judgment and discretion of the trustee. Her son, for whose

use it was, might have partialities for any part of the property, and was also properly to be consulted as to the property proposed to be substituted.

It was, therefore, declared that any such change should only be lawful, when made with the consent, in writing, of her son, William Pearce. But none of these reasons were applicable to the pecuniary legacy, the management of which was left with the trustee. Such being the construction of the will adopted by this Court, it is ordered and decreed that the appeal be dismissed.

WARDLAW, and INGLIS, A. J., concurred.

Appeal dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—APRIL AND MAY TERM, 1868.

JUSTICES PRESENT.

HON. BENJAMIN F. DUNKIN, CHIEF JUSTICE.
HON. DAVID L. WARDLAW, ASSOCIATE JUSTICE.
HON. JOHN A. INGLIS, ASSOCIATE JUSTICE.

14 Rich. Eq. *90

*VENUS BLAKELY and PHILLIS STAGGERS v. JOHN J. TISDALE,
Executor, and Others.

(Columbia. April and May Term, 1868.)

[*Slaves* ⚡22.]

Testator, who died in 1822, by his will dated the same year, bequeathed five slaves to his brother W. for life, "and then after his death to be free to all intents and purposes forever;" and also devised a tract of land and \$1,000 to W. for life, with remainder to the same slaves. W. died in 1862, and in 1865 the slaves were emancipated:—*Held*, that the slaves, now become free, were not entitled to the land and money.

[Ed. Note.—Cited in *Rosborough v. Rutland*, 2 S. C. 385; *Davenport v. Caldwell*, 10 S. C. 340.

For other cases, see *Slaves*, Cent. Dig. § 108; Dec. Dig. ⚡22.]

[*Slaves* ⚡13.]

The rights of slaves and their masters under the law of this State prior to 1865, in reference to property, real and personal, devised to, or otherwise acquired by slaves, considered, and the legislation of the State and decisions of the Courts on the subject examined.

[Ed. Note.—Cited in *Davenport v. Caldwell*, 10 S. C. 334, 335, 344.

For other cases, see *Slaves*, Cent. Dig. § 59; Dec. Dig. ⚡13.]

Before Carroll, Ch., at Williamsburg, March, 1867.

The decree of his Honor, the Chancellor, is as follows:

Carroll, Ch. On the 10th of October, 1822, Martin Staggers executed his last will and

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testament, and within *thirteen days afterwards died, leaving the same of force. He bequeaths therein to his brother, William Staggers, five negro slaves: Hannah, Venus,

Peggy, Phillis, and Merica, with their future issue and increase, to be his property during his natural life and no longer, and then after his death to be free to all intents and purposes forever. The testator also devises one hundred acres of his lands to his brother William during his natural life and "at his death to go to the five negroes aforesaid, to them and their heirs forever." Sundry specific legacies to his three brothers respectively are next bequeathed and the testator then directs that the residue of his property be sold, and that one thousand dollars of the proceeds be placed in the hands of his brother, William Staggers, to remain there during his natural life, and at his death to be paid to the five colored people aforesaid, share and share alike. The residue of the money to arise from the sale of his residuary estate, with all money proceeding from debts owing to him, the testator directs to be equally divided among his three brothers, John, George, and William Staggers. The will was duly admitted to probate, and of the three persons nominated to that office, but two qualified as executors, William Staggers, and one James G. McGill. The latter died some years after the testator. William Staggers survived long afterwards and died as late as August, 1862.

The plaintiffs, Venus and Phillis, allege "that Hannah, Merica, and Peggy, have long since departed this life, without any heirs except Peggy, who was the mother of one daughter, sold many years ago as a slave in Charleston, of whose whereabouts or whether she be alive or dead, the plaintiffs have now no knowledge;" and they pray partition of the land and the payment of the pecuniary legacy given them by the will, with an account for rents and interest to be computed

from the death of William Staggers, the life tenant. The residuary estate of Martin

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*Staggers, directed to be sold, seems to have been of sufficient value to satisfy the bequest of \$1,000. The land in controversy was held in possession by William Staggers, from the death of the testator, until his own decease and since that time has passed into the possession of his devisees, or his executor, the defendant, John J. Tisdale.

After the death of Martin Staggers, the five negroes referred to were received by William Staggers, as legatee under his will. Some of them he seems to have sold prior to 1857. In 1855 suit was instituted in this Court against William Staggers by James M. Staggers, claiming that John and George, brothers of William Staggers, were with him the absolute owners of the slaves referred to, subject to his life-estate in them, and that he (James) had succeeded by assignment, to all the interest of John and George Staggers in those slaves. The purpose of the bill was to obtain security for the production of the slaves, at the termination of the life-estate. In 1857, by agreement between the parties, it was arranged that James M. Staggers should administer in due form upon the estate of John and George Staggers, they having previously died; that thereupon William Staggers should surrender his life interest in the slaves; that he should account for such of the negroes as he had disposed of, at the prices received for them, without interest; that the remaining negroes should be sold by the Commissioner, and that partition of the proceeds of the sales of the whole should be presently made, by assigning one-third to the administrator of John Staggers, one-third to the administrator of George Staggers, and the remaining third to William Staggers. Accordingly James M. Staggers proceeded to obtain the grant of the administration of the estates of John and George Staggers, and the agreement of the parties was consummated by a decree in March, 1857, under which the negroes that remained in possession of William Staggers

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were sold *and the proceeds of their sale, with the sums arising from the sales of those previously disposed of, were divided among the parties, and in the proportions specified.

On the part of the plaintiffs Venus and Phillis, it is not denied that, in their former condition of slavery, they were incapable of acquiring for themselves property of any description, but it is contended that their disabilities, in that regard, are analogous to those of an alien, who has acquired lands by purchase. An alien it is argued may take by purchase though he cannot hold as against the State. But if prior to any legal proceeding divesting his title, his disability of alienage be removed by naturalization or otherwise, his title thereupon becomes com-

plete and indefeasible, and it is argued that the emancipation of the slaves in this State, and the Acts of the Federal and State Legislatures conferring civil rights upon them have effected, in this regard for the slaves, all that is accomplished by naturalization for the alien. Brief consideration will show that the analogy suggested has no existence whatever. An alien devisee is purchaser and may take the land "under the devise and hold it too against all the world, except the State, and against the State also, till office found." (*Vaux v. Nesbit*, 1 McC. Eq. 374.) "The freehold abides in him, and it cannot be divested out of him, but by some notorious act, by which it may appear that the freehold is in another. An office of entitling is necessary to give this notoriety and fix the title in the Sovereign." (*Fairfax's Devisees v. Hunter's Lessees*, 7 Cranch, 621 [3 L. Ed. 453.]) No such right belonged to the plaintiffs in this cause, in their former condition of slavery. They were then in legal contemplation, themselves but chattels personal though at the death of Martin Staggers, they were not incapable to take, yet whatever property, title, or interest was transferred to them passed at once by operation of law to their masters. (*Lenoir v. Sylvester*, 1 Bail. 643; *Fable v. Brown*, 2 Hill

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*Eq. 396, 7.) If it were conceded, therefore, that the naturalization of an alien devisee, before office found would confirm and complete his title, it could avail the plaintiffs nothing.

They had in them no remnant of title, defeasible or otherwise, to be strengthened and perfected by means of the emancipation and the subsequent legislation in their favor.

The direction of their former master, Martin Staggers, that they should be free after the death of his brother William, was illegal and ineffectual. Whatever interest was given them in the estate of that testator was transferred to their owners, and who they were is distinctly ascertained by the decree in the suit of *J. M. Staggers v. William Staggers*, already referred to.

If a slave have several masters, his gains belong to them all pro rata. (*Cobb on Slavery*, 235.) "Though a master could not bring suit for a legacy to his slaves, yet, if it were delivered by the executor to either slave or master, or came lawfully within the control of the latter, the title would vest immediately in the master." In *McLeish v. Burch*, (3 Strob. Eq. 225,) the testatrix bequeathed certain negro slaves to her executor, and to those slaves sundry sums of money. It was adjudged that the "slaves and the legacies bequeathed them be the absolute property of the executor." Upon the same principle, it is said, that if lands were conveyed to a slave, and possession given, the master would be seized of the land. (*Fable v. Brown*; *Cobb*, 238.)

The plaintiffs, Venus and Phillis, were undoubtedly slaves at the death of the testator, Martin Staggars, and continued to be slaves until the death of William Staggars, in 1862.

Their subsequent emancipation certainly cannot operate to divest their former owners of rights in other forms of property, transferred to them antecedently by opera-

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tion of law. To assign such retroactive effect to the emancipation of the slaves, would bring upon the State evils and calamities frightful to contemplate.

It results that the claims asserted by the plaintiffs, Venus and Phillis, cannot be sustained; and it is ordered and decreed that their bill be dismissed, but without costs.

The complainants appealed on the following grounds:

1. Because, at the date of the bequest to the complainants, there was no law in South Carolina which prohibited or rendered void a legacy or bequest to a slave, and as the disability of slavery under which the complainants labored, had been removed, before the rights of any one else had attached to the bequest which they claim, the decree should have been in their favor.

2. Because the decree was contrary to justice and equity.

Maurice, for appellants.

Pressley, Dozier & Porter, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. By the will of Martin Staggars, dated in October, 1822, five slaves, of whom these complainants are two, were bequeathed to William Staggars for life. "and then after his death to be free, to all intents and purposes, forever." The land in controversy was by the same clause devised to "William Staggars during his natural life, and at his death to go to the said five negroes aforesaid, to them and their heirs forever." Another clause directed "that one thousand dollars should be placed in my brother William Stagger's hand, to remain there during

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*his natural life, and at his death to be paid to the said colored people aforesaid, share and share alike."

The appeal brings under consideration the rights of the two complainants, now emancipated by the Constitution of 1865, or by some prior consequence of the late war, to shares of the land and money above mentioned. William Staggars died in August, 1862, unquestionably before emancipation, and to recover anything of what they claim, the complainants must establish their rights in opposition to the representatives of William Staggars, and also to the persons who are heirs, next of kin, and residuary legatees of Martin Staggars.

If the scheme of Martin Staggars was, as the will plainly indicates, that the five slaves

should be emancipated at or before his brother William's death, the provisions for them were made in contemplation of their changed condition. The emancipation was a contingency intended to precede the vesting of rights in them, and as it did not take place at or before the termination of the life-estate, the contingent remainders were defeated. (*Lenoir v. Sylvester*, 1 Bail. 642.) When Martin Staggars made his will, it is likely that he was not informed of the Act of 1820, (7 Stat. 459, § 31,) passed shortly before, which prohibited emancipation except by Act of the Legislature, and that he relied upon his brother William to effect emancipation, under the Act of 1800, (7 Stat. 442, § 7.)

But it is plausible to suggest that Martin Staggars' will affords an early instance of an attempt, such as afterwards became frequent, to evade the Act of 1820 by conferring substantial freedom under nominal slavery, and thus the gift to the slaves may be relieved from the effect of precedent contingency. We will, with the haste which the press of business constrains, examine the argument upon which the case of the complainants has been in this Court rested. A summary is this: The African slave was

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by law ranged *under the head of perpetual inimicus, and was subject to the disabilities of an alien enemy according to the ancient law. An alien enemy might take property, personal, and hold until office found, by which it became forfeited to the sovereign. The restoration of peace with the country of the alien enemy, before office found, discharged the cause of forfeiture. So an African slave might take property for the benefit of himself or his master, and hold subject to forfeiture to the State upon office found; but his emancipation and investiture with civil rights before office found, (13 Stat. 393,) discharged the cause of forfeiture and rendered indefeasible his title in property previously conveyed to him.

This argument, except the effect of emancipation and civil rights, depends upon the authority of the case of *Fable v. Brown*, (2 Hill, Ch. 392.) The opinion there was pronounced by Chancellor Harper, whose extraordinary intellect and profound learning made him, especially in equity, the luminary of our Courts. The ruling of the case and much of its doctrine have been approved and followed in subsequent cases; but the application to slaves, of the law concerning alien enemies, has always been looked upon by bench and bar as speculation, ingenious, but unsound; has never been sanctioned in subsequent cases, and has been expressly repudiated more than once. (*Carmille v. Carmille*, 2 McM. 470.) On one occasion a contrary theory was propounded by Judge O'Neill, and that declared to have the sanction of the Court of Errors. There

never has been any proceeding on the part of the State to declare the forfeiture of any property acquired by a slave, except summary forfeitures under Act of the Legislature, which forbade certain acquisitions by a slave as contrary to public policy. Judge Harper says: "There is no provision by law for an inquisition by which this" (personal property in possession of a slave) "shall be

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vested in the State;" and if *our Act (1787, 5 Stat. 47) of escheats (as forfeitures to the State are there denominated) should be supposed to embrace acquisitions of slaves under the word "otherwise" in its twelfth section, it would be hard to adapt the machinery of that Act (*McCaw v. Galbraith*, 7 Rich. 87) to such acquisitions, or to say that the slave was "divested by operation of law," when the inquisition required to divest him could proceed only in case of his having become so divested.

What influence the ancient notions concerning barbarous heathens and alien enemies may have had when African slaves were first taken to Hispaniola, and by what, if any laws, those slaves were at first regulated in any of the American colonies, are subjects of disquisition, curious, but, on this occasion, unimportant. There must necessarily have grown up in every English colony, either by statute or custom, some regulations on the subject suited to the views of policy that there prevailed. After slaves had been brought to South Carolina, the first probably brought from Barbadoes in 1671, so far as our public documents now show, they were for nearly twenty years unnoticed in any legislative Act; but still the rights of masters and some mode of emancipation were acknowledged and prevailed, as subsequent statutes show. In 1690, when the first Act (7 Stat. 343) concerning slaves was adopted which our statute book now exhibits, it was enacted that no slave shall be free by becoming a Christian; that for payment of the debts of a decedent, slaves shall be deemed and taken as goods and chattels, but in all other cases whatsoever shall be accounted as freehold, and descend accordingly; and that a slave shall have the whole benefit of a reward for apprehending a runaway, to be laid out in chattels or otherwise at the discretion of the owner. An Act of 1708, (7 Stat. 350, § 5,) provides for slaves "having and enjoying freedom" for certain services

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to the public. In 1712, (7 *Stat. 352) special "constitutions, laws and orders," different from the "laws, customs and practices" of the province, were enacted for "negroes and other slaves" who were of "barbarous, wild and savage natures." By these they and their children are declared "slaves to all intents and purposes," except those who had been or should be, for some merit, made and declared free, either by the Governor and

Council, "or by their respective owners or masters." The master's right to receive "the whole of what a slave shall earn" is taken for granted and enforced, (7 Stat. 363, § 28;) and whilst the lawfulness of a negro's professing the Christian faith and being baptized is set forth, it is declared that he shall not thereby be manumitted or set free. The popular opinion, proceeding from tradition of ancient law, superstition and intolerance, was thus corrected for the benefit of the slave and the security of the master, and done by an authority as potent as that which established the doctrine of perpetual inimicus. Various other Acts of legislation regulating slaves (in which are contained prohibitions of their acquiring property for their own benefit, and implied recognition of their ability to become free and to receive small gratuitous rewards) were made between 1712 and 1740. In 1740 a more comprehensive code for slaves than before existed was provided. (7 Stat. 397.) All negroes, (those now free excepted,) with their offspring, are declared to be "absolute slaves," to follow the condition of the mother, and to "be adjudged in law to be chattels personal in the hands of their owners," executors, &c., "to all intents, constructions and purposes whatsoever;" which provision as to chattels seems to have been intended to make slaves in all cases personal property, in abrogation of the Act of 1690, which, in all cases but one, had made them real estate. The Act of 1740 directs a mode of trying a question of freedom claimed by a negro; but neither that, nor any other Act prior to

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1800, fixed a *form of emancipation; and in this it may be seen how influential usage was in the regulating of negroes. Some provisions which are made in the Act of 1740, and other Acts before and after that, mostly prohibitory, show a recognition of the ability of a slave to acquire articles of personal property, and of the right of the master to dispose of such articles in the possession of his slave.

By the legislation of the Province and State, the status of the negro was fixed. It was not that of alien enemy, but of a native, resident human being, of a race deemed inferior; when a slave, subject to the absolute control of a master, wherever the latter was not restrained by law; having no power to contract, nor standing in any Court, under his own name, but protected, so far as the law afforded any protection, by the intervention of his master or some public authority; under all disability which had not been removed, and concerning property especially, incapable of holding, except by the consent and for the benefit of the master; even when emancipated from the dominion of a master, incapable of testifying, (except upon the trial of one of his own race before an inferior tribunal,) (*State v. Scott*, 1 Bail. 270; *State*

v. Davis, 2 Bail. 558,) of becoming a citizen, or of discharging any function which pertained to government, although protected in person, invested with full rights as to the acquisition and holding of property, real and personal, and entitled to sue and be sued in all Courts. (*Groning v. Devana*, 2 Bail. 192; *White v. Helmes*, 1 McC. 430.) Toward the negro slave, the master stood as the sovereign did toward the alien enemy, with more summary powers—powers even greater than those of the lord of the manor over his vassal; for although the lord could seize and appropriate whatever real or personal property the vassal purchased, whilst it was in the vassal's possession, an alienation by the vassal before the lord's seizure deprived the lord of the right, (*Co. Litt. 117*.) whereas

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title *in the master once vested by the slave's rightful possession was not affected by any subsequent transfer made by the slave. (*Hobson v. Perry*, 2 Hill, 277.)

Decisions of Courts in the Province were no doubt conformable to the legislation and usage then existing, but we have no reports of cases prior to the Revolution. In 1792, in a case (*Guardian of Sally v. Beaty*, 1 Bay, 260) where feelings of generous humanity and natural justice were strongly excited in behalf of a negro girl who had been purchased by the surplus earnings of an old woman slave and had been manumitted by her, Chief Justice Rutledge set forth the claims of the girl so strongly, that a jury rendered a verdict in her favor, in opposition to the old woman's master, who asserted his right to all the acquisitions of his slave. But that no change of law was wrought by this verdict, appears from a case decided by Chancellor DeSaussure in 1812, (*Walker v. Bostick*, 4 Des. 266.) where holding that slaves could take neither by descent nor purchase, he decreed that real and personal property devised and bequeathed to trustees for the benefit of Betsy, a slave, and her children, fell into the residue of the estate. Many cases are to be found where the master's right to the slave's acquisitions of personalty in possession have been sustained, (*Gregg v. Thompson*, 2 Mill, 331; *Gist v. Toohy*, 2 Rich. 424; *Peay v. McEwen*, 8 Rich. 31;) and the slave's ability to make acquisitions being thus recognized, the rights of slave, master, executor and next of kin of testator were presented in argument before the Court in a case where a legacy to a slave was directly given. That case was *Fable v. Brown*, (2 Hill, Eq. 379,) decided in 1835. There it was held that the next of kin were excluded by the legacy; that the mistress of the slave was not before the Court; that neither master nor slave could maintain an action against the executor for the legacy, any more than either could enforce any right un-

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der a bond or note given *to a slave, or under

any executory contract made with a slave, although the master might maintain an action against a stranger for chattels acquired by his slave; and the executor was left in possession of the legacy, which was held not to be void, and as to which Chancellor Harper says: "I do not say what the effect would be, if the executor should think proper of his own accord to pay over the legacy to the slaves, or their master; but remaining in his hands, it is subject to the claim of the State." The bill filed by the next of kin was dismissed. Fully acquiescing in the result of the case, and in all of the rulings made in it, we have made an effort to assail the opinion that the State had any rights, and the application to the negro of the doctrine of alien enemy, upon which that opinion of Chancellor Harper was founded. The opinion and the doctrine were unnecessary to the decision of the case, and has no other authority than that which must always attend the conclusions of an eminent jurist.

Our legislation contains no implied recognition of the right of a slave to acquire title to real property, as it does of personal. The cases concerning realty claimed by slaves have been few, and are not decisive. In *Bowers v. Newman*, (2 McM. L. 472,) the devise of land and freedom was supported by forty-eight years' possession, which the devisee had held as a free person of color, and in *Harcastle v. Porcher*, (Harp. L. 496,) the free person of color had never been a slave. In *McLeish v. Burch*, (3 Strob. Eq. 225,) an interest in a lot of land was involved, but it was held that the title was in the executors, and that the directions in behalf of the slaves were merely recommendatory. Even in *Fable v. Brown*, where the residue bequeathed contained land, there was a direction for the executors to sell the real estate, invest the proceeds in stock, and pay the dividends to the slaves; and notwithstanding remarks concerning the rights of slave, mas-

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ter and the State to land *which had been conveyed to a slave, the case seems to have been considered as one involving only a legacy of money into which land had been converted. In this condition of the cases, we doubt not that the possession of land held by a slave should be considered to have been the possession of the master; but we doubt much that a conveyance of land to a slave would have been, ipso facto, a conveyance to the master. Much more than a difference in value, the difference in the modes of transfer required by law, creates a distinction between land and chattels. When the title does not proceed from possession itself, land must be conveyed by writing in due form. Can a conveyance to Cudjo be held to be a conveyance to John Smith, made effectual by proof that John Smith was the master of Cudjo, as a conveyance to an ancestor would avail his heir upon proof of his heirship? Where

possession attends or follows the conveyance, the conveyance being the act of the grantor therein, may bar all rights of himself and those claiming under him, and the possession of the slave thereunder give to the master the advantage of party in possession; but where an opposing claim sustained by possession must be overcome, before the conveyance to the slave can be completed by enjoyment, it may well be considered that the conveyance was a mere executory contract with a slave, which neither he nor his master can any more enforce than they could compel payment of a note or legacy to the slave.

In the case before us the disposition in favor of the slaves, made by Martin Staggers' will, was at most only of a remainder in land and money. If the remainder was vested, the vested interest passed instantly to the persons who, at the execution of the will, were entitled to be masters of the slaves at the expiration of the life-estate of William Staggers; or else it was a right to a thing not in possession, which neither master nor slave

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could enforce. *The latter alternative applies to it, if it was a contingent remainder, under any view which, with the help of the doctrine of executory devises and bequests, can be taken of it. William Staggers having died before the slaves were emancipated, the fee expectant claimed by them was necessarily defeated.

It is the opinion of the Court that the complainants can recover nothing under the will of Martin Staggers, and the decree, dismissing their bill without costs, is affirmed.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Motion dismissed.

14 Rich. Eq. *105

*DANIEL McLURE and Others v. GEORGE STEELE and Others.

(Columbia. April and May Term, 1868.)

[Descent and Distribution ◊105.]

Grandchildren, whose father died in the lifetime of his father, represent their father in the distribution of the grandfather's estate, and must account for all advancements which the father would have been liable to account for if he had survived.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 400; Dec. Dig. ◊105.]

[Executors and Administrators ◊475.]

In reference to advancements, the rights and liabilities of distributees are fixed at the death of the intestate; and no subsequent loss of the property, as by emancipation, can affect those rights and liabilities.

Semble, that an administrator is not chargeable with the sale-bill merely because he so

charged himself in his returns to the ordinary. The error can be corrected when he accounts in equity; and the proper mode of making up the accounts is to charge him from time to time as he makes the collections on the securities taken at the sale.

[Ed. Note.—Cited in *Rickenbacker v. Zimmerman*, 10 S. C. 120; *Hughes v. Eichelberger*, 11 S. C. 52.

For other cases, see Executors and Administrators, Cent. Dig. § 2061; Dec. Dig. ◊475.]

[Executors and Administrators ◊103.]

Investments in Confederate bonds made in 1863, if otherwise proper, must be allowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 421, 422; Dec. Dig. ◊103.]

[Executors and Administrators ◊103.]

A. was administrator of the estates of J., R., and W., and as administrator of R. and W. was entitled in equal moieties to the estate of J. In March, 1863, having a large sum of money of the estate of J., he made investments in funds which afterwards became worthless, and credited himself as administrator of W., with four thousand dollars as an investment for that estate. On taking his accounts, it appeared that W.'s estate was not entitled, at that time, to so large a sum from J.'s estate; *Held*, that the account must be taken by crediting A., in the first instance, with the whole investment as for J.'s estate, and then carrying to W.'s estate only so much as it was entitled to at the time.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 421; Dec. Dig. ◊103.]

Before Lesesne, Ch., at York, June, 1866.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. William McLure died in the year 1859, intestate, leaving, as his heirs and distributees, six children, to wit, Jane, Robert F., Catharine, (wife of James Galloway,) Margaret, (wife of William T. Robison),

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Caroline. *(wife of James McKnight,) and Araminthia, (wife of Joseph Feemster,) and four grandchildren, (issue of a deceased son, James,) to wit, Daniel, Julia, Emma, and Catharine. George Steele administered on the intestate's estate, and the bill is filed by the grandchildren against the administrator and children and the husbands of the married daughters for an account, distribution and partition of the estate, real and personal, of the intestate. The cause was referred to the Commissioner at June Term, 1861, and now comes up on his report, plaintiffs' exceptions thereto, and his report on said exceptions, overruling the same. The defendant, George Steele, is also administrator of the estates of John and Robert McLure, two brothers of the intestate, William McLure. The questions to be decided are set forth in the exceptions, and will be taken up in their order.

1. John McLure died, unmarried and without issue, in the year 1848, leaving a nuncupative will, whereby he gave to William McLure a plantation, on which William McLure then resided, and to Robert McLure, for life,

all the rest of his property. Robert administered on his estate, (no executor having been named in the will,) took possession of the personal estate, and filed an inventory and appraisement of the same, but did nothing more. Robert died in the year 1859. (a few months after the death of William,) leaving as his heirs and distributees his nephews and nieces, the defendants; and the defendant, Steele, administered on his estate, and at the same time administered, *de bonis non*, on the estate of John. There being no disposition by John McLure's will of the remainder in the property given for life to Robert, the same was intestate property; and the administrator, Steele, accordingly included all the personal property, so circumstanced, in the inventory of his estate. Among said personal property was a negress named Rose, and her children. The plaintiffs' claim that the said slaves, or the proceeds of the sale

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thereof, should be administered as belonging entirely to the estate of their grandfather, William McLure. They allege that Rose was purchased by him many years ago, and loaned to his mother, who then resided, and continued to reside until her death, with her son John. That he always claimed her and her increase as his property during John's life, and soon after John's death was about to institute legal proceedings against Robert, John's administrator, to establish his claim, when a parol agreement was entered into between them, whereby it was arranged that Robert should have a life-estate in said slaves, with remainder to William absolutely. Robert McLure had put these negroes in his inventory of the estate of John, and had possession of them as long as he lived. The report finds that the negroes in question belonged to John, and were properly treated as part of his estate; and in making up the accounts of the several estates, William and Robert being the distributees of John, the Commissioner credits one-half of the proceeds of the sale of the negroes to the estate of the one, and the other half to the estate of the other. The Court concurs in the conclusion of the Commissioner, although it does not appreciate the importance of one of the reasons on which he relies, namely, a supposed acquiescence by William in the provisions of John's will. But the will does not mention these negroes as constituting part of his estate. And I do not think, therefore, that William's course necessarily implied an acknowledgment of that fact. But I have carefully examined the testimony, and there is, in my judgment, an entire failure of proof to sustain plaintiffs' allegations.

The fact of possession in John at the time of his death, and for many years before, is *prima facie* evidence of property. There is no pretence of proof that William had purchased Rose. The evidence is not uniform that he claimed her as his property before

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John's death, or even afterwards; and the reason assigned for their being in John's possession having ceased with their mother's life, and John being an unmarried man, and in better circumstances than himself, his suffering the woman, and especially her children, to continue in John's service some eighteen years after the mother's death, and then in Robert's, as long as he lived, is not consistent with the claim now set up. There is no evidence whatever of the alleged agreement between Robert and William. The exception is overruled, and the report confirmed in this particular.

In this first exception, it is also objected that the Commissioner transcended his province in passing upon the question of ownership. The decision of the Court is based upon the testimony accompanying the report, and the objection, for that reason, is, in this case, without significance. But, besides that the order of reference, made on motion of the plaintiffs' solicitor, directed the Commissioner to "report any special matter touching the issues made by the pleadings, as to whom the negroes and other property belonged, of which the said Robert McLure died possessed," &c. it was necessary in taking the account, which is also ordered, of the estates of John, William, and Robert, to decide to which of them the proceeds of sale of these negroes should be credited. The Court will here adopt the words of Chancellor Wardlaw, in the case of *Allen v. Richardson*, (9 Rich. Eq. 55,) "Where a question of law" (a *fortiori*, of fact,) "underlies the conclusions the Commissioner is required to report to the Court, it is his duty, and one exercised in almost every case, to determine the question, subject of course to review by the Court." These remarks also apply to similar objections contained in the second and third exceptions.

2. More than twenty years before the death of William McLure, his mother-in-law gave

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him a negress called Judy, retaining a child of hers named Bill, then two or three years old. Judy very naturally "made a fuss" about such cruel separation, and the old lady then said: "Here, take this child along with you, I allow him for Robert," (meaning William McLure's son, Robert F., one of the defendants in the cause, then an infant of tender years.) The child Bill was accordingly carried away with his mother, and was at William McLure's residence, working for him when he became old enough, until the death of the latter in 1859. When the inventory and appraisement of William McLure's estate was made, Robert F. claimed Bill as his property, and his brothers and sisters contended that he constituted part of the estate of their father. Said negro was not put in the inventory, and Robert F. McLure made an arrangement or compromise with his

brothers and sisters, (five in number.) whereby, for the consideration of one hundred dollars, each of them executed a release to him. He also agreed to indemnify the administrator against the claim of the plaintiffs; and, in his answer, offered to settle with the plaintiffs on the same terms, provided the offer should be accepted at once. The testimony is that Bill would have brought one thousand dollars, if he had been sold when the estate of William McLure was sold. Robert F. McLure lived with his father until he attained manhood, and elsewhere, from time to time, after that, as his business made it necessary or convenient; but, it does not appear that he ever kept house during his father's life. Bill was in the possession of Robert F. McLure from the death of William until his emancipation in 1865. The report finds with hesitancy that Bill was the property of Robert F. McLure at his father's death. The Court considers the gift to Robert F. McLure as having been perfect, and that his father became his trustee. The onus, therefore, rests on the plaintiffs, and it is necessary for them to show that after Robert F. McLure

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came of age, either he conveyed the *negro to his father, or his father acquired a title by adverse possession. There is no evidence whatever of a conveyance by Robert F. McLure, or even that the father ever claimed this negro as his property. And not only no facts establishing adverse possession by the father, but no evidence that sufficient time elapsed between the majority of the son and the death of the father to create a title by possession. The exception is overruled, and the report confirmed in this particular.

3. William McLure gave a negro child, Caesar, to his (deceased) son, James, (plaintiffs' father,) and the Commissioner has ascertained the value of the negro at the time of William's death, with reference to his age and condition at the date of the gift, to be six hundred dollars, and has thrown the same into hotch-pot, and charged it against plaintiffs in adjudging their share of William's estate. It is not disputed that the gift was complete. It is indeed established by plaintiffs' witnesses, Mrs. Gillespie and Mrs. Miller. But it is urged that plaintiffs claim directly from their grandfather, William, who outlived their father, and are not chargeable with any advancement made to the latter in his lifetime. This is contrary to the plain provisions of the statute (5 Stat. 163, § 3), and the exception is overruled, and the report confirmed in this particular.

4. The fourth exception is in these words: "Because the Commissioner has allowed the administrator of William McLure credit in his accounts for the sum of four thousand dollars, as invested in Confederate bonds, when there was no evidence of such investment, or at the date of said bonds said admin-

istrator had any sum whatever in his hands which by law he was authorized so to invest, instead of applying the same in satisfaction of the debts then unpaid, amounting to over three thousand dollars, or paying over the same to distributees."

The Commissioner has not decided the

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question raised *in this exception, but only reported the facts and the evidence. Plaintiffs charge that the investments under consideration were made with Steele's own money. If this be true, they must be struck out of his account; though it is not perceived how that would benefit the estates, seeing the effect would be to make the administrator chargeable with that amount of Confederate treasury notes, which, like the bonds, are valueless. The administrator, in his sworn account, affirms that these investments were made for the estate, and with its money; and Mr. John A. Brown testifies that he procured Confederate States treasury bonds at Richmond for the administrator, with money furnished by him, and which he (the administrator) mentioned at the time to belong to the estate, and to be for an investment for the same. The witness very naturally was unable to state the amount of money furnished by him, or the number or dates of the bonds. The bonds themselves were produced before the Commissioner, and at the hearing, but, being payable to bearer, they contained no intrinsic evidence on the question. It is difficult to conceive how the administrator could have made out a stronger *prima facie* case, as it was not the usage for the treasurer to give bills of parcels; and in the great rush for bonds at that time, it would not have been practicable, and would doubtless have been refused. It therefore rests on the plaintiffs to establish their charge. These investments purport to have been made, March 16, 1863, and to have been partly in eight per cent. bonds, dated May 1, 1862, and partly in seven per cent. bonds, dated March 2, 1863—two thousand five hundred dollars of the former, and one thousand five hundred dollars of the latter. It is said that at those dates, respectively, the administrator had not so much money in hands for the estate; but supposing the fact to be so, it does not reach the question. The bonds were printed; and those of the same denomination carry inter-

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est from the *same day, and bear the same date; and if at the time of issuing them, any of the coupons appeared to be over-due, they were cancelled, or cut off. Without affirming that it would be conclusive, it is at least incumbent on the plaintiffs to show that there was not funds in hand when the investments were made, March 16th, 1863.

The Commissioner has exhibited the administrator's accounts made out in two ways. In the first he charges him with the amount

of the "sale-bill," or account sales, as of the day the purchaser's notes became payable, (in accordance with a bad practice which prevails generally in this State, and will be noticed more fully hereafter,) and credits himself from time to time with his disbursements. The effect of this is generally to make the administrator apparently largely indebted to the estate, until, upon final account rendered, he shows the amount of assets uncollected, and takes credit for it. The accounts rendered by this administrator to the ordinary were made out after that fashion. In the second, which was made up lately, and, it may be presumed, under advice of counsel, he charges himself only with the sums actually received. According to the latter mode of stating the account, there was not any balance in the administrator's hands when these bonds were purchased; but according to the other mode—the one, as remarked, which was pursued in all the returns to the ordinary—there was at that time a balance of more than fourteen thousand dollars. It is true, there were then unsatisfied claims against the estate to a considerable amount, but a large payment was made on them the same day. The residue of these claims is still unpaid; and it does not appear that the creditors were willing to receive Confederate treasury notes, then greatly depreciated. The Court is of opinion that plaintiffs have failed to make good their charge against the administrator, and that the in-

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vestments must be allowed as proper credits in his account, and it is so adjudged.

5. In his first return to the ordinary, the administrator, as before remarked, charged himself with the whole amount of the sale bill, as of the day when the notes of the purchaser were payable, although many of them are still in his hands unpaid, and some are said to have become valueless by the results of the war. An administrator is chargeable only with moneys actually received, or which, with diligence, might have been received, and the accounts have been restated on that basis. Charging himself indiscreetly, does not fasten on him a liability which the law does not impose; and errors in an account may be corrected at any time while it is unclosed, provided no one suffer injustice thereby. It is only when an administrator fails to render any account, and it has to be made up for him, that he is properly chargeable with the sale-bill. Allusion has been made to the common practice of executors and administrators charging themselves in this manner in their first returns, and discharging themselves in the final returns, to the extent of the notes which may not have been collected. This is contrary to the truth, and wrong; and the Court avails itself of this occasion to say that the account should be opened and kept in this simple manner:

The estate of A. B. in acc. with C. D., cr.
or admr.

Dr.

Cr.

On the Cr. side enter the items of money actually received, and on the Dr. side those of moneys paid out, under their several dates; at the end of the year charge commissions on the Dr. side, strike the balance, and carry it forward to the next year's account. In this exception the plaintiffs insist that the administrator shall remain charged with the whole sale-bill, not because of want of diligence in collecting all of it, but merely for the reason that he erroneously so charged himself. The exception is overruled.

6. It is not clear to me that Mr. Steele was

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interested in *establishing an interest in the negroes in Robert McLure, in contravention of the paramount claim made by some of William McLure's distributees in behalf of his estate. At any rate, his testimony is hardly pointed at all to that question; and the Court is abundantly satisfied, from other testimony in the cause, that the negroes belonged to John McLure; at his death, became the property of Robert for life; and, on his death, were divisible equally between his estate and William's. The exception is overruled.

7. This exception is kindred to the sixth, and is overruled for the same reasons.

8. Besides that, according to the testimony, it was agreed "that the administrator of William McLure should be credited for the three fifths of Thomas Davis," the Commissioner's reasons for overruling this exception are conclusive, and his report on the exceptions is sustained in this particular.

It is ordered and decreed that it be referred to the Commissioner to state the administrator's account according to the views herein expressed, and to report any special matter; and that the parties, or any of them, have leave to apply at the foot of this decree for any orders that may speed the cause.

The complainants appealed on the following grounds:

1. Because the Chancellor erred in allowing the administrator of Wm. McLure credit in his accounts for the sum of four thousand dollars, claimed to have been invested in Confederate bonds—no such investment being authorized by the terms of the Act of 1861; and said administrator, as manifestly appears from his statement filed of collections made and credits taken, in his returns to the ordinary, at no time had any such sum for

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investment; and such assets *as he had in hand should have been applied in payment of the debts, or paid over to the distributees.

2. Because the Chancellor erred in decreeing that the negroes, Rose and her children, were not the property of William McLure;

inasmuch as Robert McLure, to the sheriff and others, disclaimed having any other interest than a mere life-estate, and William McLure, together with the distributees of Robert, claimed that said negroes belonged absolutely to him at Robert's death.

3. Because the complainants are not properly chargeable with any sum, as an advancement for negro Caesar, since the emancipation of slaves.

4. Because the administrator should have been charged with the notes mentioned in Exhibit E of Commissioner's Report, no cause being shown why they were not collected, or any effort made to do so.

Smith, for appellants.

Williams, contra.

The opinion of the Court was delivered by

INGLIS, A. J. This Court concurs in the conclusion attained by the Commissioner, and affirmed by the Chancellor, that upon the evidence, the negroes, Rose, and her descendants must be held to have been the property of John McLure, and that at his death, they passed under the provisions of his will to his brother Robert for the term of his life, and there being therein no further disposition of them, the unbequeathed reversion was in John's personal representative, and upon

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Robert's death, was to be *distributed as intestate property between the personal representatives of William and of Robert respectively in equal shares. The reasons assigned by the Chancellor for his judgment in this particular are satisfactory to this Court, and it is not deemed necessary therefore, to add anything to what he has said.

The fact that the negro Caesar, was given by William McLure to his son James, is not disputed. James after the date of the gift, died in the lifetime of his father, and his children the present plaintiffs, are therefore, it is said, claiming directly from their grandfather, and as heirs and distributees, under the statute, to him. But according to the express terms of the statute they take by representation; stand in the place of their father, and "take the share to which he would have been entitled, had he survived the ancestor," William, (A. A. 1791, § 1, par. 255, Stat. 162,) and they must take it as he would have taken it. As thus representing him, they have an election to come in and participate in the distribution of their grandfather's estate, or to stand out at their pleasure. (Hamer v. Hamer, 4 Stro. Eq. 124.) But if they elect to come in, the requirement of the statute is positive. No Court has any power to relieve them from this obligation; it was fastened upon their father when the gift was made, and the subsequent loss of the property could not discharge it. The case presented does not call for more than this. It is said in McCaw v. Blewit, (2 McC. Eq. 90). "By

hotch-pot is meant, that each child is to draw at the death of the parent an equal proportion." (See Ison v. Ison, 5 Rich. Eq. 15.) And in Manning v. Manning, (12 Rich. Eq. 428,) this Court said: "The period for fixing the rights of the parties is the death of the decedent." In the final adjustment of the distribution other questions may arise. It is not intended here to conclude them. The judgment of the Chancellor on the point made in the third ground of appeal is affirmed.

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*The defendant, Steele, must of course, account for all the assets of each of the estates which he undertook to administer. If he converted the specific assets or any of them into securities, he must account for the proceeds of such securities as he realized them by collections. Such as having failed to collect, he still holds, he has a right to turn over to the distributees in his own discharge, (if they insist upon present distribution,) if he can justify his failure to collect them, by showing reasons for retaining them in specie, sufficient in law for this purpose. For loss resulting from any want on his part, of reasonable care and diligence in taking these securities originally, or letting them lie inactive subsequently, he is of course, responsible. But this question made in the fourth ground of appeal, has not yet been concluded by any judgment in the case. On the contrary the Commissioner says in his report: "He" (the administrator) "should proceed with all due diligence, to collect the outstanding debts due to the said estates, and satisfy the existing demands against the same." When he shall have completed his administration to the extent of paying all demands of creditors so far as the assets will extend, and the residue is ready for distribution, the question of his ultimate liability for any of these securities then remaining uncollected, will perhaps arise for final adjudication. The claim made by the plaintiffs on the circuit, seems to have been that the administrator should be charged with the whole sale-bill, merely for the reason that he had according to a very common error, so charged himself in his returns, and not that the uncollected securities taken at the sale, as otherwise forming part of the assets, should be charged against him, because of want of proper care and diligence in taking or collecting them. The Chancellor properly disallowed the claim as made. That which is now preferred in this fourth ground of appeal, stands open for further adjustment.

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*The account of the administration of the defendant, George Steele, made up by the Commissioner, and contained in the brief, very clearly shows that, prior to the 1st April, 1863, his collections in money from the assets proper of the estate of William McLure were very small, and wholly inadequate for the payment of debts; so much so

that, for this purpose, it was necessary to transfer moneys from his collections on account of John McLure's estate, to one-half of which, in any event of the then impending controversy, William McLure's estate would be entitled. It is quite manifest, therefore, that the administrator did not, at any time during the month of March, 1863, have funds of William McLure's estate proper, for investment in Confederate bonds or otherwise. It is equally clear, however, from these accounts, that prior to the 1st April, 1863, the defendant, George Steele, who was also administrator of the estate of John McLure, had made large collections in money from the assets of that estate, amounting in all to something more than \$11,000. A large part, if not the whole of these collections, were the proceeds of the sale of Rose and her descendants. The great controversy of the suit then pending, and not until now finally adjudicated, was, whether the slaves were the separate property of William McLure's estate, or were the estate of John McLure, to only one-half of which William's estate was entitled. The answer of the defendant, Steele, is not before this Court, but it appears from the testimony, that during the lifetime of William and Robert, he, as the friend and creditor of both, advised them that in his opinion, the estate of each would, after Robert's death, be entitled to one-half of these slaves. The existence of this controversy was a sufficient reason why the administrator, Steele, should retain the moneys collected for John McLure's estate, undistributed, or at least, one-half of them. No question has been made touching the admin-

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istrator's care and diligence *in collecting the sale notes and other assets of John McLure's estate, when he did and in the currency in which they were paid. Having certainly more than \$5,500, of the money so collected in his hands, which he could not safely apply in a course of administration, it was his duty to invest such otherwise idle money, and the particular form of investment in Confederate bonds, was in conformity with his duty, as has been now repeatedly held by this Court. The testimony is quite satisfactory that such investment, of \$5,500 in all, was in fact made, "on account of the estates of William and Robert," but there is no testimony proving what proportion of this sum was invested for the separate estate of each. An investment of the funds of John McLure's estate would in effect be an investment for the several estates of William and Robert, in some then unascertained proportion, in any event of the litigation, if there was any estate of John other than the slaves in dispute. That the defendant, Steele, had in his hands for investment of

the moneys of John McLure's estate, during the month of March, 1863, so much as \$5,500; that he invested that sum of such moneys in Confederate bonds during that month, and that under the circumstances this was a proper investment, this Court is well satisfied. But the very cause which detained this fund undistributed in the administrator's hands, and constituted the occasion for its investment, forbade his undertaking in advance virtually to decide the controversy, by carrying to the credit of, and investing for William McLure's estate, a larger share than one-half of such moneys. As the event has proved that only one-half of those moneys belonged to William's estate, as the case then stood he could not in a due course of administration have transferred more than one-half to that estate. It is difficult to understand why, entertaining the opinion which he did, he would have done so. If, therefore, he

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did what he only ought to have done, *or could have done, the figures demonstrate that he had not at any time during March, 1863, in hand for William's estate, including its half of John's moneys theretofore collected, for investment, more than \$1,800, or \$1,900. He could not therefore have invested \$4,000 of the moneys of William's estate in Confederate bonds in March, 1863.

An account of the defendant, Steele's, administration, of John McLure's estate, should have been made up by the Commissioner, and in that account the defendant should have had credit for the whole investment of \$5,500 in Confederate bonds in March, 1863, and that account should have been carried on to the closing of the controversy between the two estates of William and Robert, by the present judgment of this Court, against the exclusive claim of these plaintiffs, on behalf of William's estate, to the whole proceeds of Rose and her descendants, and the balance found in the administrator's hands upon the closing of that account should be divided in equal shares between the two estates of William and Robert. The accounts of the administrator of each of these latter estates, limited to the proper assets belonging to it, (independent of John's estate,) and the payments on its account should also be made up to the same time. In this way the whole will be properly adjusted according to the rights of the parties.

It is ordered that the Commissioner restate the accounts in conformity with this opinion. With this modification, the circuit decree is affirmed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Decree modified.

14 Rich. Eq. *121

*MARY A. McPHERSON and Others v. EDWARD LYNNAH and JAMES W. GRAY.

(Columbia. April and May Term, 1868.)

[Judicial Sales ⇨22.]

Decree, on creditor's bill, made January, 1859, directed the Master to sell the testator's estate for one-third cash, and the residue on a credit of one, two, and three years, secured by bond and mortgage—the debts to be paid out of the proceeds, and “the residue, subject to the trust of the testator's will, to abide the future order of the Court.” The Master made the sales, and took from the purchaser of a plantation his bond for a large sum of money with mortgage. In January and March, 1864, the purchaser paid the bond to the Master in Confederate treasury notes, a currency which at that time had greatly depreciated but which was the only currency in the country. The Court concluded from the evidence that the payment was made and received in good faith:—*Held*, that neither the purchaser nor the Master was liable to the beneficial owners of the bond.

[Ed. Note.—Cited in *Bulow v. Witte*, 3 S. C. 325; *Pickens v. Dwight*, 4 S. C. 360, 366; *Blackwell v. Tucker*, 7 S. C. 400; *Black v. Rose*, 14 S. C. 280; *Hyatt v. McBurney*, 18 S. C. 217, 218.

For other cases, see *Judicial Sales*, Cent. Dig. § 47; Dec. Dig. ⇨22.]

[Judicial Sales ⇨7.]

[An additional order was not necessary to give the master power to receive payment of the bonds given for the purchase money under the original order.]

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 20; Dec. Dig. ⇨7.]

Before Lesesne, Ch., at Charleston, February, 1867.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. On January 22d, 1859, an order was made by Chancellor Wardlaw, at Charleston, in the cause entitled *Coffin v. McPherson*, whereby James W. Gray, Esq., one of the Masters of this Court, was directed to sell the estate of the testator, James E. McPherson, on the terms of one-third cash, residue in one, two, and three years. And it was further ordered, that the testator's debts should be paid out of the proceeds of sale, and that the residue of said proceeds, subject to the trusts of the will, should abide the future order of the Court.

A plantation on Savannah river, called Vernersobre, which constituted part of the

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estate, was accordingly sold *by Mr. Gray, at public auction, on the third day of January, 1860, and purchased by the defendant, Edward Lynnah, at the price of \$34,000. Mr. Lynnah soon after paid the cash part, and gave his bond and mortgage to Mr. Gray, as Master, for the residue, with interest, payable in one, two, and three years. In February, 1861, he paid the first year's interest, which had become due; and on the 30th January, 1864, the bond being fully due, he paid

\$22,667 in full of principal, and on the eleventh day of March following, the further sum of \$4,943, in full of interest, both payments in treasury notes of the Confederate States of America. The plaintiffs, John McPherson, Mary Ann McPherson, and Cornelia McPherson, are the persons who, according to the will of Col. McPherson, and in consequence of the changes in the family caused by death, are now entitled to the fund that represents said plantation. And the bill seeks to annul the settlement made between Mr. Gray and Mr. Lynnah, and to set up the bond and mortgage, or to make Mr. Gray liable for the amount of the same. The transaction between Mr. Gray and Mr. Lynnah was perfectly fair on both sides. The bond being past due, Mr. Lynnah, who was then in the State of Georgia, simply wrote to Mr. Gray that he was prepared to pay. Mr. Gray replied that he would receive payment, and the money was remitted to him. The whole amount was not paid at one time, because the bond was not accessible at first, and the exact sum due for interest could not be stated. Mr. Gray says in his answer, “there was no persuasion whatever used by Mr. Lynnah to induce him to receive payment of the bond, and nothing to distinguish his case, from that of many others, the debtors of the estates whose bonds he held, and who paid them in Confederate money, as they became due.”

After receiving the first payment, and before the second payment was made, Mr.

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Gray met with Chancellor Inglis, *who advised him, generally, not to take Confederate money any longer, in payment of old debts, but added that he could not make any order on the subject, as it was mere matter of opinion. In consequence of this, Mr. Gray wrote to Mr. Lynnah, and proposed that the money should be returned, and the receipt for it cancelled, but the proposal was declined.

When the last payment was made, the bond was given up to Mr. Lynnah to be cancelled. The mortgage had been sent to Beaufort District to be recorded, soon after its execution, but was never returned to Mr. Gray, by the friend (now deceased) who took charge of it. The State Records for that district were destroyed by fire in 1865.

Such are the facts. Mr. Gray was examined by the plaintiffs as a witness at the hearing. My notes of his evidence will accompany this decree.

It was argued by the plaintiffs' counsel, that it was beyond Mr. Gray's duty and power to receive payment of the bond at all, inasmuch as Chancellor Wardlaw's order directed “the residue” of the sales, remaining after payment of the debts, to await the future order of the Court: and that Mr. Lynnah paid the bond with knowledge of the terms of the order, the same having been recited

in the conveyance which he received from Mr. Gray. To this, two answers were given, each of which, in my judgment, is sufficient. First, the order to the Master to pay the debts out of the sales of the property, implied that for that purpose he should receive payment of the bonds which were to represent the sales. And secondly, that part of the order which was relied on, does not mean that the bonds should not be paid to the Master according to their tenor, but that the residue of the fund created by the sale, whether in the shape of bonds or cash, should be retained to abide the further order of the Court.

And this brings me to the question on

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which the decision of the case depends, namely, whether the transaction between Mr. Lynah and Mr. Gray was a valid payment of the bond, which cannot now be set aside? Admitting, with the defendants' counsel, that the Constitution and laws of the United States were inoperative in South Carolina, during the existence of the civil war, which was going on when this transaction took place, I cannot agree with him that during that time, according to the laws of the de facto government, anything but gold or silver was a legal tender for the payment of debts. Mr. Lynah then had no right to require Mr. Gray to receive Confederate notes. But it does not follow that it was not, under the circumstances, right and proper for Mr. Gray to receive them. That, therefore, is the question to be considered.

This case is not, in my judgment, subject to a positive, inflexible rule, which would make Masters in Equity liable for the consequences, if they received anything but gold or silver in payment of debts owing to them in their official character. If, for example, a Master before the war, (when there was a metallic currency in the country,) had received payment of a bond in bank notes, as was customary, and by some public calamity, the value of the notes had suddenly perished, he could not, I apprehend, have been held responsible for the loss. There is some room, then, for the exercise of discretion in this matter. And if Mr. Gray, in the exercise of that discretion, manifested good faith and reasonable prudence, he is entitled to the protection of the Court. In the case of *Pollock v. Dubose*, (7 Rich. Eq. 23.) Chancellor Dunkin, speaking of the Commissioner in Equity says: "In the discharge of his duty, no other rule can well be adopted than that the officer should exercise the same care, diligence, and caution which a prudent man would employ in the management of his own funds."

It will be remembered that this bond was past due; there was therefore a right of pay-

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ment, and the obligor *called on Mr. Gray to receive payment. The condition of things

at that time is historical. There was no metallic currency in the country. There was no other medium of circulation and exchange than Confederate treasury notes: even the bills of the State Bank had disappeared. Confederate currency was generally received in payment of debts by prudent men. Some few persons may have declined to take it, but such were the exceptional cases. The banks took it; the State government paid all salaries in it; and this Court ordered sales with reference to it.

If Mr. Gray had officiously called in the bond, the case might have been different. But such was not the fact. He did not even receive Chancellor Inglis' friendly advice until after payment had been made. And more than that, he never received one whisper of admonition from the parties interested in the bond. They must have known of its existence, that it was past due, and that such debts were being generally paid with Confederate currency. If they had then considered it unadvisable to receive that currency, I do not say it was their duty to say so to Mr. Gray, but common regard for their own advantage would have prompted it. It is difficult at this day to regard the transactions of that trying period in the same light in which they were then seen.

Upon the whole, it is my opinion that Mr. Gray, in exercising the discretion with which he was charged, not only acted with perfect good faith, good faith too, in the line of his duty, but that he did exactly what prudent men around him were doing, and that his act is entitled to the sanction of the Court.

If this be correct—if as the agent of the Court and the parties, he did what was right, the payment of the bond, in the manner in which it was made, was a valid settlement. The case is one of an executed contract, and there being no fraud on the part of the ob-

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ligor, it cannot be opened *against him. Even in a recent Tennessee case of *Wright v. Overall*, (MS.,) in which the Court scouted the idea of Confederate currency being called money, it uses this language: "But we do not say a case might not arise involving Confederate money, as the basis of an executed contract, where the rights of the parties were vested, which the Courts for the repose of society, would not disturb."

The case is hard for the plaintiffs—for the defendants it may or may not be fortunate.

But it is one of the many untoward results of a ruinous war.

It is ordered and decreed that the bill be dismissed.

The complainants appealed, and now moved this Court to reverse the decree, for the following reasons:

1. Because, if Mr. Lynah "had no right to require Mr. Gray to receive payment of his bond in Confederate money," as the Chancellor has properly decided, then as against the

complainants, for whom Mr. Gray was a mere trustee, the receipt of these notes and the consequent cancellation of the bond and mortgage by Mr. Gray, were breaches of trust, and converted Mr. Lynah, who had notice, into a constructive trustee for the complainants.

2. Because, there is not only no proof that the complainants ever acquiesced in the payment by Mr. Lynah, of his bond in Confederate notes, but there is no proof that either of them ever heard of the transaction, until a short time before the filing of their bill, and it never was any part of their duty, even had they been aware of the course of business, to caution Mr. Gray against receiving payment in a currency, which, as the Chancellor says, "Mr. Lynah had no right to require him to receive."

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*3. Because, in releasing Mr. Lynah from his obligation to pay \$27,000 in gold, in consideration of \$27,000 in Confederate notes, worth at that time about \$1,300, Mr. Gray did not "exercise the same care, diligence and caution, which a prudent man would employ in the management of his own funds."

4. Because, the Chancellor is wrong in comparing the payment and cancellation of the said bond under the circumstances, to an executed contract; if there was any contract, it was between Mr. Gray and Mr. Lynah, for the sale to Mr. Lynah of his own bond for one-twentieth of its value to which contract the complainants, the owners of the said bond, were not parties.

5. Because, under the order of Chancellor Wardlaw, Mr. Gray's only authority was to use "so much of the proceeds of sale as was necessary for the payment of the testator's debts;" the "residue" (of which the said bond was a part) "subject to the trust of the will," was "to abide the future order of the Court." No such future order ever was made; and though, perhaps, the order "does not mean that the bonds, constituting the residue, shall not be paid according to their tenor," yet it certainly does mean that they shall not be paid in a currency which the obligor "had no right to require the Master to receive."

6. Because it is respectfully denied that any such circumstances existed as will justify Mr. Gray in the mode of settlement, but whether he is or is not to be excused, (and the complainants do not care to charge him,) Mr. Lynah who came into possession of the aforesaid bond and mortgage, with notice that they were held for others, must be decreed to be bound by the trust and to the execution of it.

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*7. Because the complainants only seek to be placed where they would have been had Mr. Lynah's bond not been released or discharged by Mr. Gray—the right to compel the payment of the bond by Mr. Lynah, or

to foreclose the mortgage given to secure it, is all the complainants require—and they hereby submit, that a decree to that extent will in no wise affect Mr. Gray.

8. Because the decree is in other respects contrary to law and equity.

DeTreville, Porter & Conner, Simonton & Barker, Hutson & Legare, for appellants, cited 3 M. & S. 574; 2 Story Eq. § 1258; 1 S. & Stu. 61; 1 Vern. 149, 342; Story on Bills, § 46; 2 Hill Ch. 567; 1 Rich. Eq. 56; 1 Sch. & Lef. 262; 2 Story Eq. §§ 1257, 1262; 7 Ves. 166; 1 Strob. 377; 3 Strob. 131; 2 Vern. 197; Hill on Trustees, 503, 522; Harp. Eq. 197; Rich. Eq. Cas. 172.

The opinion of the Court was delivered by

WARDLAW, A. J. The decree of the Chancellor is satisfactory to this Court, and very little will be added to the observations he has made.

The dates of the various occurrences may be seen at one view, as follows:

Order of Chancellor Wardlaw, . . .	Jan. 22, 1859.
Sale by Mr. Gray,	Jan. 3, 1860.
Report of sales,	March, 1860.
Bond and mortgage by Mr. Lynah,	Jan. 1860.
Whereon instalments became due, Jan. 1861, '62, and '63.	
Payment of interest by Mr. Lynah, Feb. or April, 1861.	
Death of Mrs. McPherson, at a very great age, whereupon the rights of the complainants to immediate enjoyment became complete	Fall, 1863.

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*Payment of principal by Mr. Lynah,	Jan. 30, 1864.
Conversation between Chancellor Inglis and Mr. Gray,	Feb. 1864.
Payment of balance, being interest by Mr. Lynah,	March 11, 1864.
The bill in this case filed,	March 31, 1866.

The order of Chancellor Wardlaw, was made in the case of Collin v. McPherson, a creditors' bill, under which debts against the testator, Col. McPherson were to be paid. The order recites "the acquiescence of all the parties, who are directly interested in the sale proposed by the tenant for life, in connection with the fact that such sale must necessarily take place at no distant day, as well for partition as the payment of debts," and also "the application of the solicitors who represent both plaintiff and defendants," and directs the sale by Mr. Gray, one of the masters of the Court, of the estate of Col. McPherson with some exceptions; further "that out of the proceeds of sale the debts of the testator be paid, and the residue, subject to the trust of the testator's will, to abide the future order of the Court." The report of sales shows that Mr. Gray sold to various purchasers three plantations besides Verner-sobre, and many slaves and much other personalty, in the whole amounting to more than \$180,000. The residue was the residue of proceeds, and the proceeds must, for payment of

debts, have been intended to be cash obtained by the Commissioner from bonds. Not intending in the least to indicate the opinion of the Court, concerning suits commenced, or even payment demanded by the master without the order of the Court, we see in the order which we have cited a justification for Mr. Gray's receiving payment of Mr. Lynah's bond, whenever the latter chose to exercise the right of paying it.

But the payment was not, it is said, a payment—it was but the delivery of Confederate

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treasury notes, which were then *far below their nominal value, and since have become worthless. On this head, the defendants have referred to the Act of December, 1861, (13 Stat. 87,) which authorizes trustees, &c., to invest funds in bonds of the Confederate States; but the Act is inapplicable to the case, for here were no funds held in trust for investment and no bonds into which other securities had been changed. Mr. Gray was a trustee, and Mr. Lynah knew at least for what estate the bond was given, and so far may be said to have been constructively a trustee for those who were entitled to its proceeds. The defence of both in the transaction, whereby the bond was converted into Confederate treasury notes, has been properly placed by the Chancellor upon their good faith and the state of the times. These treasury notes were not as said, even in form valid promissory notes; but they constituted the whole currency of the country, passed as money, were received by prudent men, and paid by the other debtors of McPherson's estate. They were not equivalent to gold and silver, but they supplied the place of gold and silver; they were not in fact compared with specie, for of that there was none; nor were they expected to be immediately convertible into something of universal acceptance, but were sustained in credit by the expectation of their becoming redeemable in future, and by the sheer necessity which every one felt of their being some acknowledged representation of value. It is, as the Chancellor has intimated, difficult to recall precisely the state of affairs in the beginning of 1864; but very many now feel the consequences of their then selling valuable property for this money, now despised, but then eagerly sought. It would be unjust to exact from Mr. Gray more than the same care, diligence and caution, which a prudent man would employ in the management of his own funds. Not one of the complainants was in or near the city—the principal was accepted before Chancellor

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Inglis' advice *was given, and that was but the opinion of a discreet friend, and no material change in political prospects, nor, as we may suppose, in the credit of treasury notes, took place before the interest was paid. Mr. Lynah is understood to have act-

ed with perfect fairness throughout, and it would be impossible now to do what the plaintiffs ask in reference to him: restore the parties to the condition they were in when the bond was delivered to be cancelled. We cannot now restore the value which treasury notes, and the land for which the bond was given, then had.

The contract has been executed, and this without evil purpose or violation of duty on either side. To re-open it would transfer a loss from those upon whom it has fallen to another sufferer not less entitled to consideration, and the establishment of a rule which would permit this, might work mischief to an appalling extent.

The decree is affirmed.

DUNKIN, C. J., and GLOVER, J., concurred.

Decree affirmed.

14 Rich. Eq. *132

*W. A. MOORE v. ANN E. WRIGHT and Others.

(Columbia. April and May Term, 1868.)

[Execution \hookrightarrow 171; Executors and Administrators \hookrightarrow 385.]

W. recovered judgment against B. in October, 1861, and fi. fa. thereon was levied on a tract of land. B. died intestate in March, 1862, and under proceedings in equity for partition, between his heirs—the administrators of B. being parties and admitting personal assets sufficient to pay his debts—the tract of land was sold by the Commissioner and purchased by M. who paid the purchase-money and took a conveyance from the Commissioner. On bill filed in 1861, by M. against W. and the administrators of B.; *Held*, that M. was not entitled to an injunction to restrain W., whose debt remained unsatisfied, from enforcing her execution by a sale of the tract of land.

[Ed. Note.—Cited in Walker v. Covar, 2 S. C. 20; Barber v. McAliley, 4 S. C. 48, 51; Clark v. Wright, 24 S. C. 534; Latimer v. Bal-
lew, 41 S. C. 521, 19 S. E. 792, 44 Am. St. Rep. 748; Anderson v. Cave, 49 S. C. 513, 27 S. E. 478.]

For other cases, see Execution, Cent. Dig. § 508; Dec. Dig. \hookrightarrow 171; Executors and Administrators, Cent. Dig. § 1569½; Dec. Dig. \hookrightarrow 385.]

Before Carroll, Ch., at Chambers, June, 1867.

This was a motion at Chambers, to dissolve an injunction which had been granted by the Commissioner in February, 1867.

In October, 1861, Ann E. Wright, one of the defendant's, recovered a judgment in the Court of Common Pleas for York district, against William Berry, for \$1,064.88 and costs, and fi. fa. was issued on the judgment and levied by the sheriff, on a tract of one hundred and eighty-eight acres of land. In March, 1862, Berry died intestate, and Rob-

ert A. Black and Thomas L. Berry administered on his estate. In April, 1863, a bill for partition was filed by some of Berry's heirs against others of his heirs—sixteen in all—and also against his administrators, who admitted personal assets in their hands sufficient to satisfy the debts of their intestate. In June, 1863, an order for sale was made by the Court for so much cash as would pay the costs and the residue on a credit of one and two years. The sale was made in September, 1863, and William A. Moore became

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*the purchaser of the tract above mentioned at the price of \$5,828. With the consent of the heirs, he paid to the Commissioner the whole of the purchase-money in cash and took from the Commissioner a conveyance of the land.

Some payments were made on the execution of Ann E. Wright, leaving a balance of about \$1,200, and she being about to enforce her execution by a sale of the land, this bill for an injunction to restrain the sale was filed in February, 1867, by William A. Moore against Ann E. Wright and the administrators of William Berry. The bill also prayed that the administrators be decreed to account; that the defendant Ann E. Wright be compelled to resort to the personal estate for payment of her debt, and in case of a sale of the land, that the plaintiff be surrogated to the rights of Ann E. Wright under her judgment, and for further relief.

Other facts stated in the pleadings and the grounds upon which the motion to dissolve the injunction was made and resisted, will be found in the opinion of his Honor the Chancellor, which is as follows:

Carroll, Ch. The motion submitted proposes to dissolve the injunction granted by the Commissioner. It has not been contended that his sale under the decree for partition, divested or in any wise impaired the lien of the judgment in favor of the defendant Mrs. Wright. But conceding the continuance of such lien, the bill submits that to permit its enforcement against the land purchased by the complainant, would be inequitable and oppressive. It is charged in the bill, that Mrs. Wright stood by and interposed no objection to the partition of the land. She was no party to the proceedings and denies having in any way assented to the sale. Surely she was under no obligation to be present at the Commissioner's sale, and to give notice of her judgment. The very existence of the

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*judgment, a debt by record, implied notice. *Ellis v. Woods*, 9 Rich. Eq. 19. In the suit for partition of the lands of their intestate, the administrators of William Berry, admitted that the personalty in their hands was sufficient for the payment of the debts. It is urged, that Mrs. Wright stands in the position of a creditor, with several funds for satisfying the debt; that she may have re-

course to the personalty in the hands of the administrators, or to the proceeds of the sale of the land by the Commissioner, and that she should be required to exhaust her remedies in that behalf before proceeding to sell under her judgment the land purchased and paid for by the complainant. In adjusting priorities and marshalling securities, the usual course is not to restrain the preferred creditor in the first instance, but to compel him to place his remedies at the disposition of the other claimant, after they have served the purpose of satisfying his own debt. It seems only just to require that those who insist on the sufficiency of remedy as a means of payment, should be obliged to take the risk and delay of enforcing it on themselves. *Aldrich v. Cooper*, (Am. notes,) 2 Lead. Cas. in Eq. 276. In general to warrant any further or more direct interference with the rights of the creditor, there must be on his part a case savoring of oppression, or at least of manifest disregard of the just claims of others. The senior creditor, it is said, "is not bound to resort to a dubious fund, or one which may involve him in litigation, when there is unencumbered property—notwithstanding that the claims of a junior creditor may be defeated thereby." *Fowler v. Barksdale*, Harper's Eq. 165. It appears to be a necessary condition of the Court's interposition, that the remedy to which it is proposed the more favored creditor shall resort, must be shown to be as certain, prompt and efficient as that which he is required to forego. Were it otherwise then the multiplication of securities instead of promoting or acceler-

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*ating the payment of the debt, would but serve to embarrass or retard. *Goodwyn v. The State Bank*, 4 Des. 393. Even a surety cannot compel the creditor to resort to a collateral security in the first instance, unless such security be as available in all respects, as a proceeding against the surety. *Adam's Eq.* 268, n. e. At the least, the fund to which the preferred creditor is required to resort, must be shown to be adequate for the payment of his debt. It must be pointed out in the bill and its existence proved. *Felder v. Murphy*, 2 Rich. Eq. 58; *Gadberry v. McClure*, 4 Strob. Eq. 178. Has the plaintiff made proof of the sufficiency of the funds to which he seeks to refer Mrs. Wright? Her judgment is for \$1,064.88. and is recorded as far back as October, 1861. The personalty in the hands of the administrators, consists of moneys or securities for moneys, which came to their hands in the year 1862 and 1863, and according to their return exhibited with the bill, they were indebted to their intestate's estate, on the 29th October, 1864, \$1,584.29. If the whole of this balance were represented by notes or bonds, against persons yet solvent amid the general ruin, still it is to be inferred that, by the ordinance of September 29th, 1865, a consider-

able abatement must be made from the sums recoverable on those securities. The bill seeks from the administrators an account of their administration. In response they answer, that their admission of the sufficiency of the personal assets to pay the debts was a gross mistake. That since that date other debts against their intestate, of which they were wholly ignorant, have been presented. That the payments made by them on account of their intestate's debts, since their return in October, 1864, exceed \$1,700. That the only assets in their hands to be administered, consists of notes for articles of their intestate's personal property, amounting to about \$600, only a portion of which will probably be realized, and that it will require their

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*intestate's whole estate, real and personal, to pay his debts. They deny the sufficiency of personal assets now in the hands of the administrators to pay the judgment debt of Mrs. Wright, and beyond what remains of those assets in their custody they deny their accountability. It is averred in the bill that the price of the land purchased from the Commissioner was paid in cash by the plaintiff in September, 1863. It is not proved or even suggested that the money remains in the hands of the Commissioner. The natural inference is that it has long since been distributed among the heirs, and such inference has been confirmed by the statement in the bill, "that the money came to be then promptly paid because of the said heirs being then ready and willing to receive the whole amount of the purchase-money in cash, and the complainant being then ready and willing to pay the same." To say nothing of the character of the currency in which such payment was probably made, it is sufficient to observe that the statutory heirs of William Berry are about sixteen in number; of their places of residence and pecuniary means respectively, the Court is wholly uninformed. If the security held by Mrs. Wright were equitable only, or if she was seeking its active aid, the Court might, perhaps, more readily interfere, but she is a party defendant and asks only not to be molested in the assertion of her legal rights. To deprive her of the prompt and efficient means of compelling payment by a sale of the land, and to constrain her to resort to either of the remedies suggested, with its attendant litigation, uncertainty, expense and delay, in order that others may be relieved from the consequences of their own errors and mistakes, seems not to be warranted by principle or precedent. Other topics were discussed in the argument, but comment upon them is not deemed necessary. It is ordered and adjudged, that the injunction granted by the Commissioner against the defendant, Ann E. Wright, be dissolved.

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*The complainant appealed on the following grounds:

1. Because on the case made by the pleadings and proofs, the complainant was entitled to the injunction prayed for.
2. Because the injunction granted by the Commissioner and dissolved by the order of the Chancellor, should have continued until the hearing of the case upon its equities.
3. Because the Chancellor is wholly mistaken in the assumption, that the assets in the hands of the administrators of William Berry were not sufficient, in a due course of administration, to satisfy the execution in favor of Ann E. Wright, levied on complainant's land.

Williams, for the motion.

Wilson and Witherspoon, contra.

The opinion of the Court was delivered by

INGLIS, A. J. The Chancellor, in his judgment, very satisfactorily demonstrates that, in the facts which constitute this case and under the principles of law applicable to them, the plaintiff has no equity whatever to restrain the defendant, Ann E. Wright, from proceeding by a sale of the intestate's land under execution, to complete the satisfaction of her judgment, which had been commenced by the levy in his lifetime. At his death this land descended upon his statutory heirs, subject, not only to a general liability, as assets under the statute, for all his debts, but especially to the then subsisting lien or incumbrance of the defendant's judgment. The plaintiff who purchased (what alone the Court could sell) the estate of those heirs, of course took it cum onere, and with full notice thereof. It would be most inequitable to turn the defendant, Ann E. Wright, round,

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*from the prompt and effective remedy of her execution, to the delay, expense, and embarrassment, incident to a pursuit of the personal assets in the hands of the administrators, or of the personal responsibility of such administrators and the sureties on their bond.

The propriety of the order dissolving the injunction, which had been granted by the Commissioner, is abundantly vindicated by the reasoning of the decree and the authorities therein cited; and this Court does not feel it necessary to add anything thereto. It need scarcely be added, that the plaintiff may, in his present suit, still pursue his equities against the personal representatives of the intestate William Berry.

The circuit order is affirmed and the appeal dismissed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Appeal dismissed.

14 Rich. Eq. *139

***M. M. GATEWOOD v. E. R. TOOMER and Others.**

(Columbia. April and May Term, 1868.)

[Executors and Administrators ⇨299.]

Where real estate of a decedent is sought to be partitioned, under a bill for partition only, the Court may, upon statements, made by petition in the cause, or in the answer of a defendant, that there are unsatisfied claims of creditors of the decedent, or others, to which the estate should be subjected, make all necessary orders, as under a creditor's bill, for the protection of such claims.

[Ed. Note.—Cited in *Ex parte Crawford & Sons*, 27 S. C. 162, 3 S. E. 75.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1205; Dec. Dig. ⇨299.]

[Partition ⇨83.]

[A claim by one of the devisees of a testatrix to have her interest in certain land, of which partition is prayed, marshaled, justifies an order that partition shall be made; but that such interest shall be retained, subject to the further inquiry and order of the court.]

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 228; Dec. Dig. ⇨83.]

Before Carroll, Ch., at Charleston, March, 1868.

The following statement of the case is taken from the appellant's brief.

The bill is for a partition of certain lands devised by Henry Laurens, the elder, to his grand-daughter, Frances Eleanor, for life, remainder to Henry Laurens, the younger; and by him devised one-third part to his widow, Eliza Laurens, the other two-third parts to his children. Eliza Laurens devised her one-third part to her daughter, Mrs. — Ingram, and her son, Edward R. Laurens. Edward R. Laurens being a defaulter in his office as Master in equity, duly assigned his share to William C. Gatewood, to protect him from a heavy loss, suffered by reason of his being one of his sureties on his official bond. All the parties having title are before the Court. Their respective titles are not denied or disputed. But the late John Laurens, one of the original defendants, who had intermarried with a daughter of Edward R. Laurens, by his answer, sets up against Mrs. Ingram and Gatewood, in behalf of his wife, and the other distributees of her mother Margaret Horry Laurens, who was also a devisee of Eliza Laurens, and in be-

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half of other devisees and legatees of *Eliza Laurens, to wit: That the devisees and legacies by Eliza Laurens to Margaret Horry Laurens, and others, having been exhausted in the payment of the debts of Eliza Laurens, the devise to Mrs. Ingram and Edward R. Laurens, (now Gatewood's,) must be in the first instance marshalled so as to make good said devisees and legacies, of which the devisees and legatees had been deprived. The daughter of Edward R. Laurens, widow of John Laurens, is Eliza R. Laurens, adminis-

tratrix of his intestate estate, and as such, and as his widow, has been made a party defendant. She is not otherwise a party. His daughter, an only child, and her husband, have also been made parties, and his share is thus fully represented.

Being in this way before the Court, Mrs. Eliza R. Laurens insisted upon setting up and having adjudicated her equity as one of the distributees of Margaret Horry Laurens. To this the complainant, Gatewood, and the defendants Ingram and wife, object, and insist that she has full and easy remedy to establish her equities without interfering with the partition, namely, by an original proceeding against them, and the share of Eliza Laurens after it should be assigned to them. Their statement of objection before the Chancellor appears below.

His Honor, the Chancellor, made the following order:

Carroll, Ch. The pleadings, evidence and argument of counsel having been heard, it is ordered and decreed, that all and singular the real estate described in the original bill exhibited in this cause, consisting of six thousand acres of land, more or less, in the district of Abbeville, and of certain marsh lands opposite, or adjacent to Hamstead, Charleston, be parted and divided among the parties, according to their respective rights and interests in the same, as set forth in the report of Master Gray in this cause, filed 12th day of March, 1866, except so much

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thereof as *represents the portion to which Mrs. Eliza Laurens, if living, would be entitled, which said portion is to be designated and set out, but is to remain, subject to the further order and decree of the Court.

It is further ordered, that the creditors of the said Mrs. Eliza Laurens be required to come in and prove their respective demands before one of the Masters, by a peremptory day, to be fixed by him, of which, and of this order, he is to cause public notice to be given, by an advertisement to be published in one of the daily papers of the city of Charleston, for forty days prior to such day; and such of the said creditors as shall fail to come in, and prove their respective demands as herein above required, are to be excluded from all benefit of any decree to be pronounced in this cause.

And it is further ordered, that it be referred to one of the Masters to inquire and report as to what provisional orders should be made in respect to the portion of the aforesaid lands, which would belong to the said Mrs. Eliza Laurens, if in life, while the same is retained, subject to the further order of the Court. And it is also referred to one of the Masters to inquire and report as to the form of the writs of partition to be issued conformable to this order.

The complainant, and the defendants, D.

N. Ingraham, and Harriet, his wife, appealed from so much of this order as calls in the creditors of Eliza Laurens, and excepts her share of the land from partition, and for grounds of appeal renewed their objections submitted before the Chancellor, as follows:

1. That the creditors of Mrs. Eliza Laurens need not be again called, because they were once called in by the executor, and after-

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wards again by special order of this Court, and duly reported on under proper proceedings, all now of record before the Court.

2. That the partition ought not to be delayed or obstructed, every party having, or claiming to have, title in the premises, being before the Court; and if there are, as suggested, outstanding equities against any of the parts of the land, or against the parties having the title thereof, such equities may be prosecuted, notwithstanding the partition, without prejudice to any one.

3. That the distributees of Margaret Horry Laurens, who was a devisee of Eliza Laurens, are not, and need not be, parties in this cause, because they have not any title in the premises.

Having full notice of these proceedings, they may take such further proceedings as they may be advised, to protect the equity suggested in their behalf against some of the parties. They cannot be in anywise prejudiced by a partition which the parties before the Court are well entitled to have without further delay.

And they humbly pray that such may be the order and judgment of the Court.

Campbell, Buist, for appellants.

Wilkins, Miles, Lord, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. The late Mrs. Eliza Laurens was entitled to one-third part of the lands of which partition is sought by these proceedings. By the decree of the Chancellor

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lor, *partition is directed; but the share of Mrs. Eliza Laurens is directed to be retained subject to the further order of the Court, and, in the meantime, the Master is instructed to inquire and report what provisional orders should be made in relation to the portion so retained.

By the will of Mrs. Laurens, her interest in these lands was devised to her daughter, Mrs. Ingraham, and her son, Edward R. Laurens, whose interests are represented by the plaintiff. It appears from the exhibits filed with the pleadings, that Mrs. Laurens also devised and bequeathed certain other real and personal estate in trust for Margaret Horry Laurens, the wife of her son Edward R. Laurens, with the right to dispose of the same by will, but, in the event of her dying intestate, to be distributed among her heirs at law. John Laurens, who was one of the original defendants in the cause, filed

his answer, in which, among other things, it is stated that Margaret Horry Laurens survived the testatrix and afterwards died intestate, "leaving three children, to wit, Eliza R., who was the wife of defendant, (John Laurens,) and two sons, Henry Laurens and John R. Laurens, and that the said three children succeeded to the property so devised and bequeathed to their mother." The answer furthermore states that the property devised and bequeathed to Margaret Horry Laurens, "had been taken and applied to the payment of the debts of the testatrix, Mrs. Eliza Laurens, the property by her specifically charged with the payment of the same having proved insufficient for that purpose." It is then submitted by the answer that the interest of Mrs. Eliza Laurens in the premises sought to be partitioned, is liable to be so marshalled as to make good the said devises and legacies, of which the devisees and legatees have been thus deprived.

John Laurens subsequently died intestate. His widow, Eliza R. Laurens, having administered on his estate, an order was passed by

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the Master in February, 1866, that *the said Eliza R. Laurens, administratrix of John Laurens, deceased, be made a party in the cause; and her answer was filed in which, among other things, she "refers to and sets up the answer of her said intestate already mentioned."

Under these circumstances the order was made by the presiding Chancellor, which is the subject of this appeal.

In proceedings for the partition of the real estate of a deceased person among his heirs or devisees, it is the practice of the Court, upon the suggestion of the personal representative, or of other persons interested as creditors, to take care that their rights are protected and an order made for calling in creditors. And so, if a claim exists to the distributive portion of one of the heirs or devisees, it is not infrequent to entertain a petition, in behalf of such claimant, entitled in the cause, and a copy of such petition is required to be served upon the adverse party. That petitions of this character are sanctioned, see 3 Danl. Ch. Pr. 1709.

Probably, acting on this familiar practice, the Chancellor made the order for calling in the creditors of Mrs. Eliza Laurens, deceased. The report of Master Tupper, entitled in another cause, shows that this notice had already been given and the amount of indebtedness ascertained. So much of the order as directs a notice to be published is, therefore, superseded.

The claim of the defendant, Eliza R. Laurens, to have the interest of the testatrix marshalled, and the grounds of that claim had been distinctly brought to the notice of the Court in the answer of her late husband, John Laurens, which was referred to and adopted in her answer subsequently filed.

This was enough to justify the order, which would obviously include an inquiry by the Master as to the persons entitled, with the defendant, Eliza R. Laurens, under the devise to Margaret Horry Laurens, and what orders were proper to be made, whether they

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should be *made parties defendant, or proceed by petition in the cause, &c.

The equity, on which these parties insist, is the right of subrogation to the creditors whose claims they have satisfied. This Court intimates no opinion as to the alleged facts, or as to the conclusions. The order of the Chancellor is purely administrative. It settles no rights—adjudicates nothing. Nor is the execution of the order attended with any considerable delay. In general, such orders are very much within the discretion of the presiding Chancellor, and, so far as this Court can perceive, it seems to have been properly exercised. So much of the appeal as assigns error in this respect is dismissed.

WARDLAW, A. J., and GLOVER, J., concurred.

Order modified.

14 Rich. Eq. *146

*ELIZABETH SHAFFER and Others v. A. C. McDUFFIE and Others.

(Columbia. April and May Term, 1868.)

[*Husband and Wife* ⚭31.]

The trusts of a marriage settlement were to the joint use of husband and wife during their joint lives; remainder to survivor for life; remainder to issue of wife; and in default of such issue to her "right heirs at law."—Wife died without issue, husband surviving. *Held*, that husband was entitled as a "right heir at law" of wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 193; Dec. Dig. ⚭31.]

[This case is also cited in *Roberson v. McCauley*, 61 S. C. 423, 39 S. E. 570, without specific application.]

Before Carroll, Ch., at Marion, February, 1867.

On the intermarriage of George M. Fairlee with Margaret G. Shaffer, the parties executed a settlement of the intended wife's estate—she being the party of the first part, and he the party of the second part. The trusts of the settlement were as follows: "in trust for the joint use and benefit of the said parties of the first and second part, during their joint lives, and in case of the death of either of them, then to the survivor during his or her natural life; and after the death of both the parties, of the first and second part, then to the issue of the said party of the first part, his, her or their heirs and assigns forever; and in default of such issue, then unto the right heirs at law of the said

party of the first part, his, her or their heirs and assigns forever."

The wife died leaving no issue—the husband being the survivor—and this bill was filed for settlement of the trust estate. The only question at the hearing was whether the husband took as a right heir of the wife.

The decree of his Honor, the Chancellor, is as follows:

Carroll, Ch. In all essential particulars, the present case is identical with the case of

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Glover v. Adams, (11 Rich. *Eq. 264.) There, as here, the limitation to be construed is found in a deed of marriage settlement. In that case the trusts declared were for the joint use and benefit of the husband and wife during the coverture—if he survived her, then for his use and benefit during his natural life, after his death for such persons as she should appoint by will, and, on failure of such appointment, then in trust for her legal heirs and representatives. It was held that the persons entitled to take were the heirs and distributees of the wife at her death, including the husband, who survived her.

The case reported was more favorable to the claim on behalf of the husband, than the present case. The limitation there, to the legal heirs and representatives "of the wife, was to take effect only in the contingency of the husband surviving her." If she survived him, the whole estate was "to remain in her, free and unencumbered of all trusts." In the deed of settlement, in this case, no special provision is made for the contingency of the husband's being the survivor. The provision is, in general terms, in case of the death of either of them then to the survivor during his or her natural life, "with remainder to the issue of the wife." &c., "in default of such, then to her right heirs at law." The heirs of a person, in the primary sense of that term, means the individuals fulfilling that description at the time of his death. The burden of showing that the term was not used in that sense, rests here upon the plaintiffs. When the marriage settlement in this case was executed, it could not, of course, be foreseen that the husband would survive the wife. It was quite as likely that she would be the survivor. Had she, in fact, survived him, there could have been no contest as to the meaning of the words, "her right heirs at law." The persons standing in that relation to her at her death would have taken, and no others. In that event, the words in question

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would have *retained their primary sense. It cannot be varied because the husband happened to be the survivor. Surely the construction cannot depend upon the accident of her surviving him or his surviving her. If the interpretation proposed by the plaintiff be adopted, then the remainder to the right heirs of the wife was manifestly contingent.

But the law favors vested estates, and no remainder will be construed to be contingent which may consistently with the intention, be deemed vested. (4 Kent's Com. 203.)

It is adjudged and decreed, that the persons entitled to take under the limitation to the "right heirs at law" of Margaret G. Shaffer, afterwards Margaret G. Fairlee, in the deed of marriage settlement referred to in the pleadings, are the persons, including her husband, who were her statutory heirs at the time of her death. It is further ordered, that the Commissioner inquire and report to what estate, of every description, real or personal, the said Margaret G. was entitled at the date of the said marriage settlement between her and George M. Fairlee; and, also, to what estate, real or personal, she became entitled afterwards, during her marriage with the said Fairlee. It is further ordered, that the defendant, A. C. McDuffie, executor of the said George M. Fairlee, do account, before the Commissioner, for all moneys, effects and estates of every kind, received by his testator, in his lifetime, as trustee, under the deed of marriage settlement referred to. And it is also ordered, that upon the coming in of the Commissioner's report, the parties have leave to move for such further orders as may be necessary or proper.

The plaintiffs appealed, and now moved this Court to reverse the decree, on the grounds:

1. That it is respectfully submitted that his Honor, the presiding Chancellor, erred in
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holding that the deed of *marriage settlement, under the term of right heirs of Margaret Fairlee, included the husband; whereas, the plain intention of the deed is to exclude him, except as to a life-estate.

2. That the gift of the life estate, as survivor of his wife, under the deed, is inconsistent with a vested interest of the husband.

Evans, for appellants, cited Seabrook v. Seabrook, M'M. Eq. 204; Evans v. Godbold, 6 Rich. Eq. 26; Vaux v. Henderson, 1 Jac. & W. 288; 2 Wm's. Exors. 997, 1009; 4 Kent Com. 537, note; Cholmondely v. Clinton, 2 Jac. & W. 65, 189; Holloway v. Holloway, 5 Ves. 399; Long v. Blackall, 3 Ves. 486; Jones v. Horlbut, 8 Ves. 38.

McIver, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. The Chancellor's decree is fully sustained by Glover v. Adams, 11 Rich. Eq. 267, and other cases therein cited. The marriage settlement must be construed now as it would have been immediately after its execution. The inconsistency does not exist which the appellant has attributed to the result of the husband's taking both the enjoyment for his life, and a vested transmissible interest. Those who urge a de-

parture from the natural meaning of "heirs," must show sufficient reason to authorize the Court in making the departure, and the intention inferred from the supposed inconsistency cannot avail to give to the same words a meaning in the case, which has happened, of the husband's survivorship, different from what they would have had if the wife had survived.

The decree is affirmed.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Motion dismissed.

14 Rich. Eq. *150

*J. C. CRAIG and Wife v. C. G. PERVIS and Others.

(Columbia. April and May Term, 1868.)

[Bills and Notes ⚡511; Evidence ⚡423.]

Promissory note for \$1,000, dated 30th March, 1864, and payable "at the end of the war without interest." Held that, under the ordinance of 1865, it was competent to prove by parol, that the note was given for \$1,000 in Confederate money, and that it was agreed that it should be paid at the end of the war in whatever money was then current.

[Ed. Note.—Cited in Smith v. Prothro, 2 S. C. 376.

For other cases, see Bills and Notes, Cent. Dig. § 1760; Dec. Dig. ⚡511; Evidence, Cent. Dig. § 1965; Dec. Dig. ⚡423.]

[Interest ⚡6.]

Held, further, that the payee was entitled only to the value of the Confederate money at the time of the loan, but that interest should be added from that time and not merely from the end of the war.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 16; Dec. Dig. ⚡6.]

Before Johnson, Ch. at Chesterfield, February, 1868.

By a decree in this cause, the creditors of John C. Pervis, deceased, were called in to prove their claims, before a special referee—the Commissioner of the Court being a party complainant. James W. Steagall, one of the creditors, proved a note of which the following is a copy, viz.,
\$1,000. Cheraw, S. C., March 30th, 1864.

One day after date, I promise to pay J. W. Steagall one thousand dollars. Payable at the end of the war without interest, for value received.
J. C. Pervis.

The following extracts from the report of the special referee, of the testimony and the claims proved before him, explains the character of the controversy between the parties.

Extract from report of the testimony:

"J. W. Steagall, sworn: 'The consideration of this note was Confederate money
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loaned. The full sum of *\$1,000 was to be paid at the end of the war, in whatever money was current at that time, and it was in consideration of this fact that no interest

was claimed.' This last statement was objected to by McIver & Moore, solicitors for the estate, and its competency as evidence was insisted upon by Prince, solicitor for Steagall, on the ground that it merely explained, and did not vary the terms of the note."

Extract from report on claims:

"It is claimed on behalf of the estate, that this note, being evidence of indebtedness arising out of a transaction which took place at a late period of the war, when the currency of the country was very much inflated, is liable to be reduced in its amount under the provisions of the ordinance of the convention of this State, and it being in evidence that the consideration of this note was Confederate money loaned, the 'Augusta scale' was agreed upon as the proper basis of reduction, if it be held to be liable to reduction at all. On behalf of Steagall, it is contended that this note does not come within the intention of the ordinance referred to, since the understanding of the parties at the time the note was given was, that the full amount of \$1,000 was to be paid at the end of the war, in funds current at that time. The testimony of Steagall in reference to this point, is, that the full sum of \$1,000 was to be paid at the end of the war in whatever money should be current at that time, and that it was in consideration of this fact that the words 'without interest,' were inserted in the note. This testimony of Steagall was objected to by the counsel for the estate and was supported by the counsel for Steagall, on the ground that it merely explained the terms of the note and did not vary them. The evidence and the argument have however failed to convince the mind of the referee, that this is not a proper subject of reduction according to the provisions of

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the ordinance, and *he has therefore, on the basis of the scale agreed upon between the parties, reduced the face of the note to \$68.63. He therefore reports the amount proved on this claim as \$81.63, being the reduced amount and interest thereon, from 15th May, 1865, to 1st February, 1868."

Steagall excepted to the report. Because the note on its face shows that it was the true meaning of the contract and the intention of the parties, that the full sum of \$1,000 was to be paid at the end of the war, in whatever currency should be then in use, and the evidence proves the same.

His Honor, the Chancellor, overruled the exceptions, and Steagall appealed and moved this Court, to reverse the ruling of His Honor on the following grounds, viz.:

1. Because his Honor erred in ruling that the note for \$1,000, made by John C. Pervis to the said Steagall, payable "at the end of the war," "without interest," fell within the operation of the ordinance of the convention and was subject to reduction, when the said note upon its face bore conclusive evi-

dence of the meaning of the contract, and the intention of the parties, without resorting to the provisions of the ordinance to ascertain them.

2. Because his Honor erred in ruling that the said note ought to be reduced, when the evidence was that the parties themselves, taking into consideration the true value of the consideration and the circumstances of the transaction, fixed the amount and provided for the very exigencies which have since befallen, and to alter the amount under such circumstances, is to interfere with and impair, and not to explain the contract.

Prince, for appellant.

McIver, contra.

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*The opinion of the Court was delivered by

WARDLAW, A. J. The appellant, Steagall, has had the advantage of his own testimony, notwithstanding the objections made to it, and perhaps the propriety of its admission might be safely rested on its consistency with the terms of the note, whilst it showed a reason for introduction of the words "without interest." But the ordinance of September, 1865, removes all doubt, for under that it tended to show the "real character" of the consideration of the contract, and the circumstances attending it. The case of Rutland v. Copes, [15 Rich. 84.] decided in the Court of Appeals, May, 1867, and in the Court of Errors, December, 1867, (ante p. 84,) held that the ordinance extended to all actions upon contracts made within the time therein mentioned, that it was not unconstitutional, and that under it, when evidence of the true value and real character of the consideration had been heard, the jury, Judge or Chancellor, as the case may be, having "regard to the particular circumstances of each case," shall "render such verdict or decree as will effect substantial justice between the parties." The value of the consideration has in this case been established, and this Court perceives nothing in the character of the consideration or in the circumstances of the case, which should alter the report that has been confirmed by the Chancellor, except this, viz., according to the terms of the note all interest has been excluded, from its date until May 15, 1865, fixed for the "end of the war;" but when the sum in the note was reduced, to effect substantial justice, interest from the date of the note should have been allowed for the same purpose. With the slight modification here suggested, the report and the decree confirming the same are affirmed. Let the Commissioner amend his report as thus required.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Decree modified.

14 Rich. Eq. *154

*AMOS F. ENO and Others v. AGNES CALDER, Executrix, and Others.

(Columbia. April and May Term, 1868.)

[*Executors and Administrators* ⚡356.]

Bill by a simple contract creditor of testator against his executrix and devisees, merely stating "that the personal estate left by the testator is insignificant in value, but that his real estate is large and valuable," that the executrix had refused to make sale of the real estate to pay debts, and praying a discovery of the separate parcels of real estate, an account, sale of the real estate and general relief, does not state a case within the jurisdiction of a Court of equity, the remedy at law by action of assumpsit being plain and adequate. (a)

[Ed. Note.—Cited in *Ragsdale v. Holmes*, 1 S. C. 96; *Hall v. Joiner*, 1 S. C. 190, 192; *Clinkscales v. Pendleton Mfg. Co.*, 9 S. C. 323; *McLaurin v. Rion*, 24 S. C. 412; *Butler v. Elberh*, 44 S. C. 280, 22 S. E. 425; *Easler v. Southern Ry. Co.*, 60 S. C. 120, 38 S. E. 258; *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 145, 70 S. E. 396.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1463-1467; Dec. Dig. ⚡356.]

[*Abatement and Revival* ⚡3.]

Where the want of jurisdiction appears from the statement of the plaintiff's case it need not be pleaded, and the objection, it seems, never comes too late.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 7-24; Dec. Dig. ⚡3.]

The Reporter has not been furnished with a brief in this case, and can therefore make no statement except that which is contained in the opinion of the Court of Appeals.

The opinion of the Court was delivered by

DUNKIN, C. J. It is an original principle in the administration of equity jurisprudence that the aid of the Court cannot be successfully invoked where adequate relief may be afforded in the ordinary forum. But the Legislature of South Carolina have not thought proper to leave this to inference or to the authority of usage which might be changed by the Court. It was, therefore, provided by the Act of Assembly that suits in equity should not be maintained where the party had a plain and adequate relief at

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*law. And in *Jaudon v. Gourdin*, (Rich. Eq. Cas. 249,) it is said, that "when a case is stated over which the Court has no jurisdiction at all, the objection to the jurisdiction never comes too late. It need not be pleaded, for the Court is bound to know the extent of its jurisdiction, and needs not be informed of its limits by pleading."

It is incumbent on the plaintiff to show by his pleading, and, if need be, to establish

(a) If this had been a creditor's bill it would seem to have contained all the statements necessary. See *Cur. Eq. Prac.* 46; see, also, 1 *Story Eq.* §§ 546-7; *Story Eq. Pl.* §§ 99-102; *Woodgate v. Field*, 2 *Hare*, 211.

by proof, that a case is presented in which plain and adequate relief may not be obtained in the ordinary forum. A creditor seeking to set aside a deed for fraud is required first to show that he has exhausted his legal remedy. Thus, in *Sereven v. Bostick*, (2 *McC. Eq.* 416 [16 *Am. Dec.* 664]) Judge Nott, recognizing the authority of *Chancellor Kent*, in *Brinkerhoff v. Brown*, (4 *John Ch.* 671,) says, "it is a settled rule in chancery, that if a person wants relief touching the personal estate of his debtor, he must show that he has taken out an execution and pursued it to every available extent against the property before he can resort to equity for relief;" and again, "The Court of equity cannot know by anticipation that an effort to obtain the debt at law will not be effectual—and, if such an allegation is to furnish a ground of equity jurisdiction, every creditor may go at once into the Court of equity for relief." Such has been the uniform doctrine of this Court. In *Pettus v. Smith*, (4 *Rich. Eq.* 198,) the Court adverts to the well established rule, and only determines that taking the defendant with a *cas.* was equally satisfactory to show his insolvency, and thus entitle the plaintiff to the aid of this Court as the return of *nulla bona* to a *fi. fa.* In the leading authority on which the plaintiff relies, *Thompson v. Brown*, (4 *Johns. Ch.* 419,) a judgment had been obtained against the surviving partner of *Brown and Fay*, and an execution returned *nulla bona*. The bill was against the administrator and heirs of the deceased partner for an account, and to subject the real estate to

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*the payment of debts. No action at law could be maintained against the administratrix; and the simple contract was merged in the judgment against the surviving partner whose insolvency had been established. The only remedy left to the plaintiff was a resort to the Court of equity.

Where the proceeding is *inter vivos* the rule in this State is believed to be uniform. Nor is the requirement less stringent that the plaintiff must show a defect in the legal remedy where the debtor is dead and relief is sought from his personal representative, or heirs and legatees, or devisees. The inadequacy of the ordinary tribunals, as is said by the text-writers, may originate from various causes—such as that of compelling the executor or administrator to get in the assets—where there is any controversy as to the existence of assets, and a discovery is wanted; or if the assets are not of a legal nature; or if the marshalling of assets is indispensable to a due payment of the creditor's claim. "In such cases it is obvious that the remedy at law cannot be effectual," and so, "the executor himself, if he finds the affairs of the testator so complicated as to render the administration of the estate un-

safe, may institute a suit against the creditors for the purpose of having their several claims adjusted by the decree of the Court." Tollers Law of Executors, recognized and approved in *Brown v. McDonald*, (1 Hill Eq. 297.) In either case the insufficiency of the ordinary forum must be set forth. The Act of 1789 prescribes the duties of executors and administrators, allows time for the collection of assets and notice to creditors, and prescribes the order of payment. The executor or administrator is bound faithfully to discharge the duties thus defined by law. He cannot voluntarily throw off those duties unless difficulties arise which, in the language of the authorities, render it "unsafe" for him to proceed in the administration, and justify an application to the Court. Mr.

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Justice Story, in stating the objections *made to such bills and why they ought not to be encouraged because, among other reasons, "they may be made use of by executors and administrators to keep creditors out of their money longer than they otherwise would be," adds, "however correct these reasons may be for a refusal to interfere in ordinary cases, involving no difficulty, they are not sufficient to show, that the Court ought not to interfere in behalf of an executor or administrator under special circumstances, where injustice to himself, or injury to the estate, may otherwise arise," (1 Story Eq. § 544.) and so of the creditor. In ordinary cases the law has provided a plain and adequate remedy for the satisfaction of his demand as well against his personal representative as (by the Statute 5 Geo. 2 Chap. 7) against his heirs and devisees. Circumstances may exist which render these remedies ineffectual and demand the interposition of a Court of equity. The personal representative may be eluding or wasting the assets before a lien can be established, or there may be other difficulties, such as those heretofore adverted to, which may render a creditor's bill very proper for the cognizance of the Court. It remains to inquire whether such case is here stated by the pleadings.

The allegations of the bill are that the plaintiff is a simple contract creditor of the late William Calder, by three promissory notes amounting, in the aggregate, to twelve hundred and fifty dollars—that he left a will of which his widow, Agnes Calder, was executrix—and that she, with the other defendants, were legatees and devisees of his estate—that the plaintiff "is informed and believes, that the personal property left by the testator is insignificant in value, but that his real estate is large and valuable, consisting of a large and valuable property in the city of Charleston," that the plaintiff "has frequently applied to the executrix to procure a sale of the real estate or of such part thereof as may be needed for the purpose of

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making up any deficiency which may exist for satisfying such debts in full," "with which just and reasonable request the said executrix had refused to comply, on certain vain and unfounded pretences; all of which is contrary to equity and good conscience, and tends to the manifest wrong and injury of the plaintiff in the premises." Such is a full statement of the plaintiff's case, "in consideration of which and forasmuch as he is remediless at common law," he prays the interposition of this Court. To the end that the defendants may answer, and that the executrix may discover all the separate parcels of real estate; that, at the proper time, she may account as executrix, and that the real estate may be sold under the direction and decree of the Court, and for general relief, a subpoena ad respondendum is asked against the executrix and the several devisees, by name. Gustavus C. Street and Cecelia Street, two of the devisees, who are infants, answer by their guardian, and insist that the plaintiff has no right, on the case made, to the interposition of the Court of equity, and pray the benefit of this objection to the jurisdiction as if specially pleaded.

By the familiar action of assumpsit on the notes, the plaintiff might have his judgment and execution against the executrix, levy upon and sell the real estate of the testator, and have satisfaction of his demand. The remedy at law is not only plain and adequate, but direct, prompt, and unexpensive. It is not suggested that the estate is insolvent, even were that sufficient. It is not averred that there is any creditor other than the plaintiff. Upon the case presented by the bill, the plaintiff is not warranted in burthening the estate of Calder with the expensive litigation of a suit in chancery, much less to implead the devisees in this tribunal. In the language of Judge Nott, "if such a statement is to furnish a ground of equity jurisdiction, every creditor may go at once into the Court of equity for relief." The jurisdiction of that Court is most

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*salutary and beneficial, indeed, indispensable to the successful administration of justice when exercised on subjects properly within its cognizance. But it should always be borne in mind that equity is auxiliary to the law, and its interference should only be interposed when from the imperfection of the machinery, or from other causes, the ordinary tribunal is inadequate to accomplish the purposes of justice.

It is ordered and adjudged that the decree of the Circuit Court be reversed, and that the bill be dismissed.

WARDLAW, A. J., and GLOVER, J., concurred.

Bill dismissed.

14 Rich. Eq. *160

*WILLIAM FINKLEA v. A. B. JORDAN
and Wife, and Others.

(Columbia. April and May Term, 1868.)

[*Executors and Administrators* ⇨14, 292.]

Testator directed as follows: "I wish my executor hereinafter named to sell my land * * * out of which he is to pay all my just debts, and funeral expenses. The balance, if any, of the money derived from the sale of my land, I give and bequeath to my brother W., his heirs and assigns, which is to be in lieu of all commissions." No one was expressly appointed executor. *Held*, that W. was constituted executor according to the tenor. *Held*, further, that W., having neglected to assume the executorship, was not entitled to the legacy.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 29, 1164; Dec. Dig. ⇨14, 292.]

[*Wills* ⇨639.]

Where a legacy is given to one who is appointed executor the presumption is that it was given to him in that character, and it lies on him to show something arising on the will to repel the presumption.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1523; Dec. Dig. ⇨639.]

Before Carroll, Ch., at Marion, February, 1867.

The decree of his Honor, the Chancellor, is as follows:

Carroll, Ch. In the consideration of this case some degree of embarrassment has been produced by the state of the pleadings. It is assumed by the bill, and apparently conceded by the answer of Jordan and wife, that an executor cannot be constituted but by express appointment of the testator. In his bill, the plaintiff, after averring that Hugh Finklea had executed his last will and testament, thus proceeds: "A copy of which is herewith filed, as a part of your orator's bill of complaint, and to which he craves all necessary and proper reference." The effect of such a reference is to make the whole document referred to part of the record. 1 Danl. Prac. 372.

In their answer, the defendants, Jordan

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and wife, in *terms, admit that Hugh Finklea died leaving a will, but no executor. Yet, in effect, these respondents do maintain in the sequel of their answer, that the bequest to the plaintiff, under the will, was made to him solely in character of its executor. If they do not touch that ground, they certainly verge most closely towards it, when they contend that the "money bequeathed to the complainant was given as compensation for his services and trouble, as executor, and now belongs to them, as they have had the trouble of administration, and not he." In the argument, it was maintained, on the part of Jordan and wife, that by the effect of the will, the plaintiff was appointed executor, according to the tenor that the legacy to him was upon the condition that he should as-

sume that office, and he having failed to do so, that his right to such legacy had never been consummated. It was urged in reply, that the ground of defense had not been taken in the answer, and could not, therefore, be considered by the Court. There is certainly room for the doubt whether the answer of these defendants, fairly interpreted, does not include substantially the objection in question to the plaintiff's claim. But though such grounds of defence were not included in their answer, yet it is apprehended that it would be competent at least for the Court to regard and consider it at the hearing. The plaintiff seeks the active aid of the Court, and must make out his right to its interposition. He sets forth in his bill the will of his brother, Hugh Finklea, and admits that he has never assumed upon himself the office of its executor, but has permitted the administration of the testator's estate to be committed to other hands. If the objection in question be well founded, it is manifest and patent upon the plaintiff's own statement of his claim. There is less strictness of pleading exacted here than in the law Court. Yet even there the Court will take into consideration, retrospectively, the sufficiency in law of matters to which an

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*answer in fact had been given. "The remedy," says the Court, "to be afforded in a case in equity depends upon the whole pleadings in the cause." *Nix v. Harley*, 3 Rich. Eq. 383. It is deemed admissible and proper, therefore, to consider the ground of defence adverted to. "The appointment of an executor may be either express or constructive. He may be appointed by necessary implication by conferring those rights that belong to the office, or by any other language from which the intention of the testator to invest him with that character may be inferred." 1 Wm.'s Exrs. 211, 219, and *Watson v. Mayrant*, 1 Rich. Eq. 449. In the second clause of his will, the testator thus speaks: "I wish my executor, hereinafter named, to sell my land according to his best discretion, publicly or privately, out of which he is to pay all my just debts, and funeral expenses. The balance, if any, of the money derived from the sale of my land, I give and bequeath to my brother, William Finklea, his heirs and assigns, which is to be in lieu of all commissions." After the words "my executor, hereinafter named," no male person whatever is mentioned in the disposition of the will, except the testator's brother, the plaintiff, William Finklea, and he is designated by name in the next succeeding and concluding sentence of the clause. The testator having directed the sale of his land, proceeds to dispose of the proceeds; out of them his debts and funeral charges are to be paid, and the residue, if any, is to be received by the plaintiff, in lieu of all commissions. The

fund to be disposed of, it will be observed, is regarded by the testator as being in the hands of his executor. It is he who is to receive and disburse it—the very acts of an executor, which entitle him to a pecuniary compensation for his services; and the final disposition, in respect to that fund, is the bequest of the residue, if any, to the plaintiff, in lieu of all commissions. Surely, the commissions intended must have been those

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incident to the *receipt and disbursement within the testator's immediate contemplation, and for which he was providing by the very clause in question. In common parlance, as also in the language of the Courts, the compensation of an executor, under the Act of 1789, is habitually spoken of as his commissions. It was not proved, or even suggested in argument, that the plaintiff had ever rendered the testator any service in his lifetime, as factor or agent, or otherwise, out of which could have arisen any debt that could rationally be designated as commissions; nor was any suggestion made as to the expression being susceptible of any other meaning than that which has been indicated. On the contrary, that the plaintiff was constructively appointed the executor, seems to be distinctly conceded by his bill, when he alleges that from the tenor of said will it is apparent that his said brother intended to appoint him executor of his said will, although it is added, "but no one was appointed." The plaintiff must be regarded as the executor of his brother the testator's will, according to the tenor. The presumption is, that a legacy to a person appointed executor, is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the will to repel that presumption, 2 Wm. Exrs. 1153, 1156, and cases cited. It is said that this presumption is inapplicable to the bequest of a residue. In the cases cited as thus modifying the general rule, it will be found that the bequests in question were not given to the legatees expressly as executors, as in the present case, as compensation for their care and trouble in that capacity. "Nothing is so clear," says Lord Alvanley, "as that if a legacy is given to a man as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor." "If," he adds, "there was any circumstance to show he

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was backward in undertaking the *trust reposed in him, he shall not have it," *Harrison v. Rowley*, 4 Ves. 216. Certainly the plaintiff has not been forward in taking upon himself the office of executor of his brother Hugh Finklea's will. If he has made the slightest effort to do so, it does not appear in this cause. Having failed to assume the trust of

executor, the plaintiff is regarded as not entitled to the legacy which he claims.

His bill should therefore be dismissed, and it is accordingly so ordered and adjudged.

The plaintiff appealed, and now moved this Court to reverse the decree of his Honor, the Chancellor, below.

Harlee, for the motion.

Evans, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. The reasoning of the Chancellor is entirely satisfactory to show that the plaintiff was executor, according to the tenor of his brother's will. Indeed it is so alleged in the bill. But it is insisted that the bequest of the residue of the fund to arise from the sale of the land was not made to the plaintiff as executor, and that "being residuary devisee of the land by the express terms of the will, he was entitled to a decree for the land upon payment of testator's debts, which he had offered to do,"—or at least to a decree for the sale of the land, and payment of the debts, and the surplus to be paid to him.

The general proposition is not questioned, that, where a legacy is given to a person appointed executor, the presumption is that it is given to him in that character, and that the burthen of proof is on him, to show something in the nature of the legacy, or other circumstances arising on the will, to repel that presumption.

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*This will was executed in March or April, 1862, just as the testator was leaving home to join the army of the Confederate States. Although prepared and witnessed by a gentleman of the legal profession, it bears evident marks of haste. The instrument is without date, and, although purporting to appoint an executor, no one is nominated. The testator had a wife, but was without children. The first clause directs the payment of his just debts. The second is that recited in the decree; and the will concludes thus: "all the balance of my estate I give and bequeath to my wife, Elizabeth Ann, her heirs and assigns forever." The will was proved 2d Dec. 1862, and, on 18th Dec. the widow took out letters of administration, with the will annexed, and has since been engaged in discharging her duties as such. The plaintiff was in the army at the death of his brother, but returned for a short time in 1864, and gave notice that he wanted the land, and would pay the debts. In Dec. 1865, these proceedings were instituted. In the course of litigation many references were held, the result of which was that the market value of the land would scarcely pay the debts. But, if the plaintiff's positions are well taken, he was entitled to a decree. Is there any circumstance, arising on the will or otherwise, to rebut the pre-

sumption that the bequest to the plaintiff was in his character as executor, and consequently, never having assumed the office, he is not entitled to the bequest? The Court is at liberty, in giving construction, to look at the surrounding circumstances. The testator had a brother, the natural object of regard, and a wife, the object of his regard and solicitude. His land, if sold "according to the best discretion of his executor, at public or private sale," might probably sell for something more than was sufficient to pay his debts. He directs it to be sold by his executor, and, "after payment of his debts and funeral expenses, the balance, if any, of the money derived from the sale is

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given *to his brother, (the plaintiff,) which is "to be in lieu of all commissions."

The primary object of the testator's bounty was his wife. A particular portion of his estate is set apart for the payment of his debts. His brother and executor is to have the trouble of administering the estate, and for his compensation, or in lieu of commissions, is to receive any balance which may remain of the fund especially set apart for the payment of debts and expenses, thus relieving his wife from the trouble or charge in the management and settlement of his estate, and bequeathing to her the residue of his estate, except only the portion thus set apart. If the portion set apart had been a bond which his executor was to collect, and, out of the proceeds pay testator's debts, and retain the balance, if any, in lieu of commissions, it would not be doubtful that the presumption would prevail, and that, although the executor was the testator's brother, he could only entitle himself to the bequest by assuming and discharging his official duties. It is not perceived that the character of the property set apart affects the conclusion.

It is ordered and decreed that the decree of the Circuit Court, dismissing the plaintiff's bill, be affirmed.(a)

Decree affirmed.

(a) It does not appear who concurred with the Chief Justice, but as nothing appears to the contrary, it is presumed the Court was unanimous.

14 Rich. Eq. *167

*WISEMAN and FINLEY v. ALEXANDER HUNTER and Others.

(Columbia. April and May Term, 1868.)

[Equity 72.]

Under an order made in June, 1861, to collect a certain bond with "as little delay as possible," the Commissioner in August, 1862, received payment in Confederate treasury notes. In May, 1863, the Commissioner reported that he had collected the bond, and on motion of the solicitor of the parties entitled to the fund an order for distribution of the same was made.

Two of the parties resided in Tennessee, and did not receive their shares, and they now sought to have the payment opened and to compel the obligor to pay their shares. *Held*, that the obligor was discharged by the payment, and that the transaction could not be opened on their application.

[Ed. Note.—Cited in *Blackwell v. Tucker*, 7 S. C. 400; *Black v. Rose*, 14 S. C. 274, 280; *Hyatt v. McBurney*, 18 S. C. 217, 218.

For other cases, see *Equity*, Cent. Dig. § 212; Dec. Dig. 72.]

Before Lesesne, Ch., at Abbeville, June, 1867.

The facts of the case are sufficiently stated in the decree of his Honor the Chancellor, which is as follows:

Lesesne, Ch. In a cause of J. Wardlaw Perrin, Administrator of Thomas M. Mitchell v. Alexander Hunter, Executor of Thomas Finley, there being in the executor's hands a sum of \$2,359.12, to which the next of kin of the testator were entitled, this Court made an order at June Term, 1859, for the said next of kin to come in and establish their claims, and directed the Commissioner to receive and invest the money "to be refunded after two years." Under this order the money was invested in Alexander Hunter's bond to the Commissioner, with these defendants, Samuel Hunter and J. H. Cunningham as sureties, in January, 1860. Claims to the fund were filed by Ann Green and by these plaintiffs, Sarah Wiseman and O. G. Finley, who reside in the state of Tennessee. The proofs produced by Ann Green

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seem to have been *satisfactory, and on June 17, 1861, the Court ordered the Commissioner to call in the funds with as little delay as possible, and to take evidence as to the claims of these plaintiffs. In pursuance of this order, Hunter paid the Commissioner \$2,912.35 in Confederate treasury notes, in full of his bond and interest on the 13th of August, 1862, and the money was deposited in bank according to law.

On the 4th of May, 1863, the Commissioner reported favorably on the claims of the plaintiffs, and on the 7th of May, 1863, the Court ordered the Commissioner to pay one-third of the fund to the legal representative of Ann Green, (she being dead,) one-third to Sarah Wiseman, and the remaining third to O. G. Finley. The same gentleman who was the solicitor in Court of all the claimants, became the administrator of Ann Green, and received her share on the 21st of May, 1863, from the Commissioner, having also on the 19th of the same month, received from him the sum of \$497 on account of these shares, for costs and fee.

It was also on his motion that the decree of May, 1863, was made.

The Commissioner proposed to pay him the shares of these plaintiffs, at the same time that he received that of Ann Green, but

he had no power of attorney, and did not receive them.

The plaintiffs ask that the receipt endorsed on the bond be erased and the bond stand unsatisfied and recoverable to the amount of two-thirds its value. And failing that that the Commissioner be decreed to be liable to plaintiff to that extent.

I will first consider the claim made against the Commissioner.

Hunter's bond was collected by him in obedience to an order of the Court, not of his own motion. But he received payment of it in notes of the Confederate States of Amer-

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ica, *or Confederate currency as it was called. And if he be subject to any liability in the premises, it arises from his acceptance of that currency.

Confederate currency was not a legal tender, and the obligor had no right to require it to be taken in payment of his bond. But the duty imposed on the Commissioner by the order of 1861, was plainly ministerial in its character. And the true question is, whether he discharged that duty according to the true intent and meaning of the order. If he did so, his act was the act of the Court, and involves no personal liability. The Court ordered the Commissioner to collect the bond, that is, to receive payment of it: and gold or silver coin was the only legal tender in payment of debts. Did the Court mean that coin should be required in payment of this debt. It was well known that there was not then in the country, and had not been for a long time, a metallic currency, and the prospect of its restoration was darker than ever. The banks had suspended specie payment long before, and gold and silver were articles of merchandise, and they have continued to be ever since. To have said the payment must be made in coin would have been tantamount to saying that there should be no payment at all. Requirement of coin by the Commissioner would have been sheer mockery. Then it could not have been intended to make it the duty of the Commissioner to collect this debt in coin. To suppose that it was, would be to attribute to the Court the absurdity of directing him to perform a manifest impossibility.

How then did the Court mean that the debt should be collected? If not in coin, it could only be in the currency which was then used in the payment of debts. What was that? The condition of things at that time is historical.

After the suspension of specie payments by the banks, bank notes constituted the sole

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currency so used, until *Confederate notes were issued in the year 1861. From the time of their issue they were regarded as of equal value with the bank notes, and the two were used indifferently for the purposes of a currency.

In a few months the bank notes disappeared from circulation, and Confederate notes then became the only circulating medium of the country, and as such were as generally used as bank notes had been. The banks so treated them, and the Commissioner actually received credit for the money in question as a deposit, from the bank in which he was required by law to keep his funds. When the order was made, in June, 1861, Confederate notes were in circulation to some extent. The currency, therefore, to which the order of the Court must be held to have had reference, was bank notes or Confederate notes; and in my judgment, the Commissioner in accepting the latter simply performed the duty with which he was charged, in the manner intended. It appears by the printed table, which it was agreed at the hearing should be considered as evidence, that the value of Confederate notes, as compared with gold, was less in August, 1862, when the bond was paid, than in June, 1861, when the order was made. But still its depreciation was comparatively small at the former date; and it was then generally taken and received in payment of debts, and continued to be for a considerable time after. If the Commissioner had sought instruction from the Court, can it be doubted that he would have been instructed to receive Confederate notes? Even in May, 1863, when he reported the settlement he had made with Hunter and when the depreciation of Confederate currency had become great, no objection was made to the Commissioner's act. On the contrary, upon the motion of the solicitor of these plaintiffs, an order was made for the distribution of "the funds in Court," and soon afterwards the same gentleman, in his

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*character of administrator of the other distributee, Ann Green, received her share in Confederate notes. This is certainly significant of the fact that the Commissioner was regarded as having properly discharged his duty. These plaintiffs were in Tennessee, no one held a power of attorney from them, the war was at its height, and the difficulty of communication then, and long after, very great, so that they were not informed of what had been done until Confederate money had ceased to be of any value at all. Thereupon this suit was directed to be instituted. It remains to consider the claim made against the obligors of the bond.

These plaintiffs became parties to the cause of *Perrin v. Hunter*, when they presented their claims as distributees. From that time they were bound by all the orders regularly made in that cause; and it was after they had filed their claims that the order of June, 1861, for the collection of the bond was made.

But if the view already expressed be correct, that order was, under the circumstances, equivalent to an order authorizing the acceptance of Confederate currency in payment

of the same. If any party in the cause was unwilling for Confederate currency, or anything but coin to be received, that was the time to say so. And such an objection would certainly have received attention, for the Court would not have authorized the acceptance of anything but the legal tender of the country against the will of any party interested in the fund. None such was made, and it cannot be listened to now, after payment by the debtor in the manner required of him, and in accordance with a proper construction of the order of the Court. The plaintiffs are estopped by remaining silent when they should have spoken, if they meant to object. The debtor was no volunteer in this matter. The debt was past due, and was

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paid in consequence of a stringent order of this Court for its speedy collection. In the settlement made, the Commissioner was the agent of the parties in the cause, including these plaintiffs, his instructions being contained in an order of the Court to which they were privy. So that the case is really as though they had themselves received payment of a debt in Confederate currency in August, 1862, and now repudiated the settlement and sued the debtor's executor for the same debt.

Again, in the words of Ch. Wardlaw, "a consent decree is the mere agreement of the parties under the sanction of the Court, and is to be interpreted as an agreement." (*Allen v. Richardson*, 9 Rich. Eq. 56.)

The consent decree of 1863 is then to be regarded as an agreement on the part of these plaintiffs to carry out or abide by its provisions. But it provided expressly for the distribution of "the funds in Court," and it was known that they were in the shape of Confederate currency.

The view I have taken has rendered it unnecessary to consider the question, whether or not, Confederate currency was money, which was elaborately argued at the hearing. I regard the transaction on which this suit is founded, as being in effect, an agreement to which the plaintiffs were parties, that the Commissioner should receive payment of the bond in Confederate currency. That agreement is not executory but executed. It was executed more than five years ago, and the obligor has actually been dead nearly two years. In the absence of fraud, none of the parties has the shadow of a right to open such a settlement. Even in the Tennessee case, (*Wright v. Overall*, MSS.) which was relied on by the plaintiffs, and in which it is held that Confederate currency was not money, the Court uses this language: "But we do not say that a case might not arise, involving Confederate money as the basis of an executed contract where the rights of the

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parties were vested, which the Courts for the repose of society, would not disturb."

It is ordered and decreed that the petition of the plaintiffs be dismissed.

The plaintiffs appealed and now moved to reverse the decree on the following grounds:

1. Because the decree should have held that payment by the obligors in Confederate currency did not discharge the debt; that such currency was not money or legal tender, and could not, without the consent of parties, be paid or taken as money in the discharge of the debt.

2. Because the debt in question not having been legally paid, the decree should have ordered erasure of payment endorsed on the bond and required the obligors to satisfy the same in good money.

Noble, for the motion.

Thomson & Fair, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. J. The Commissioner in equity was originally impleaded with the other defendants, but as to him, the appeal was not prosecuted and the petition was dismissed at the last session of this Court. It remains to inquire whether the Chancellor erred in not ordering an erasure of payment on the bond, which had been endorsed by the Commissioner on 13th August, 1862. The decree has not determined that Confederate currency was a legal tender in payment of debts. It is only held that under the circumstances of this case, the petition-

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ers interposing their claim on 20th April, 1867, were not entitled to the active aid of this Court, in cancelling a receipt given on 13th August, 1862.

It is not proposed to repeat what is said by the Chancellor. But it is proved from the records, that prior to the decree of June, 1861, the petitioners, residents of Tennessee, had become parties in the cause, and were represented by their solicitor, who was actively engaged in substantiating their claim and prosecuting their interests. Under his supervision the order was made for the prompt collection of the bond constituting the funds of the estate. There was no qualification, no special direction to the officer, except that he should collect the bond "with as little delay as possible." It may be that at the date of the order (June, 1861,) Confederate notes were not yet issued, and irredeemable bank paper alone was in circulation; but soon after and before the payment in August, 1862, Confederate notes constituted equally the only circulating medium. In the meantime testimony was taken under the order of June, 1861, which established the claim of the petitioners, and on 4th May, 1863, the Commissioner presented his report, setting forth that the bond had been paid, and that the petitioners had established their right to participate in the

undistributed property of the late Thomas Finley, "now in the hands of the Commissioner in Equity"—and an order was accordingly made for payment of two-thirds of the fund to the petitioners. A fortnight afterwards, the solicitor of the several parties interested in the said fund, received from the Commissioner four hundred and ninety-seven dollars, "in part of the shares of Ann Green, D. G. Finley, and Sarah Wiseman, being the amount applicable to fees and costs," and two days subsequently, the same solicitor, as administrator of Ann Green, deceased, received from the Commissioner \$799.45, on account of her share in the same fund.

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*Debtors have rights as well as creditors. In August, 1862, Alexander Hunter paid in full to the officers of the Court, the amount of his bond in the currency of the country, which bond the officer, by order of the Court, was directed to collect, and the obligor took his receipt for the same. The parties entitled to the fund, residing in an adjoining State, were represented by a solicitor in the cause who was cognizant of all the facts, and who some months afterwards, received from the officer of the Court a part of the fund thus paid in. Nearly five years after the payment of the bond, and when the obligor was in his grave, this petition is preferred, seeking the aid of the Court, to open the transaction and cancel the receipt on the bond. The question is not whether bank bills or Confederate treasury notes, or anything other than gold and silver is a lawful tender in payment of debts: but whether, when a debtor has paid to an officer of the Court in these funds a debt, which he was required to collect, and taken his receipt in discharge of the same, the Court will at this distance of time, and at the instance of a party in the cause, repudiate the act of its officer and set up the claim against the debtor. It concerns the interest of the public that there should be an end of litigation. Where a transaction has been consummated and rights vested, the repose of society demands that it should not be opened.

The decree of the Chancellor is affirmed and the appeal dismissed.

WARDLAW and INGLIS, A. JJ., concurred.

Motion dismissed.

14 Rich. Eq. *176

*JOHN H. COLBURN v. P. J. HOLLAND,
Executor, and B. P. COLBURN.

(Columbia. April and May Term, 1868.)

[*Executors and Administrators* ⇨470.]

A wife, residing in Boston, received and used the income, and had the control as apparent beneficial owner, for a number of years,

of a trust fund, the legal title to which was in W., but by whom the trust was created, what were its terms, and what quantity of interest she had, whether for life or absolutely, did not appear, and at the time of her death there were also standing in her name certain bank stocks of banks in Charleston, but by whom, and with whose funds the investments were made did not appear. The husband resided in Charleston, and on her death he received the trust fund from W., and converted the stocks to his own use—then and ever afterwards until his death, claiming both as his own property—and a few years afterwards, in order to clothe himself with the legal title to some of the stocks, he sued out letters of administration on her estate, at the same time declaring himself to be the owner. On bill filed by a distributee of the wife against the executor of the husband, more than twenty years after the husband had received the trust fund and converted the stocks:—*Held*, that the principles declared in *Riddlehoeover v. Kinard*, 1 Hill Ch. 376, applied, and that defendant was protected from liability to account by the presumptions arising from the lapse of time.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2014; Dec. Dig. ⇨470.]

[*Executors and Administrators* ⇨466, 470; *Limitation of Actions* ⇨102.]

A husband who had administered on his deceased wife's estate, made a final return to the Ordinary in which he declared, in effect, that the estate was wound up, and that he had transferred all the assets to himself as sole owner, and the Ordinary certified to the return as a final settlement:—*Held* that, as against a distributee who was of full age, this transaction in a public office, and remaining there as of record, gave currency to the statute of limitations, and that a bill for account filed more than four years afterwards was barred.

[Ed. Note.—Cited in *Mason v. Johnson*, 13 S. C. 24.]

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1994, 2014-2017; Dec. Dig. ⇨466, 470; *Equity*, Cent. Dig. § 209; *Limitation of Actions*, Cent. Dig. § 505; Dec. Dig. ⇨102.]

[*Domicile* ⇨5.]

[The domicile of the husband is the domicile of the wife, notwithstanding that they have lived apart for 14 years without having been divorced, and although the wife may never have intended to return to the place where her husband is domiciled.]

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 26; Dec. Dig. ⇨5.]

Before Lesesne, Ch., at Charleston, February, 1867.

This case came before the Court on exceptions to the Master's report, which is as follows:

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*This case was referred to me, by consent, "to take the testimony and report upon the facts and the questions arising thereon, with leave to report any special matter."

James Smith Colburn made his will on the 20th of February, 1856, and thereby, after bequeathing certain inconsiderable portions of his estate, gave all his interest in the partnership assets of Colburn & Holland, to Parker J. Holland absolutely, and all the rest and residue of his estate to the said Parker

J. Holland, in trust for the sole and separate use of Susan C., wife of the said Parker J., for her life, and after her death, to other uses. He appointed Parker J. Holland and J. Harleston Read, Jr., executors of his will. The testator died on the 14th July, 1859, and his will was proved by Parker J. Holland, who alone qualified as executor.

Mr. Colburn left surviving him, three sons by his second wife, Sarah Dunn, namely: Frederick C., Benjamin P., and John Henry. Mrs. Holland is the daughter of James B., a son of testator by his first wife.

The bill was filed on the 7th of December, 1859, by John Henry Colburn, one of the sons of the testator by his second marriage, against Parker J. Holland as executor, and prays that an account may be taken of the separate estate of Sarah Dunn Colburn, the mother of the plaintiff, which estate it is alleged, came to the hands of her husband after her death, and was by him converted to his own use, and that the plaintiff's share of the said estate may be paid to him by the said executor, out of the estate of his testator. Frederick A. Colburn and Benjamin P. Colburn, the two other sons of the testator by his marriage with Sarah Dunn, are also made parties defendant. Frederick A. disclaims in his answer all interest in the subject matter of the bill. Benjamin P. claims the same interest as the plaintiff, and joins in the prayer for an account, and for payment of his share.

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*The facts in the case are in some degree obscure, owing to the length of time over which they extend, and the anomalous character of the domestic history to which they refer. In applying the facts to the questions upon which depend the rights of the claimants, I have been essentially aided by the elaborate and able discussion before me of these questions by the solicitors in the cause. To give as much perspicuity as may be in my power to the examination of the case, I shall arrange the facts derived from the pleadings, as well as from the testimony, together with what I have to say, under the following heads:

1. Had Mrs. Sarah Dunn Colburn a separate estate; and if she had, upon whom did it devolve at her death?

2. If the plaintiff, John Henry Colburn, and the defendant, Benjamin P. Colburn, were entitled upon the death of their mother to distributive shares of her estate, are they now precluded from asserting their claim by lapse of time, or other matter subsequent thereto?

3. Do the circumstances establish such a case of fraud as will avoid the bar of lapse of time, or other matter precluding the claimants from the relief which they now seek?

1. As to a separate estate. The bill states that James Smith Colburn, in the year 1808, intermarried with the late Sarah Dunn at

Boston, in the State of Massachusetts, of which place they were both at that time residents, and so continued to be until the year 1818, when they removed to Charleston, South Carolina, where they permanently established themselves, and where James Smith Colburn continued to reside until his death in 1859, and where Sarah Dunn resided until 1819, when together with her husband, she visited the State of Massachusetts, where she remained until her death in 1836. That during the said marriage, the said Sarah Dunn, through her mother, the late Mary Prince, be-

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came entitled to a considerable estate *which was disposed of by the said James Smith Colburn, who in substitution therefor, conveyed to Samuel D. Ward of Boston, certain real estate in that city, in trust for the separate use of the said Sarah Dunn. That afterwards, but during the marriage, at the instance of the said Sarah Dunn, this last mentioned property was sold, and the proceeds, to wit, \$20,000, invested in securities for money for the use of the said Sarah Dunn. That the said Sarah Dunn was also entitled to a separate estate in certain shares, standing in her name in the capital stock of the following banks in the city of Charleston, viz.: 44 shares in the Planters' and Mechanics' Bank; 6 shares in the Bank of South Carolina; 9 shares in the Union Bank, and 3 shares in the State Bank.

The plaintiff further states, that from his birth in 1816, he lived with his mother until her death, when, in 1836, he came to Charleston and took lodgings at the house of his father, and there continued until 1841. That after the death of Mrs. Colburn, her eldest son, Frederick A., who was then a resident of Boston, where Mrs. Colburn died, made a claim for his portion of her estate situated in said city, and that the plaintiff, upon receiving information of said claim being made by his brother, interposed his claim also, but under certain representations and influences mentioned in the bill, he abandoned the prosecution of his claim to the property in Boston.

Parker J. Holland, executor of James S. Colburn, admits in his answer that his testator bequeathed the great bulk of his estate to him in trust, for the sole and separate use of his wife during her life, with certain subsequent limitations. He states that he has heard and believes, that Mrs. Colburn, the wife of his testator, became entitled some time after their marriage, to an undivided interest in certain lots of land in Boston belonging to the Prince estate, to which estate she was one of the heirs. That there had

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*been no marriage settlement at the time of the said marriage, nor was there any settlement of any kind subsequent to that event. That some time in the year 1823, the said undivided interest of Mrs. Colburn by the

joint deed of herself and husband, was sold and converted into money, which by virtue of the marital rights of the said James Smith Colburn vested absolutely in him. He denies "that any act or arrangement was ever made or done by the said James Smith Colburn which altered the legal relations of the said property." He also denies that his testator ever conveyed any property whatsoever in trust to Samuel D. Ward, of Boston, or to any other person by way of substitution for the property derived by the said Sarah Dunn from the Prince estate; or that the said James S. Colburn ever covenanted to hold any property whatever in trust for the said Sarah as a substitute therefor. He further denies, that the said James S. Colburn was a trustee for his wife or his children, by any direct appointment, or by any act of his own whatsoever. He admits that at the time of the death of Mrs. Colburn, there stood in her name in the banks in Charleston, the shares mentioned in the bill, except as to the number alleged to have been so held in the Planters' and Mechanics' Bank, which he states to have been 24 instead of 44, as charged. And he says that the said James Smith Colburn considered himself entitled to all of the above shares by virtue of his marital rights. That there was no trust whatsoever, either by anti-nuptial or post-nuptial settlement, or separate trust of any kind binding this property, "even although the money which was invested in said shares of said banks, was a portion of the money realized from the sale of the property derived from the Prince estate, by the said Sarah Dunn Colburn." He also denies that Frederick A. Colburn received any sums of money as his distributive

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share of the estate of *his mother, and indirectly alleges that whatever he did receive was a gift by his father to advance him in life.

The defendant, Benjamin P. Colburn, states in his answer that James Smith Colburn left Boston and settled in Charleston in consequence of commercial misfortunes. "That he had failed in Boston and came to Charleston to mend his fortunes." That from his childhood he recollects that his mother had a separate estate in Boston, the income of which she received and enjoyed, and over which she appeared to have exclusive control. That Mr. S. D. Ward, of Boston, was her trustee, and had the management of said estate. That the history of his mother's estate, derived from information obtained in Boston, in 1839, he believes to be as follows: Mary Prince, of Boston, defendant's grandmother, was, during her life, possessed of a large tract of land situated in the western part of Boston, and known in early times as Prince's Pasture. By his grandmother's death, his mother became entitled to a distributive share of her estate, which his father received as trustee or executor of Mrs.

Prince, and having involved the same in some way in his business, and his circumstances being such as to make it improper for him longer to retain the trust funds, he in substitution therefor, conveyed in 1819, a certain dwelling-house, situated on Beacon street, in Boston, to S. D. Ward, Esq., of that city, to hold the same in trust for the separate use of the said Sarah Dunn, as her separate estate and inheritance. That several years before the death of the said Sarah, her trustee, at her request and by her authority, sold the said house for \$20,000, received the money, and retained and managed it in trust for the sole and separate use of the said Sarah Dunn until her death. That his elder brother, Frederick A., did at the time of his mother's decease, insist upon his share of his mother's estate, and that the same was by his father allowed, and paid to him as his

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right by law, and that he received *the same as one of the heirs and distributees of his mother. As to the bank shares in Charleston, standing in the name of his mother, he says that he is not informed of the source whence the money thus invested came, but he does not doubt that it was a part of his mother's patrimony and inheritance.

The answer of Frederick A. Colburn states, that he knows his mother had a separate estate which she enjoyed during her life, independent of his father, and that it consisted in part and chiefly of the sum of \$20,000, held in trust for her by Samuel D. Ward, Esq., of Boston, which was the sales-money of her house on Beacon street, in said city, held by Mr. Ward for her use, and sold by him to Augustus Thorndike. That after his mother's death his father claimed to have the fund in Mr. Ward's hands paid over to himself, but this defendant objected, and claimed his distributive share of the same as of his mother's separate estate, to be divided among her heirs, according to law. That after considerable delay, and under the pressure of impending or threatened legal proceedings, his claim was allowed, and by direction of his father, Mr. Ward transferred to him the sum of \$5,000, as his share of his mother's estate, and which was received by him in full of his share therein, and that the residue of said estate in Boston was paid over to his father by Mr. Ward. He states distinctly that his father finally yielded to his claim, and consented that he should be paid the said sum of \$5,000, which he received without further contention or inquiry, in full satisfaction of his interest in his mother's estate.

Much testimony, oral and documentary, has been introduced. So much only as refers to the question of the separate estate of Mrs. Colburn will be here stated.

Frederick A. Colburn having disclaimed all interest in the suit, was examined by commission as a witness on the part of the plain-

tiff, and of the defendant, B. P. Colburn.

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*Much of his testimony is a repetition of the statements of his answer, which have been already given. The additional facts brought out by his examination are, that his mother had a separate estate which she held and controlled as her own during her life independent of his father. It consisted of real estate which descended to her. Samuel D. Ward acted as her agent in the management of her property until her death. He states that he does not know whether his father consented or not to his receiving \$5,000 from Mr. Ward as his share of his mother's estate. Upon this last point the evidence of this witness seems to conflict with the statement of his answer. He says he claimed \$8,000, but received only \$5,000. He received it about two years after his mother's death. That previous to her death the real estate had been sold by her consent and direction.

In reply to the cross-examination, this witness says, that the property of his mother was received by her in real estate which was sold after her marriage and during her life, and went into the hands of herself and her agent. That his father and mother lived apart from the year 1822 to the year 1836, when she died. His father lived and did business in Charleston, and his mother resided part of the time in Boston, and part of the time in Roxbury, near Boston. As far as the witness knows, she supported herself out of her own money; he never knew of his father remitting any money to her, or leaving any funds in Roxbury or Boston for her maintenance and support. That his father did not have any property at that time, or at any other time after 1822 in Boston or its vicinity. The property and funds of his mother in the hands of Mr. S. D. Ward, as her agent, were not under the ultimate control or power of his father, nor did she hold them subject to his control as his agent. Mr. Ward was Mr. Colburn's legal adviser while he lived in

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Boston up to 1822. Mrs. *Colburn had no other property left with or for her except that referred to. Does not know whether his father admitted his claim or not. His claim was not against his father, it was against his mother's estate. At the time his father left Boston, which was in 1822, or soon thereafter, he became bankrupt, and had he owned or left any property in Boston at that time, it would have been taken by his creditors.

This witness annexes to his testimony a paper signed by S. D. Ward, dated the 8th of September, 1859, which paper he states was furnished to him by Mr. Ward, but of the contents of which he has no personal knowledge. The admission of the paper as evidence is objected to on the part of the defendant Holland. A statement of the contents is here made subject to the objection. The paper states, that in the year 1819,

James Smith Colburn conveyed to Mr. Ward a certain dwelling-house and appurtenances in Beacon street, in Boston. The conveyance, though made to him, was understood to be in trust for his wife, Sarah D. Colburn, and was received by Mr. Ward with that understanding. Mr. Colburn, at the time of the conveyance, stated as the consideration of the conveyance, that he had received moneys belonging to Mrs. Colburn as her share of her mother's estate, which he had applied to his own use, and never accounted for to her. That the property was managed by Mr. Ward, as the trustee of Mrs. Colburn, and the income was applied by him for her sole and separate use. That the house in Beacon street was sold by him at her request for \$20,000, and the money invested in personal securities, and the interest paid to her until her death. That after the conveyance by Colburn to Ward, the latter considered the property as belonging to Mrs. Colburn, and recognized his responsibility to her for its management.

This paper cannot, I think, be received as a

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part of the *testimony of Frederick A. Colburn the witness who produces it, inasmuch as he states that he has no personal knowledge of the fact stated in it. Nor can it be admitted as the testimony of Mr. Ward, who for some reason not appearing, has not been examined on either side. At first I was inclined to think that the paper might be admitted as a declaration of trust on the part of Mr. Ward, the grantee of the real estate in Boston, alleged to have been conveyed in fee to him. But the deed of conveyance from Colburn referred to in this paper, has not been produced, nor has its non-production been accounted for in any way. There is nothing upon which a declaration of trust is to operate, and no legal evidence to show that Mr. Ward was seized of the legal estate, which he declares was subject to the trust in favor of Mrs. Colburn. I therefore consider the objection well taken, and the paper signed by Mr. Ward is not admitted as a part of the testimony in the cause.

Certain letters have been introduced on the part of the defendant, Parker J. Holland, from which the following extracts are taken:

Letter from Mrs. Sarah Dunn Colburn to Mr. James S. Colburn.

Boston, February 16, 1835.

"I notice what you say respecting the new Charleston Bank, which you say is about to be established there, and that Mr. Mordecai and Benjamin wishes me to take from two to five thousand dollars, and let it stand in their name. It may be excellent property, but I do not think it would be as safe as it now is. I should not like to do it. If I did, I should never expect to see either interest or principal. But if you choose it must be done, I must consent. You always told me to take care of it myself, and I think

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* it will be much more safe with me than in Charleston." "I should have sent you an exact memorandum how my property is placed, but Mr. Ward is out of town. I hold all the papers, etc. I wish you would give me some paper so I could hold all the furniture."

Letter from Mrs. Colburn to Mr. Colburn.
Boston, 16th May, 1835.

"I have been thinking that if I could find a good house in the country, I would give up my house in Boston."

"You still wish me to purchase some shares in the new bank, but I would rather not. If you were in want of the money I would let you have it. I know you have got more than I have, and I think the little I have I had better take care of myself. It will be better for both of us for me to keep what I have got under my own control. At any rate, I could not do it without I sold bank stock, as the other money is loaned for one year from this time. Mr. Ward has no money of mine, and I have not any. I know that there will be a time that you will thank me for wishing to keep the money myself. I shall never touch one cent of the principal without your advice. I shall keep it in such a way that no one can get it, let what might occur, but you. If I should die to-morrow, the children could not get one cent of it. It would belong to you."

Letter from Frederick A. Colburn to his father.

Boston, December 31, 1836.

Expresses an intention to enforce his claim for a share of his mother's estate by suit. States that he is informed by Mr. Ward, that his brothers, Ben. and Henry, had written him concerning their share of their mother's estate. Refuses to consent to certain

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payments, out of his mother's *estate to Mrs. Howard and the Turner children. Offers to take \$8,000 for his claim, to be paid partly in cash, and part on credit, and the balance in a pew. Says he cannot make arrangements with Mr. Ward.

Letter from Frederick A. Colburn to his father.

Boston, February 1, 1837.

Acknowledges a receipt of a letter from his father, and says he has written to Mr. Ward and will look to him for a speedy settlement. Says that his father values the pew too high, etc. Adds, that he has seen the letter to Mr. Ward from Ben. and Henry, and expresses pleasure at their having written, and his hope that they will be settled with.

Edward Winslow, a witness for plaintiff, says, that he has known Mr. and Mrs. Colburn for many years, but does not know of Mrs. Colburn having any estate except what by reputation she derived through her family, and had in what was known as the

Prince estate in Boston, consisting of a dwelling-house and an extensive pasture ground. Her mother and herself lived on the place. Witness was very intimate with Mr. and Mrs. Colburn. Never heard a word from either of them, showing a want of affection. Mrs. Colburn lived in much comfort in a fine dwelling-house in Boston, indicating an annual income of \$3,000. He visited her at Jamaica Plains, a resort near Boston, suitable for a person in comfortable circumstances. Mr. Colburn left Boston without satisfying his creditors. Is of the impression that Mr. Colburn told him that he was willing to pay them twenty cents on the dollar, and thinks whatever settlement he did make was made on that basis. Mr. Colburn was not in good credit with the Boston merchants after he left. Is satisfied that he did not regain

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his credit *there. Mr. Samuel D. Ward is a Boston lawyer of respectability and position.

Two letters from James S. Colburn to S. D. Ward are introduced by the plaintiff. The first dated Charleston, August 14, 1837, acknowledges receipt of letter from Mr. Ward enclosing forty-five shares in Bank of United States, with power of transfer. Cost of shares \$5,332.50, for which sum a receipt is annexed for so much paid by S. D. Ward, "on account of money in his hands, intrusted to him by the late Mrs. S. D. Colburn." The letter directs other funds invested in the same way. Gives notice that Mr. Mordecai is authorized to draw on Mr. Ward for \$1,500, and says, "this business was done exactly right and to please me."

The second letter is dated Charleston, October 31, 1837, and acknowledges receipt of certificates of fifty-three shares in the United States Bank, costing \$6,380.25, for which a receipt is given for so much paid by Mr. Ward "on account of money in your hands, intrusted to you by the late Mrs. Colburn."

A petition was filed by James Smith Colburn, in the Court of Ordinary for this District, some time in 1843, in which application was made for letters of administration on the estate of his wife. The petition states that at the time of her death "there stood on the books of the Planters' and Mechanics' Bank, twenty-four shares in the capital stock of said bank, and also three (or six) shares in the capital stock of the Bank of South Carolina." That he was desirous of having the said shares "transferred to him with all the dividends due thereon; but the directors of the said banks refuse to transfer the said shares without administration is taken out on the estate and effects of the said Mrs. Sarah Dunn Colburn." He therefore prays letters of administration on the said estate. On the 28th December, 1843, the said letters

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were granted by the Ordinary. On the 30th of October, 1844, Mr. Colburn, upon receipt

of a circular from the Ordinary, requiring a return, filed an inventory in which the shares in the Planters' and Mechanics' Bank and in the Bank of South Carolina, mentioned in his petition are set down, and the following statement made in respect to other stocks: "There was also standing in the name of Mrs. Sarah D. Colburn, at the time of her death, nine shares in the Union Bank, and three shares in the State Bank, which were transferred to me by order of the solicitors of said banks, as they were my property by right, as there was no marriage settlement. There is no other property to my knowledge." From a memorandum submitted to the Ordinary at the time the inventory was filed, it appears that the value of the shares in the four banks was estimated at \$1,645.

In considering whether the facts presented in the foregoing statement, establish the proposition contended for by the plaintiff and by the defendant, Benjamin P. Colburn, that their mother was possessed at the time of her death, of a separate estate in Boston, there are certain facts derivable from the pleadings which may be considered as admitted by the parties to this controversy. These facts are, that Mrs. Colburn after her marriage with the testator, inherited through her mother, a considerable real estate in Boston, and that she was entitled to no other property in her own right. That the said estate of inheritance was sold during the coverture, and the proceeds appropriated by her husband to his own use. That he was insolvent at or about the time of the said sale and conversion, and thereafter lived separate and apart from his wife in another State. That notwithstanding this conversion, insolvency, and removal, Mrs. Colburn continued for thirteen years to enjoy in the State where her inheritance was acquired, a considerable property undisturbed by her husband's creditors, and independent of his do-

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minion and control. The *natural presumption arising from these facts alone is, that the property enjoyed by Mrs. Colburn in Boston, from the time her husband removed from that city in 1819, to the time of her death in 1836, was in some way connected with her inheritance derived through her mother. It is not claimed that the property so enjoyed by her, was a part of her original inherited estate, and excluding the written declaration of Mr. Ward, there is no direct competent testimony which shows from whom the said property was immediately derived. But notwithstanding this uncertainty, as to the origin of the alleged separate estate, I think it may be assumed from the facts admitted, that the relinquishment by Mrs. Colburn of her inheritance, was not voluntary, but for a valuable consideration, and that the property which she enjoyed from 1819 to 1836, was that consideration. By the laws of

Massachusetts, the real estate of the wife can only be conveyed by the joint deed of the husband and wife, (Rev. Stat. of Mass. Part 2, ch. 59, Sec. 2,) duly acknowledged and recorded. (Fowler v. Shearor, 7 Mass. R. 14.) And it has been held in that State, that the relinquishment by a wife during her husband's life of her estate in lands, is a good and valuable consideration for a conveyance by the husband to the wife, of property which may be considered but a fair equivalent, and such conveyance if not fraudulent, will be valid as against the creditors of the husband. (Ballard v. Briggs, 7 Pick. 533.) As a general proposition it cannot be doubted, that a wife by means of property which she acquires in her own right, may become a purchaser from her husband, and that a post-nuptial settlement of a husband's property upon his wife and children, based upon an actual purchase made in good faith, or for a valuable consideration, will be good against prior as well as subsequent creditors. It would be a violent presumption that Mrs. Colburn without consideration parted with

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her entire estate *at a time when the insolvency of her husband, and his residence apart from her, rendered it almost certain that she had nothing to expect from him in the way of maintenance. Under the circumstances in which she was placed, she was entitled to a settlement out of her property, and the Courts of Massachusetts would have enforced her equity to such settlement, her husband being bankrupt, out of the real property which came to her by inheritance, and such settlement would be valid against her husband and all claiming under him.

In the answer of the defendant Holland, it is stated, that the undivided interest of Mrs. Colburn in the Prince estate, was by the joint deed of husband and wife, sold in 1823. It appears from the testimony that Mr. Colburn had no property in Boston after 1822. The allegation of the answer, therefore, may be strictly correct, that Mr. Colburn never conveyed any property whatsoever in trust by way of substitution for the lands inherited by his wife. This is not directly inconsistent with the presumption that in 1819 he purchased and settled for the interest of his wife in his mother's lands, though the latter was not sold until four years thereafter. Frederick A. Colburn in his testimony says, "at the time my father left Boston, or soon after he left there, which was in 1822, he was deeply indebted and bankrupt." There may have been a reason for securing the purchase by paying the consideration before public insolvency, and for postponing the sale to a period subsequent to his removal from Boston. As long as the interest of Mrs. Colburn in her inherited estate was an undivided one, the legal estate of the husband in his wife's real estate, had not so vested as to be subject by the laws

of Massachusetts to the claim of his creditors.

The answer of the executor states, that the proceeds of the sale of Mrs. Colburn's lands by virtue of the marital rights, vested absolutely in his testator. This being in

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*1823, a year after Mr. Colburn's permanent settlement in Charleston, it may be that the postponement of the sale of the Prince Pasture, and the vesting of the marital rights in the proceeds, had some connection with the purpose of his removal to Charleston, which (according to the statement of Benjamin P. Colburn) was "to mend his fortunes."

The presumption that the property enjoyed by Mrs. Colburn was the consideration for the release of her inheritance, is also consistent with the declaration of her husband, who received the benefit of that release, that he had made provision for the support of his wife and children, "in some way," as expressed in one of the answers, "out of the wreck of his business." I am disinclined to believe that the testator appropriated to his own use the proceeds of his wife's estate, and left her and her children to depend for subsistence on the bounty of strangers; and even if this were possible, it would be scarcely conceivable, that when she had acquired a second estate, he would claim that also, to the exclusion of his children. It is much more probable that Mr. Colburn did make provision out of his embarrassed estate for his family in Boston, and as an equivalent for said provision, received subsequently, and when it could most effectually aid him, the proceeds of his wife's inherited estate. It may be, as suggested by Benjamin P. Colburn in his answer, that his father had "involved in some way, the estate of his mother in his business," and that this was the consideration for the provision made for her. This is perfectly consistent with the presumption, that the property she enjoyed was the consideration for her parting with her estate of inheritance, and with the fact of her enjoyment of said property unmolested by her husband's creditors. In the case last put, Mrs. Colburn would be regarded as a purchaser from her husband, by applying her estate to the payment of his debts, which would be upheld in equity against the claims

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*of his creditors. The interest of Mrs. Colburn in the Prince estate, although not converted by her husband in 1819, when she acquired the property, which she enjoyed during her life, may have been then pledged for the debts of her husband, and if so, it was a present, and consequently, a valid consideration, or inducement for the provision made for her in 1819. And this view is further consistent with the connection of Mr. Ward, either as trustee or agent, in the transactions relating to the property of Mrs. Colburn. He is represented by the testimony as a lawyer

of position and respectability, and as such, cannot be supposed to have participated in the transfer of property by Mr. Colburn to his wife, which would be in fraud of the rights of his creditors. Excluding the paper signed by Mr. Ward, and also the answer of Benjamin P. Colburn, which as to matters in which he has an interest, is not evidence against his co-defendant Holland, and there is no direct evidence as already stated, on the point we are considering. Frederick A. Colburn says in his testimony, that his mother received her share of the Prince estate in real property, and in his answer referring to her separate estate, he says that it consisted chiefly of the sum of \$20,000, which was the proceeds of the sale of her Beacon street house. But he does not state how the latter property was acquired, or in what way it was connected with his mother's share of the Prince estate. If the Beacon street house could be regarded as the inherited real property of Mrs. Colburn, then her husband's estate in said property terminated with his life, and his wife's inheritable issue, including the present claimants, would take by direct descent from their mother. But it is admitted that the Beacon street house was sold in the life of Mrs. Colburn, and sold without her husband joining in the conveyance. He therefore could have had no legal estate of any kind in the property at the time of

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its sale. If he ever did have *such an estate he had divested himself of it, and in so doing, parted with his right to control its disposition, or to subject the proceeds of its sale to any trust, either for himself or for another.

It has been already stated, that there is nothing in the answer of the executor which directly rebuts the presumption that Mrs. Colburn was entitled as purchaser from her husband, to the beneficial interest in the property now claimed to be her separate estate. In fact, the answer gives no information as to how it was derived or from whom derived. It however does distinctly deny that Mr. Colburn "ever covenanted to hold any property whatsoever, in trust for the said Sarah, as a substitute" for the Prince estate, or that he was "trustee for his wife, or his children, by any direct appointment or acts of his own whatever." This I think is true. It is certainly consistent with the allegation that he conveyed the fee in the Beacon street house to Mr. Ward, and left him to declare or act upon any trust that he might consider binding upon him in respect to the said property. That Mr. Ward had the legal power to create a trust therein, for the sole and separate use of Mrs. Colburn, cannot be doubted. It is, however, contended that no such trust is evidenced by writing, and, therefore, none can be held to have been created in the Beacon street house. Excluding the paper of Mr. Ward, offered in

claim; i. e., it may be conceded that there is no writing by which such a trust is manifested in respect to the said real property. There is certainly nothing which shows that Mr. Ward held in trust for Mr. Colburn, after the termination of a beneficial life-estate for his wife. But there is evidence that the rents and profits of the said property up to the time of its sale, were applied by Mr. Ward to the separate use of Mrs. Colburn. This Mr. Ward had a right to do, considering the property as his own, unincumbered

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with any trust. He also had the right to dispose of the said house. The power to sell was an incident of his legal title, and Mr. Colburn having conferred the title, those claiming under him cannot dispute the exercise of the power. The sale by Mr. Ward, and the investment by him of the proceeds in stocks and securities for money, did not change the legal estate. It remained in Mr. Ward, and the question is, did he hold the said substituted personality in trust for the sole and separate use of Mrs. Colburn?

I conceive it to be a well settled doctrine of this Court, that personal property of any description, may be limited to the use of a married woman. But "whether that use shall be separate or not, and whether her husband shall be barred of the interest which the law gives to him in the possession of his wife, depends altogether on the intention of the donor." When that intention is once ascertained to be, that the use is for the wife alone, and not for her husband, equity will give effect to it without any regard to the legal maxim, that "the husband is the head of the wife, and therefore all she has belongs to him." There is another rule equally well settled, that a valid trust of personality to the separate use of a married woman, may not only be created but established, and proved by parol. Who, then, was the donor of the personal property which it is claimed constituted the separate estate of Mrs. Colburn? Was it Mr. Ward? Then his intention is a proper subject of inquiry—in view of the fact that the absolute legal title was in him, subject to a trust which has not been clearly established. It is certain that Mr. Ward claimed no beneficial interest for himself. This he has never claimed, and his management of the property rebuts any presumption of that kind. He may have continued to hold the legal estate in his own name, and probably did until her death: for upon the happening of that event, he was enabled, without ad-

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ministration, to transfer the property to another person, and to another State. But it is clear, that during the life of Mrs. Colburn, he managed the estate for her sole and exclusive benefit. He accounted to her for the income, and paid it over to her until her death for her separate support and maintenance. Upon her death he recognized the

claim of one of her children, to a distributive share of the said property, and paid it over to him; and upon transferring the residue to her husband, required and obtained receipts from him which expressly declared that the fund had been "intrusted to him (Ward) by Mrs. Colburn." The fact that Mr. Ward, after settling with Frederick A. Colburn, for his share in his mother's estate, remitted the balance to Mr. James S. Colburn, at Charleston, is relied upon as showing that he did not consider himself as a trustee of Mrs. Colburn. But the answer to this is plain. Before sending the fund to South Carolina, he paid the claim of the only son of Mrs. Colburn, who was then residing in Massachusetts, and sent the balance to the father, with whom the two other sons were living, and to a State, the law of which was to govern the distribution. He knew that these sons were then claiming or had claimed, under the laws of South Carolina, their shares in their mother's estate, and unless he distrusted the ability or integrity of their father, which there is nothing to show, he could in no way have so effectually aided the present claimants in the assertion and recovery of their rights, than by sending the fund out of a State, where the right of the husband to the entire personal estate of the wife is upheld, and by remitting it to a jurisdiction where the rights of the children, as distributees, would be recognized, and where they could most conveniently enforce their claim.

If Mr. James S. Colburn is to be regarded as the donor of the property, the use of which his wife enjoyed in Boston, then the question

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as to his intention becomes a more important one than it would be if the trust had been created by a stranger. For it cannot be disputed that a husband may make a provision for the maintenance of his wife living apart from him, without relinquishing the title in his marital right to the property which is the subject of the provision. The rule seems to be, that if the husband, by his acts or his declarations, furnish clear and incontrovertible evidence that he intended to divest himself of the title to the property enjoyed by his wife, and that her right to a separate estate therein, was recognized by him in intention and fact, this will alone be held to vest in her as against him and all claiming under him as volunteers, an unimpeachable and exclusive right of property. (Roper on Husb. and W. p. 134-139.) We have indicated the opinion that the legal title of Mr. Colburn to the property enjoyed by his wife, was divested by his own act, not as a voluntary gift, but for a consideration, which was valid against him and against his creditors. In this view of the case, the question of intention is not material. But upon the supposition that it was a voluntary gift, the intention is a proper subject of inquiry. If it be plain that the husband intended to sur-

render his entire interest by a clear irrevocable gift, and allows his wife to apply the property to her own separate use, it will be considered in equity as her separate estate. (Story's Eq. J. §§ 1374, 1375, and cases cited in notes.) It is certain that during the life of Mrs. Colburn, her husband asserted no claim to the funds in Boston, and exercised no act of dominion over them. It appears from the correspondence between himself and wife, that the funds were invested in public stocks and securities for money. He did nothing to reduce these into possession, either by requiring a transfer into his own name or otherwise. He permitted her to enjoy them under circumstances which, by the laws of Massachusetts, subjected them, even if they

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stood in his own name, to her *control and disposal, and to all the incidents of legal ownership in herself during his absence from that State. (Rev. Stat. of Mass. chap. 17, p. 485.) His desire to call in these investments and substitute stocks in Charleston, for those held in Boston, was not accomplished, owing to her objection to the removal of the fund, and to her judgment being opposed to the change of investment proposed by her husband. In the letters of Mrs. Colburn, to which the above allusion refers, there are expressions which are supposed to be inconsistent with the fact of her having a separate estate, "independent of the ultimate control and power of her husband." In the letter to her husband dated 16th May, 1835, referring to the proposed removal of a portion of the fund to Charleston, she uses this language: "I know there will be a time that you will thank me for wishing to keep the money myself. I shall never touch one cent of the principal without your advice. I shall keep it in such a way that no one can get it, let what might occur, but you. If I should die to-morrow, the children could not get one cent of it. It would belong to you." There seems to me to be necessarily involved in this language, the assumption on the part of Mrs. Colburn, that the property to which she refers, was her separate estate. If not, how could its removal from Boston to Charleston affect her husband's right to it upon her death? If the property was his and not hers, he would be entitled to it as well in the latter as in the former place. But if her separate estate, then, by the laws of Massachusetts, the husband alone is entitled in right of his wife, to her entire personal property; while in South Carolina, her children and her husband take as distributees. This she urges as a reason for not consenting to the removal of the fund, and the expression, "I will hold it in such a way that no one can get it * * but you," manifestly refers to her retaining it in Massachusetts, where she

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very naturally but erroneously supposed it would be subject upon her death to the laws

of that State regulating the distribution of a wife's separate estate. That Mr. Colburn consented to the payment, by Mr. Ward, to Frederick A. Colburn, of \$5,000, as his share of his mother's estate, is evidenced by the letters of the latter, in which he proposes terms of settlement to his father, and discusses with him the value of a pew in Boston, which was to be taken in the said settlement. The acquiescence of James S. Colburn in the payment of his son by Mr. Ward, is further manifested by his letter to the latter after said payment was made, in which he expresses his satisfaction in these words: "this business you have done exactly right and to please me." There is one other fact already referred to which I think is conclusive on this point. The two receipts of Mr. Colburn, to Mr. Ward, for the surplus of the fund remitted to Charleston, expressly state that the amounts so remitted, were "on account of money in his (Ward's) hands, intrusted to him by the late Mrs. Sarah D. Colburn." It seems to me that all the acts of Mr. Colburn before, and immediately after the death of his wife, evinced his concurrence in her being sole owner of the property in Boston, and after a careful consideration of the testimony, the conclusion that it was, in some way, her separate estate, is to my mind irresistible. I find that the value of the said estate at the time of Mrs. Colburn's death was \$20,000.

It is alleged that Mrs. Colburn had a separate estate in Charleston as well as in Boston. This is based upon the fact that at the time of her death there was standing in her name certain stocks in several banks in this city. The answer admits the fact alleged in the bill, except as to an error in the statement by the plaintiff of the number of shares in the Planters' and Mechanics' Bank. The evidence sustains the answer, that there were only twenty-four shares in that bank, instead

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of forty-four as charged by *mistake in the bill. The origin of these investments is involved in even more obscurity than that of the property in Boston. The pleadings give no information as to when or by whom the investments were made, nor to whom the dividends were paid, and the testimony is entirely silent on the subject. But this, I conceive, is not important. The fact that the stock was in Mrs. Colburn's name, is prima facie evidence that they belonged to her, and this has been held sufficient to establish a separate estate in the wife. (Wildman v. Wildman, 9 Ves. 164; Dunning v. Pitcher, 5 Shm. 35.) There is no evidence that this stock was ever vested in Mr. Colburn, and it is clear that he did no act during the life of his wife to reduce it into possession. It is argued that the fact of Mr. Colburn taking out letters of administration, on the estate of his wife, amounts to an admission on his part, that the said stocks belonged exclusive-

ly to her. Whatever may be the legal consequences of an administration by the husband, I do not think that the grant to Mr. Colburn can, in itself, be regarded, under the circumstances of this case, as an admission by him that the stock was the separate estate of his wife. This presumption is rebutted by the fact that his petition for said letters in 1843, states that his purpose in making the application was to have the stocks "transferred to him with all the dividends due thereon." And his subsequent acts as administrator, show that his sole object in taking out administration, was to aid him in converting the stock to his own use as husband of the deceased. In the second petition of Mr. Colburn to the Ordinary, dated the 27th of March, 1858, he claims to be entitled to the entire estate as sole heir and distributee of his wife. It may be remarked in respect to this petition, that if Mrs. Colburn did not die seized of a separate estate, her husband could not take as heir or distributee. Or if it be held as suggested in the answer of his execu-

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tor, that by this language *he intended to claim in his marital right, then this involves the admission that the stock was once hers, and no frauds against his rights as husband being alleged in respect to the investment in her name, the fact of his not having reduced them into possession during her life, is equally fatal to his claim. I find that Mrs. Sarah Dunn Colburn was entitled, as of her separate estate, at the time of her death, in addition to the Boston fund of \$20,000, to the following bank shares in Charleston: 24 shares in the Planters' and Mechanics' Bank; 6 shares in the Bank of South Carolina; 9 shares in the Union Bank; and 3 shares in the State Bank. And that the value of these shares, according to a memorandum furnished by the administrator to the Ordinary at the time of filing the inventory of the estate, was \$1,645.

Having thus affirmatively disposed of the question, whether Mrs. Colburn was possessed at her death of a separate estate, the next inquiry under our first head is: Upon whom did the said estate devolve upon her decease? And this depends solely upon whether the State of Massachusetts or of South Carolina is to be regarded as the domicile of Mrs. Colburn. The bill alleges that Mrs. Colburn in leaving the State of South Carolina, in 1819, had no intention of changing her domicile, nor did she ever abandon her intention of returning to that State. The answer of the defendant, B. P. Colburn, corroborates this statement of the bill. He says that his mother considered Boston as a temporary residence, for the education of her children, and looked forward to her return to Charleston, where she expected to pass her latter days. The answer of the executor denies that Mrs. Colburn ever intended to return to South Carolina, and states that she on the contrary

frequently expressed her intention never to return, although frequently requested so to do by her husband. Whatever may have

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been the intention of Mrs. Colburn, *it seems to me to be unimportant. It is the intention of the husband that governs. His domicile is the domicile of the wife. The fact that Mr. and Mrs. Colburn lived apart for fourteen years, did not make them any the less husband and wife. They were never loosed from the matrimonial bond. They might at any time again live together. The domicile of Mr. Colburn was undoubtedly Charleston, and though his wife may never have intended to return to that city after she left it, this could not change the legal relations growing out of the marital state. Another principle equally well established, is that the devolution of personal property, follows the law of the domicile, and South Carolina being in law the domicile of Mrs. Colburn, her estate was distributable according to the laws of that State. Mrs. Colburn left surviving her a husband and three children. Two of the latter are the plaintiff and the defendant, B. P. Colburn, and I find that they were each entitled upon the death of their mother to two-ninths of her estate.

2. If the present claimants were entitled upon the death of their mother to distributive shares of her estate, are they now precluded from asserting their claim by lapse of time, or other matter subsequent thereto?

The bill states that after the death of Mrs. Colburn, her husband without administering upon her estate, received from Samuel D. Ward, directly or indirectly, the sum of fourteen or fifteen thousand dollars as a part of her estate. That a considerable portion of this sum was remitted to Mr. Colburn by his direction in scrip of the capital stock of the United States Bank at Philadelphia. That he further possessed himself without administration of certain bank stock in Charleston belonging to his wife. But the Planters' and Mechanics' Bank and the Bank of South Carolina, refusing to pay him the dividends arising from their stocks without administra-

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tion on the estate of his *wife, he some time in the year 1844, applied to the Ordinary of Charleston District, for letters of administration, to which application the plaintiff objected, but the Ordinary, notwithstanding said objection, granted the application. That on the 30th of October, 1844, an inventory was filed by the said administrator which made no reference to the moneys received from Samuel D. Ward. That three accounts were subsequently filed by him, one on the 30th of October, 1844, one on the 30th October, 1847, and the last on the 14th of July, 1853. These accounts disclosed no indebtedness whatever on the part of the intestate. At the time of making the last account the administrator made a declaration in writing, that the whole

estate belonged to him, and that he in his own right had consented to receive the same from himself as administrator. Afterwards, on the 27th of March, 1858, he applied to the Bank of South Carolina and to the Planters' and Mechanics' Bank, to transfer to him the stock standing in the name of his intestate, but this the said banks refused to do without authority from the Court of Ordinary, and he then filed his petition to the said Court, stating such refusal, and that he had rendered annual accounts, "exhibiting a settlement of said estate with parties interested," and of which estate he the petitioner "was the sole heir and distributee," and further stating that "to complete a settlement of these assets with parties interested, it was necessary to make a sale and transfer of said shares." The bill further states, that J. S. Colburn, on the 5th of May, 1859, executed a certain paper purporting to be a deed, which was never delivered, conveying to the plaintiff in consideration of the sum of five thousand dollars, which the said plaintiff never paid or promised to pay, certain land in the State of Massachusetts, to which the said J. S. Colburn never had a title. The only advantage which the plaintiff states he expects to reap from this writing, is what may re-

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sult from an *acknowledgment of indebtedness by the maker, to the extent of the consideration named therein.

The executor, Parker J. Holland, states in his answer that he has heard that his testator was possessed of certain shares in the United States Bank, and that the whole of the money so invested was lost in the failure of that institution, but he does not admit that the money invested in said shares had any connection whatever with the supposed separate estate of Mrs. Colburn. He admits that J. S. Colburn possessed himself of the shares in the Union Bank and State Bank before administration, and that the said banks made the transfer upon the following certificates of the solicitor of one of said banks, and of the defendant, B. P. Colburn:

"Mr. Colburn can have the shares transferred into his own name, he being legally as husband entitled to them.

"(Signed)

Wm. Lance,

"Solicitor."

"I certify that there was no marriage settlement, either before or after marriage, between my father, James Smith Colburn, and my mother, Sarah Dunn Colburn, and that there is no claim on the part of myself or any other member of the family to prevent his marital rights attaching on certain shares in the Union Bank of South Carolina, standing in the name of my said mother, (now deceased,) which shares can be transferred to my father in his own name

"(Signed)

B. P. Colburn.

"Charleston, November 10, 1837."

The executor admits that Mr. Colburn filed his petition for administration in the latter part of 1843, in which he stated that certain shares stood in the name of his wife on the books of the said banks, and that he wished

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the shares *transferred to him with all the dividends due thereon; and that the directors of the said banks refusing to transfer the same to him, unless he took out letters of administration, he applied for the same. That the application was opposed by the plaintiff, but the letters notwithstanding, were granted on the 28th of December, 1843. The answer states that on the 23d of January, 1844, James S. Colburn transferred the twenty-four shares in the Planters' and Mechanics' Bank into his own name, in which they continued until the 3d of September, 1851, when they were sold and the proceeds converted to the use of the said J. S. Colburn. On the 25th of October, 1844, the administrator was called upon by a circular from the Ordinary, to make a return of the said estate, and that in obedience to said mandate, he filed an inventory on the 30th of October, 1844, in which he states the fact of the transfer to him, without administration, of the stock in the Union and State Banks, and alleges as the ground of said transfer that the said stocks were his property by right, there being no marriage settlement. He also returned the shares in the Planters' and Mechanics' Bank and the Bank of South Carolina, stating that the said banks would not transfer them without letters of administration. He further stated in this return that there was no other property to his knowledge. On the said 30th of October, 1844, the administrator rendered to the Ordinary his first account, in which he charges himself with the dividends received on the Planters' and Mechanics' Bank stock, and on the Bank of South Carolina stock, from July, 1834, and made oath "that he had received no other money on account of the estate of Sarah D. Colburn, than as therein credited." Similar returns were made on the 7th of October, 1848, and on the 14th day of July, 1853, at which last date there was a balance in his hands of dividends amounting to \$1,596.92. To his last return the administrator deposed

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*that the entire assets of said estate had long since vested in and exclusively belonged to him, and that he as administrator had assented to and received the same in his own right, and "that the accompanying certificates (referring to the certificates of Wm. Lance, Solicitor, and B. P. Colburn, already cited) will further confirm the above statement; that in all other respects the assets of said estate were fully administered and settled, and prays the same may be so declared." Upon which affidavit and declaration the Ordinary made the following entry:

"I do hereby certify, that I have this day examined the foregoing account; that James Smith Colburn, administrator, upon his oath, declared that he had received no other monies on account of the estate of Sarah D. Colburn, deceased; and as appears by annexed affidavit and certificate, that annexed account is a true statement of the actual condition of funds therein stated, and that the same be declared to be fully administered and settled, and that he acknowledges the receipt in his own right, of all the estate mentioned in the return.

"Final settlement.

"George Buist, O. C. D.

"14th July, 1853."

On the 27th of March, 1858, J. S. Colburn presented in the Court of Ordinary a petition, in which he states that "an inventory of said estate has been filed for record, and annual accounts rendered, exhibiting a settlement of said estate with parties interested, and in which your petitioner was the sole heir and distributee. That the assets of said estate consisted of six shares in the capital stock of the Bank of South Carolina, also, of forty-four shares in the Planters' and Mechanics' Bank, held in the name of the said intestate, Sarah D. Colburn; that to enable

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your petitioner to complete a settlement of the assets with parties interested, it is necessary to make sale and transfer of said shares, but the said banks object and refuse so to transfer without the sanction and order of a competent Court, and he is advised, it is now required by law, to authorize a legal sale and transfer, and prays the grant of proper orders of sale." Upon this petition, an order was made by the Ordinary, granting leave to the administrator to sell and transfer the six shares in the Bank of South Carolina, with directions that "the account sales thereof be filed for record in said office." No account was ever filed. The defendant, Holland, states, that under this order the said shares were sold by the administrator, who possessed himself of the proceeds thereof.

The executor of James S. Colburn, submits as to the Boston property, that the lapse of time which has intervened between the death of Mrs. Colburn, (1836,) and the date of the present claim, (1859,) is amply sufficient to protect the estate of his testator, and is a complete bar to such antiquated claim. And he pleads the statute of limitations as to so much of the claim of the plaintiff as refers to the property which came into his, testator's hands as administrator.

B. P. Colburn states in his answer, that the money received from Mr. Ward by his father, and the stocks in Charleston, of which he got possession, were applied by his father to his own use. He remembers there was some difficulty at one time about the stocks, and his father obtained from him his

signature to some paper, but what said paper was, or its intent and purpose, "he does not venture to answer from memory." A letter from B. P. Colburn to his father, dated July 29th, 1841, has been introduced, in which the writer says, Frederick has "received his full proportion of my mother's estate, when your investment of our proportion (referring

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to the shares of his *brother John H., and himself) has allowed it to be swallowed up in the destruction of the United States Bank."

It is manifest that James Smith Colburn, from his wife's death in 1836, to his own death in 1859, a period of twenty-three years, claimed the separate estate of his wife as his own. This is evidenced by his opposition to the claim of his son Frederick, for a distributive share of the said estate, and by his appropriation of a part of the said estate to the payment of a personal obligation to Mr. Mordecai, while the property remained in Boston. After the fund was transmitted to Charleston, he asserted his right to it, by transferring into his own name, the United States Bank stock, in which form the remittances, by his direction, were made by Mr. Ward. As to the stock in the Charleston banks, standing in the name of his wife, he claimed title in himself when, in 1837, he asserted his right to the said shares, and caused a portion of them to be transferred into his own name. In short, he from the first, and during the whole period of twenty-three years, assumed to be the owner of, and acted upon the assumption that he was entitled to both the Boston and Charleston property. If Mr. Colburn can be considered as a mere stranger, occupying no fiduciary or other trust relation to the property or to his co-distributee, and if he had immediately upon the death of his wife, converted her entire estate to his own use, without seeking the aid of the law to effect said conversion, it seems scarcely to admit of doubt, that under such circumstances, his title, by lapse of time, would have been perfected against the present claimants, provided they were under no disability, and with full knowledge of their father's claim had acquiesced in it up the filing of the bill. In 1837, both the plaintiff and the defendant, Benjamin P. Colburn, were of full age, and knew that their father claimed to be entitled to the Boston estate of their mother. The former states in his bill, that he discontinu-

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ed *the prosecution of his claim for a distributive share of said estate, upon being told by his father that the same belonged to him. And as to the Charleston bank stock, he knew in 1843, when he opposed the application of his father for administration, that a portion of the shares had already been converted by him to his own use, and that the sole object of the application was

to enable him to convert the rest. All this was stated in the petition for administration which the plaintiff was opposing, and which opposition he states in his bill was made, not expecting to derive therefrom any advantage, inasmuch as he then believed his father's declarations that they belonged to him. As to Benjamin P. Colburn, the evidence of notice is, if possible, still more clear. He was of age at the time of his mother's death, and, together with the plaintiff, asserted his claim to a distributive portion of the estate in Boston, and then abandoned it. He states in his answer that upon the death of his mother, his father represented and claimed that the estate was his own. Acting upon this representation, the said defendant signed a certificate that the Union Bank stock belonged to his father in his marital right, and by said certificate he effectually aided in obtaining for him, both from the said bank and from the Ordinary, a recognition of that right. It seems to me to be incontrovertible that the present claimants have for twenty years slept upon their rights, and permitted the claim of their father to the entire estate to be asserted without protest or interference on their part, and his enjoyment of the property under said claim to continue undisputed up to the time of his death.

Here, then, is a case, of persons of full age and under no legal disability, knowing that another held the possession and claimed to be the owner of their property, not only assenting to such possession, but aiding him in the assertion of the right of ownership.

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If the case rested upon *these facts alone, it would fall within the rule of equity, as well as of law, that where one having interest or title, acquiesces knowingly and freely in the possession and beneficial enjoyment of his property by a person pretending to title, he shall be bound after the lapse of four years.

But the plaintiff and defendant endeavor to withdraw themselves from the operation of this rule, by claiming as cestuis que trust, and relying upon the general doctrine of this Court, that an express trust will not be barred by any length of time, there being in such case no adverse possession in the trustee. And cases are cited in which accounts have been decreed against trustees, extending over periods of thirty and forty years. One of these cases, *Wedderburn v. Wedderburn*, (2 Keen, 749,) is specially relied upon. But in that case the familiar distinction was clearly recognized both by the Master of the Rolls and the Lord Chancellor, that if the trustee, with the full knowledge and consent of the cestui que trust, has divested himself of that character, and the person beneficially interested was aware of his rights, and informed of all the particulars of the trust transactions, his acquiescence for twenty years will be a bar to his remedy in this

Court for an account. Although Mr. Colburn can in no view of this case be regarded as charged with the execution of an express trust, but of one created by implication of law, in which the plea of lapse of time is more readily admitted, still applying the rule as applicable to express trusts, and it seems to me that in this view of the case the claimants have lost their right to the relief which they seek. We have already seen that from 1836, Mr. Colburn held adversely to his children, and that from 1837, they were both in a situation to become acquainted with their rights, and from that time to the filing of the bill in 1859, they acquiesced in being deprived of them by their father. It is said that here, as in the case of *Wedderburn v.*

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Wedderburn, "the title is still in dispute," and that, therefore, there could have been no such acquiescence as would bar the claimants' rights.

The title in the cestuis que trust in the case cited, depended upon the result of a complex partnership account, which had never been settled, and which they had never been in a situation to investigate, and therefore acquiescence on their part was impossible, and time as a bar, could only run from the commencement of such acquiescence. But in the present case, there never has been any such dispute as to the title. It depended on no account to be taken; and upon no state of facts the knowledge of which the present claimants did not possess. Upon the death of Mrs. Colburn, the means of ascertaining the value of her estate, and of what it consisted, were as available to them as to their father. They had an immediate possessory title to the same interest in her estate, and to the same extent as their brother in Boston had. They knew of his claim as a distributee, and of its recovery by him. They preferred their own claim in the same right as distributees, and with all the facts which were necessary for the assertion of that right within their reach, they voluntarily abandoned their claim. Assuming that Mr. Ward was the trustee of Mrs. Colburn, he must be considered after her death as a mere dry trustee, with the simple and obvious duty of making division himself among her distributees, or of paying over the estate to her administrator to be distributed by him. Mr. Colburn in receiving the Boston fund from Mr. Ward without administration, became by construction of law a trustee for his co-distributees, and there was nothing to prevent the present claimants from requiring him to account in this Court for their shares in said estate. It is true that where there is no administration, suit can neither be maintained at law nor in equity against an estate. But the claimants had it in their power to require Mr. Colburn as next of kin of his wife to adminis-

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ter, and if he declined *doing so, to administer themselves. The case then is simply this: one of several distributees takes and holds possession professedly for himself alone. His co-distributees are fully informed of their rights, and are under no disability, and failing to assert their claim within four years, the later authorities seem to hold that their remedy will be barred. And this appears to be the law applicable to constructive trustees, even when they obtain title in themselves through the practice of fraud. In a recent case decided in this Court, *Read v. Read*, [8 Rich. Eq. 145,] in which the representatives of a trustee are required to account after a lapse of over forty years, the Chancellor who pronounced the Circuit decree clearly maintains the doctrine which we have applied to this case. In commenting upon the plea of the statute of limitations as a bar to an account claimed against a constructive trustee, he says, "where one gets the title of property in himself through the practice of fraud in any of its innumerable shapes, * * there is an open denial of the rights of the cestui que trust, and an assertion of adverse title. And if in such cases the cestui que trust advertised that the security of his title is assailed, and being under no legal disability, fails to vindicate it with reasonable diligence, he cannot justly complain that the individual interest to which he is so indifferent, is made to yield to the demand of society, *ut sit finis litium*."

But it is contended that the administration granted to Mr. Colburn in 1843, related back to the death of the intestate, and that he is therefore to be considered as having taken the Boston fund, and the shares in the Union and State Banks, which he had converted before the grant of administration, in his right as administrator, and that he incurred all the disabilities and responsibilities incident to that character, in respect to the said property. Assuming that the administration of Mr. Colburn in December, 1843, related back to the time of the death

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of his intestate *in 1836, so as to impose upon him all the duties and responsibilities of a direct technical trustee, in respect to the assets received by him during the intervening period of seven years, it still seems to me that the principles which have been already stated, are applicable to the case of one against whom an account is claimed in his character as administrator. The rule seems to be, that as long as the relation of trustee and cestui que trust, or of administrator and distributee, is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief. But when either of these relations ceases to exist, or where the trustee or administrator does some act by which he renounces

his trust character, of which the cestui que trust have full notice, so as to put them on their remedies, and there is no disability or other impediment in the way of their enforcing their rights, in all such cases, this Court will act in obedience to the statute of limitations, and refuse relief after four years of delay wholly unaccounted for. In *Spann v. Stewart*, (1 Hill Eq. Rep. 326,) the Chancellor says, "whether a husband who is also administrator, has effected a reduction, depends, I conceive, on this: Has he, by discharging or by throwing of his trust, freed himself from accountability under it for the property in question? Has he rendered the property no longer trust property? Then he holds it in his own right. If he has openly denied his trust character, and openly asserted an adverse holding, and the Act of Limitations has barred the cestui que trust, he holds the property as his own." Every circumstance here indicated as necessary to constitute a reduction into possession by a husband who is also administrator, is to be found in this case. Mr. Colburn openly denied his trust character in respect to the Boston property, and the stock converted before administration, and by that conversion, rendered the property no longer trust

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*property. He asserted publicly an adverse holding by not including in his inventory, the fund received from Mr. Ward, and by declaring that he claimed as owner, and had transferred into his own name, the stocks of the Union and State Banks. And all this the present claimants knew at the time the administration was granted, and acquiesced therein for seventeen years after the said grant. But the doctrine that administrations relate back to the death of the testator, is a legal presumption in favor of creditors and distributees, and like other presumptions of this character, may be rebutted by proof. Such proof I think is furnished in this case. Although the letters of administration are in their terms general, it is manifest that the object of the application by Mr. Colburn was limited to certain specific effects of the deceased, and intended solely to effect a reduction into possession by the husband, of the choses in action of his wife. It has occurred to me, that the construction given to the Act of 1824, that an order from the Ordinary is necessary, to authorize a transfer or sale of bank stocks standing in the name of an intestate, may sometimes operate so as to do injustice to the true owner who, to secure his rights, is compelled to sue out letters of administration, and thus subject himself to the rule, that an administrator cannot set up an adverse title in himself against that of his intestate. But it is not necessary to consider whether this construction be correct or not. The claimants are not entitled to the benefit of this rule as applicable to the property

converted by the administrator before the grant. They admitted the adverse title of their father, aided him in asserting it, and it would be most inequitable for them to claim the advantage of a rule after the death of the administrator, which they never asserted during his life. The inventory of Mr. Colburn, as administrator, contains no reference to the stock of the United States Bank, in which the Boston fund was invested.

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That *this had been lost in 1841, two years before the grant of administration, is evidenced by the letter of B. P. Colburn, in which he refers to the investment of his brothers' and his own share in their mother's estate, and their loss by said investment. Certificates of ninety-five shares in the said bank have been produced by the executor of Mr. Colburn, and they correspond in number and date with those transmitted by Mr. Ward, and are doubtless the same. Mr. Colburn might well have supposed that he was justified in excluding these from the inventory of his wife's estate, as they had been lost, and the loss had been acquiesced in by the present claimants. They appear to have relinquished their claim to the said shares, and to the extent of their interest therein, they were no longer the property of the estate. And so as to the stock in the banks of Charleston, sold in 1837, B. P. Colburn had assented in writing to his father's claim, and the plaintiff had interposed no objection to the conversion by him, and he may well have regarded his title as unquestioned by them. Had Mr. Colburn been able without the authority of the law to reduce into possession, all the stock standing in the name of his wife, it is almost certain that he would have done so, and if no objection had been made by the claimants, their right would have been undoubtedly barred. He did succeed in reducing a large portion of the estate without that aid, and I think the claimants', acquiescing in his doing so, are barred in respect to so much as was so converted, viz., the fund received from Boston, and the Union and State Bank shares—and I so find.

It has not been seriously urged before me, that the quit claim deed of Mr. Colburn to the plaintiff of certain lands in Massachusetts, is to be regarded as an acknowledgment of indebtedness in respect to the Boston estate. If it be true, as alleged, that Mr. Colburn had no title to the said land, it is not perceived how the assignment of all one's

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right to *a mere figment, can be regarded in law any more than in morals, as an adequate acknowledgment of an obligation of any kind.

As to the bank stocks, which were the subject of the administration, there are principles which I conceive do not apply to the property previously converted, and which must be considered in determining the question of the bar of the statute in respect to

the said stocks. Mr. Colburn applied for, and obtained the authority of the law to take the stock of the Planters' and Mechanics' Bank, and of the South Carolina Bank, as administrator of his wife. In this he admitted that they belonged to her, and consented to take as administrator, the title which the law conferred upon him as such. To enable him, therefore, to hold adversely, there were certain acts which as administrator, were necessary on his part, before the statute would begin to run in his favor. The inventory filed on the 30th October, 1844, acknowledges as then standing in the name of Mrs. Colburn, twenty-four shares in the Planters' and Mechanics' Bank, and six shares in the Bank of South Carolina. The accounts filed by the administrator up to 1st July, 1853, show the receipt of dividends on said stock, amounting to \$1,596.92. But there is no admission in these accounts that the stocks themselves had been sold, and there does not appear to have been any order for their sale up to the time of the last account. The answer states that the stock in the Planters' and Mechanics' Bank was transferred into his own name by Mr. Colburn, in January, 1844, and was sold by him in September, 1851; but there is nothing in the accounts which sustains this allegation. On the 14th July, 1853, an affidavit was made by Mr. Colburn to the correctness of his accounts, and that the entire assets of the estate had long since vested in, and exclusively belonged to him; and that he had assented to receive the same in his own right; and that in all

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respects *the assets of the estate were fully administered. In verification of this affidavit, he submits the certificates of the solicitor of the State Bank, and of B. P. Colburn, to the Union Bank, both given in November, 1837, and which had been obtained to effect the transfers then made of the stocks in said banks. Upon this evidence the Ordinary certifies to the following facts: That the said administrator had declared upon oath that he had received no other moneys on account of the estate of Sarah D. Colburn; that his accounts rendered contained a true statement of the actual condition of the funds therein stated: that the administrator had upon oath declared that the estate was fully settled, and that he acknowledged receipt in his own right, of all the estate mentioned in his return. To this certificate the Ordinary adds the words, "final settlement." It is evident that the affidavit of Mr. Colburn, upon which was based the certificate of the Ordinary, was inaccurate in several particulars. His accounts were not correct if he had sold at that time the Planters' and Mechanics' Bank stock, as alleged in the answer, and there was no entry in the accounts, showing that he had received the proceeds of sale from himself, or that the assets had vested in him. The certificates filed by him as verifying his statement, that

the "assets had long since vested in and exclusively belonged to him, and that he as administrator, had assented to and received the same in his own right," do not confirm this statement. The certificates were given for a different purpose, and fifteen years before, when the stocks in the Union and State Banks were transferred. The certificate of the Ordinary settles nothing except the fact that the administrator declared that he had received no other moneys on account of the estate, and that the estate was finally closed. But it is manifest that the estate was not settled when the final account was rendered. No account had been then rendered of the

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sale of the Planters' and *Mechanics' Bank stock; and on the 27th of March, 1858, a petition was filed by the administrator praying that the stock in that bank, and in the Bank of South Carolina, might be sold to complete a settlement with parties interested. And an order was thereupon made directing a sale of the shares in the Bank of South Carolina, and directing the account sales to be filed in said office. But no such account has ever been filed. Nor does anything appear in the Ordinary's office that the Planters' and Mechanics' Bank stock, or Bank of South Carolina stock was ever sold. It is not sufficient that an administrator in claiming adversely to his testator, should simply declare his intention to do so. He must do some act by which the trust property is changed, and the evidence of such act must appear upon the records of the Court of Ordinary. And further, the act to effect a reduction must be such as to change the property in the choses in action, or in other words, it must be an act which divests the legal title of those claiming under the wife, and which makes that of the husband absolute. On this ground it has been held that "where the subject of the assignment was stock, in the public funds, and the legal title was not completed by a transfer, or where it was India stock, or shares in an Insurance Company, the legal interest in which had not been transferred by the regular mode, the transaction was regarded as imperfect and incomplete." (Note to Hill on Trustees, p. 85.) In the present case, excepting the declaration of the administrator that he had received the fund, there is nothing which shows that the Planters' and Mechanics' Bank stock, and the Bank of South Carolina stock, are not now standing in the name of Mrs. Colburn. There is certainly nothing in the Ordinary's office, and there is no other evidence before me. In the language of this Court, in the case of Spann v. Stewart, "it is very little to require of a

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husband who wishes as administrator *to convert to his own use, the estate of his wife, that he should account on the estate first." As to the capital of the stock in the Planters' and Mechanics' Bank, and the Bank of South

Carolina, the administrator has not accounted, and, therefore, he has not ceased to be accountable. In 1858, the estate was not closed, so far as these stocks were concerned, and four years had not elapsed at the time of filing the bill. The accounts, however, show that at the time of making his last return, the administrator had received dividends on the said shares amounting to \$1,596.92. This sum he had already converted to his own use, and his declaration, in 1853, amounts to notice of the fact that he held the said dividends as his own, and that he had changed the trust character of the fund to this extent, and thereafter, he held adversely to the distributees. I am aware that this Court has recently expressed great reluctance to admit the ex parte accounts of administrators as evidence of a final settlement, so as to bar distributees; and the clearest and fullest statements on the part of the administrators will, I suppose, be required hereafter, before the statute will be held to begin to run in their favor. In fact, I do not see why a public citation to all interested, may not be required in cases where administrators claim for their final account, the effect contended for in this case. But the rule seems to me to be clear that an account for rents and profits is limited in this Court for four years by analogy to legal limitation, and I therefore must hold that as to the dividends returned, the claimants are barred.

I find that the plaintiff and the defendant, B. P. Colburn, are entitled to an account from the executor of the administrator, of the shares standing in the name of Mrs. Colburn in the Planters' and Mechanics' Bank, and in the Bank of South Carolina, with the dividends accruing thereon since July 1st, 1853, when the last account of the administrator was filed.

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*3. The last question is, do the circumstances of the case establish such fraud against the rights of the present claimants as will avoid the bar of lapse of time in respect to so much of their claim as is affected thereby?

The plaintiff states that upon the death of his mother, he was led by his father to believe that the whole of her estate became vested and absolute in him. That at the time, he was living with his father; had just completed his twenty-first year; reposed implicit confidence in his word, and believed him to be deeply interested in his welfare. That during the breach of the family relations, in the indulgence of hostile feelings, he objected to the grant of letters of administration to his father, but was ignorant of the fact that such opposition might result in any substantial advantage to himself, for he still believed his father's assertion that he was entitled to the whole estate of his mother. That some time in 1851, a reconciliation took place between himself and

his father, and then and thereafter to the close of his life, his father declared that he would provide, and had by his will provided for him. That after his father's death, and upon becoming acquainted with the contents of his will, the plaintiff was induced to make inquiries, upon the result of which he alleges that the facts upon which his rights depended as well as the nature of the property were by his father studiously withheld from him, and that it is only since his death that he was advised that he had a good claim to a distributive share in his mother's estate, and that it is only "within the same time that he has discovered the fraud of which he now complains, and the facts whereby he can assert his claim, and establish the fraud." The facts alleged by the plaintiff to have been discovered by him since the death of his father are, that his mother was entitled to an inheritance through her mother in real estate, which was disposed of by his father, who in substitution therefor,

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conveyed to *S. D. Ward certain other real estate in trust for his mother, and which last estate was sold during the marriage, and the proceeds invested in securities for money, which were held for and enjoyed by her until her death.

Benjamin P. Colburn states, that from his childhood he recollects that his mother had a separate estate in Boston, the income of which she received and enjoyed, and over which she appeared to have the exclusive control. That after his mother's death, his father represented and claimed the said estate as his own, and from that fact the defendant understood that his father's claim rested upon the ground that the fund in Boston was his own, though nominally the estate of his mother. His father made no positive statement that such was the case. This was the defendant's impression derived from his father's manner of speaking of the estate as his own. He says that he had no reason to doubt that even if he were entitled to a share, and allowed it to remain in his father's possession, "it would be a sacred trust, coming back to him in the course of time and nature." That he was ignorant until after the death of his father, that the estate was derived from his mother's landed inheritance, which had been sold by his father, and other property substituted for it, and that he would not have allowed the estate to go into his father's possession if he had known the source whence it was derived.

The foregoing allegations, if fully established, would not, it seems to me, justify a charge of fraudulent misrepresentation. Upon the death of Mrs. Colburn, her husband declared that her estate belonged to him, and he continued to assert this until his own death. This was no more than the expression by Mr. Colburn, of a mere matter of opinion which, from the first, was open to the

plaintiff and defendant for examination and inquiry. And although the result of this investigation may show that Mr. Colburn was not legally entitled to the property, his dec-

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laration, to the contrary, however solemnly and repeatedly made, cannot, I conceive, be relieved against in favor of parties who had equal means of information. It is intimated that the natural and just influence which a parent has over a child, operated in this case to induce the claimants to rely implicitly upon the opinion of their father without inquiry as to their own rights. But I have been unable to discover anything in the circumstances of this case which entitles the claimants to ask the protection of this Court against the effects of overweening confidence, or of an excessive sense of filial duty on their part. The fact that for ten years father and sons were alienated in feeling and in interest, rebuts any presumption of undue influences being exerted by the former during that period in restraining the latter from asserting their rights.

The charge of fraudulent concealment is more distinctly made, but upon grounds which seem to me to be equally untenable. It is apparent that the only concealment of fact by Mr. Colburn of which the claimants directly complain, is as to the source whence the estate of their mother was derived. They knew that she had a separate estate, and that one of the distributees, claiming in the same right with themselves, had demanded and received his portion of the estate. This was all the information they required to assert and successfully prosecute their claim. Whether the separate estate was the inheritance of their mother, or had been created by their father for her benefit, was an immaterial fact, in no way important either to the knowledge or the recovery of their rights. A concealment by a parent, trustee, or administrator, to be fraudulent, must, I conceive, be of a matter of substance, of some fact important to the interests of the party to whom they sustain said relation or character. The claimants have not shown that any such fact has come to their knowledge for the first time within four years before the filing of

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their bill. The plaintiff alleges that his father studiously withheld from him the facts upon which his rights depended, but the evidence shows that he was, soon after his mother's death, fully informed both as to his rights and as to the material facts upon which they depended; and even if it appeared that the information was withheld by their father, it was not a fraudulent concealment on his part, if the claimants derived their knowledge from other sources, and he was informed that they were acquainted with the facts. There can be no concealment in respect to facts already known. And no duty can arise to commu-

nicate information which is already possessed. But have the Colburns, who are now claiming, established the fact, which they say they have discovered, that the separate estate of their mother in Boston, was derived from her inheritance? The personal representative of their father denies in his answer that such was the fact, and claims proof of the allegation. The former part of this report shows that the origin of the separate estate of Mrs. Colburn is still involved in uncertainty. And although the conclusion is reached, that the inheritance of Mrs. Colburn was in some way the consideration for the property she enjoyed up to the close of her life, the circumstances on which this conclusion rests, are such as give support to the declarations made by Mr. Colburn, and relied upon by the claimants up to the time of his death, that the property which Mrs. Colburn enjoyed, was originally her husband's, and was by him devoted to her separate use and maintenance. If this be so, then there has been no new discovery of facts favorable to the claimants, and consequently nothing upon which a fraudulent concealment by Mr. Colburn can be predicated.

It has been argued that the fact that the plaintiff and the defendant, Colburns, did not prosecute their claim to a share of their mother's estate, during the ten years of their estrangement from their father, is strongly

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corroborative *of their not being informed of their rights. There is force in this argument. But their ignorance was not of facts upon which their rights depended, but of the law. The presumption is, that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse, than to permit persons in circumstances like the claimants, to excuse their laches upon the pretence that, for twenty-three years, they were ignorant of their rights. It is rarely that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the consequences of every deception. And if persons, as in this case, are not merely silent and passive, but give explicit confirmation to the right of the party in possession, the case is much stronger, and equity and policy equally dictate that they be not allowed to set up their ignorance of the law as an excuse for their laches. The claimants could have easily dispelled that ignorance, for they had the fact of the recognition of the claim of their brother before their eyes, and this as evidence in their favor, was equivalent to a recognition of their own.

But I think the claimants have, in their own statements, afforded ground for the belief that they had prudential reasons for not making the demand in the lifetime of their father, even if their rights were clear to

their own minds. After the reconciliation in 1851, they evidently reposed in the expectation of benefit from their father's testamentary dispositions at his death. It was not until they had ascertained the contents of his will, and discovered their exclusion from all benefit under it, that they awoke to their rights, and were prompted to their assertion. The conclusion would seem to be this: that they were willing to let their father suppose the demand was not to be made upon him, and in that way to conciliate his favor. It is no favor to the deceased to postpone the

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demand during his life, and *to make it afterwards against his estate. If he died in the persuasion that this demand was never to be made upon him, it is not made under the most favorable circumstances after his death, when attempted to be sustained by a charge of fraud.

The complainant, J. H. Colburn, and the defendant, B. P. Colburn, excepted to the report, upon the following grounds:

1. Because the Master erred in reporting that the statute of limitations barred the claims of the claimants to an account from the commencement.

2. Because this is a continuing trust, and was not executed even at the time the bill was filed; and the cestuis que trust were not bound to apply upon any part of the transaction, the whole trust not being concluded.

3. Because the administration committed to J. Smith Colburn was a direct, technical trust, under which it was his duty to communicate to the distributees, truthfully and fully, all the information he possessed concerning the estate and their rights; and that, failing to communicate such information, or concealing it, or misrepresenting the rights of the distributees, or denying those rights while withholding information, neither the statute of limitations nor the lapse of time can avail J. Smith Colburn as a defence to the claim for an account from the commencement of the trust.

4. Because from the date of the administrator's last account to filing this bill, being little more than six years, and from the date of the last petition before the Ordinary, being little more than one year, is insufficient

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to establish *the defence of the statute of limitations, or lapse of time, or laches, or staleness, or antiquated claim.

5. Because the Master erred in holding that the conversion of the Boston stock by Mr. Colburn, and his neglect to include it in his inventory, were such acts as gave currency to the statute of limitations; whereas, it is submitted that there is no evidence that the claimants ever knew of the conversion of this stock by their father; and if they acquiesced in his omission to insert this fund in his inventory filed with the Ordinary, they did so under the erroneous belief that the

fund received from Mr. Ward had been "invested" by J. Smith Colburn for the benefit of the estate of his wife, and had therefore been lost by the failure of that institution; and it is submitted that acquiescence, under these circumstances, cannot prejudice the rights of the claimants.

6. Because the Master erred in holding that these claimants are barred as to the dividends received from the Charleston banks, in analogy to the rule in the case of rents and profits; whereas, it is submitted that the rule is inapplicable to the case of a technical trustee; and, that the trustee, having called in the trust fund standing in a proper security for no purpose connected with the trust, and therefore in dereliction of his duty, will be required, at the option of the cestui que trusts, either to replace the specific stock with intermediate dividends, or to account for the proceeds of sale with interest.

7. In addition to the above grounds, it will be urged, in behalf of J. H. Colburn, that the quit claim deed of J. S. Colburn to the Concord farm was an acknowledgment by the testator of a subsisting indebtedness, and saves the claim of the plaintiff from the operation of the statute of limitations.

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*The defendant, Parker J. Holland, executor of James S. Colburn, deceased, excepted to the report of Master Tupper, in the above cause:

1. Because the Master has erred in deciding that Mrs. Sarah D. Colburn was entitled to a separate estate from her husband, either as to the property situated in Boston, Massachusetts, or in Charleston, South Carolina.

2. Because the Master has erred in holding that the defendant, Benjamin P. Colburn, and the plaintiff, are entitled to distributive shares in stock of the Planters' and Mechanics' Bank, and the Bank of South Carolina, with the dividends accruing thereon since July 1st, Anno Domini 1853.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. The hearing of this cause was commenced on the 12th of March. It occupied four days, and was argued by one of the counsel on each side with remarkable ability; only one day of the term then remained, and an early time was appointed for proceeding with the same. That was prevented by the sickness of one of the counsel, and circumstances have ever since rendered it impracticable. The wish has now been expressed, that a decree be made without further argument, with which I proceed to comply.

The cause came up on the Master's Report and exceptions thereto by both parties. It is one of much complexity, involving nice and difficult questions, and if I undertook to discuss them, the delay would probably defeat the object of the parties in the wish

they have expressed. It is moreover unnecessary; for the points are stated with clear-

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*ness, and considered and decided with great learning and mature thought in Mr. Tupper's admirable report.

It is ordered and decreed that the exceptions be overruled, and the Master's report be confirmed, and made the decree of the Court.

The exceptants appealed on the grounds taken in the exceptions to the report.

Whaley, Lord, for plaintiff.

Campbell, for B. P. Colburn.

Whaley & Rutledge, for Holland.

The opinion of the Court was delivered by

DUNKIN, C. J. The plaintiff, John Henry Colburn, is the youngest of three sons of James Smith Colburn and Sarah Dunn, his wife, formerly Sarah Dunn Prince. His parents were natives of Massachusetts—probably of Boston, or the vicinity, and were married in 1808. The plaintiff was born in March, 1816, and resided with his mother in Boston until her death, in 1836. Soon after this event he came to reside with his father in Charleston, until 1841, when some differences arose, and they separated. They continued to reside in the same city until the death of James S. Colburn, which occurred on the 16th July, 1859.

These proceedings were instituted 7th December, 1859, against the principal defendant, who is the executor of the last will and testament of James S. Colburn, dec'd. The object is to obtain an account of certain personal property, alleged to have been the separate estate of the plaintiff's mother, and which had been received by his father, the late James S. Colburn.

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*The defendant, disavowing all personal knowledge of the matter charged in the bill, submits that, if Mrs. Sarah Dunn Colburn had any separate estate at the time of her decease in 1836, it vested absolutely and exclusively in her surviving husband. Such is admitted to be the law of Massachusetts. The inquiry is then presented whether Mrs. Colburn, at the time of her decease, was domiciled in that commonwealth or in the State of South Carolina. "The question of domicile," says an eminent publicist, "is often one of great difficulty and nicety, and so dependent upon circumstances, that, as it has been observed by Lord Stowell, (2 Rob. 322,) it is hardly capable of being defined by any general or precise rule. It is compounded partly of matter of fact and partly of law." When such minds as those of Lord Stowell and Chief Justice Marshall differ widely as to the inference of domicile, from the same circumstances, (see 8 Cranch, 248,) the difficulty of establishing any positive rule may well be considered. The place of birth is ordinarily considered as the domi-

cile. Not always—the party may be a minor, and his parents on a visit. Whether a guardian can change the domicile of his ward, according to his volition, is not settled. (9 Mass. Rep. 543.) In all cases, it is important, (as urged by Ch. J. Marshall, in the case cited,) to examine into the reason of the rule. The general principle is that stated by Mr. Justice Story, (Story Conf. Laws, § 46.) “The domicile of a married woman follows that of her husband. This results from the general principle, that a person who is under the power and authority of another, possesses no right to choose a domicile.” The will of the wife is subordinate to that of the husband. As a general rule, she has no right to choose a domicile different from his, or in opposition to his will. His domicile is her domicile. But circumstances may qualify this principle. In the case cited at the bar, *Irby v. Wilson*, (1 Dev. & Bat. Ch.

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R. 568.) it was ruled by the Supreme *Court of North Carolina “that a feme covert may acquire a domicile different from that of her husband, especially as to a suit between her and her husband;” and in our own case of *Bradley v. Lowry*, (Speers Eq. 1 [39 Am. Dec. 142,]) where the testator left his established domicile in South Carolina, in 1836, and went to Alabama, where he died in the spring of 1837, a majority of the Court of Appeals inferred that the testator had abandoned his domicile in South Carolina, and acquired a new domicile in Alabama, principally upon the evidence “that he had disagreed with his wife—that they had separated—that she had gone to live in the family of her son-in-law, and that he declared they could no longer live together; that he broke up his establishment, took his slaves with him, declaring he was going to the West to live, and that he would never return to this country.” The conclusion of the Court was, of course, just, to wit: that the husband was domiciled in Alabama. It was not equally clear that the deserted wife had also changed her domicile, and acquired a new residence in Alabama. The reason of the rule was wholly inapplicable. The wife had no choice but to remain where she was—and such was the will of her husband. Identity of domicile in husband and wife results from the principle that she is under his power and authority, and has no right to choose a domicile. The principle is salutary, and the reason cogent. But, as has been illustrated, the principle is not an axiom, nor is the rule inflexible.

From their marriage certainly—probably from their nativity—the parents of the plaintiff resided in Boston, in which city James S. Colburn transacted business as a merchant. About the year 1818, he was unfortunate, and failed. In the autumn of that year, he, with his wife, came to Charleston, where they passed the winter, returning to Boston

in the spring of 1819. Leaving Mrs. Colburn with her three children in Boston, James S.

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Colburn, in the *summer of 1819, returned to Charleston. They never met afterwards. Mrs. Colburn continued to reside in Boston, engaged in the education of her sons, the youngest of whom was then about three years of age. She there remained (says her son B. P. Colburn) until some time in the year 1836, the time of her death. The witness, Edward Winslow, also a native of Boston, but residing in Charleston, knew the family intimately. Witness “lived as many as eighteen years with Mr. Colburn in Charleston, at the same boarding-house. Witness was charged with messages to Mrs. Colburn from her husband, whenever he knew witness went North.” “Witness visited Mrs. Colburn whenever he went to Boston. Mrs. Colburn lived in a fine dwelling-house in Boston, indicating an income of about \$3,000. She lived in much comfort. Visited her at Jamaica Plain, a place of resort near Boston, well situated, and suited for the residence of a person in comfortable circumstances.”

In determining a question of domicile, the intention of a party has great weight. But intention can only be judicially ascertained from acts, or conduct, and declarations. The mere surmises of friends or connections afford no evidence of intention. Some of the letters of Mrs. Colburn to her husband, as of late date as February and May, 1835, were put in evidence. They are full and confidential, but, in no part of them, is any allusion made to a removal of her domicile, as either expected or desired, on the part of herself, or of her correspondent. The lady had her griefs, and she did not fail to disclose them. But this subject formed no part of the catalogue. Nor is there anything whatever in the correspondence, or in any other part of the evidence, which would countenance a surmise that this arrangement was otherwise than entirely satisfactory to her husband—that it was not, in fact, his own arrangement, and acquiesced in as such.

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*As Mrs. Colburn was born and had always lived, so she died, a resident of Boston. If she acquired a domicile in South Carolina it was not in deference to the will of her husband, but manifestly against his wishes, and in opposition to his settled convictions.

It is worthy of inquiry at what time James Smith Colburn himself became domiciled in South Carolina. On this subject, the judgment of Sir John Nicholl, in the *Prerogation Court of Canterbury*, (*Curling v. Shonlen*, 2 Adams, 6,) has valuable suggestions. “These cases,” (says he,) “go fully to demonstrate one thing, namely, that the forum originis is hardly shifted—that it continues at least till it is completely abandoned, and another taken,” and again, “mere averments of in-

tention, not deducible from the facts pleaded, are of no avail whatever in the cause."

Mr. Colburn, having failed in business in Boston, came with his wife to Charleston, in the fall of 1818. Returning with her to Boston in the following spring, he made arrangements for the comfortable support of herself and family and came back to Charleston in 1819. The evidence of his intimate friend and fellow lodger, Edward Winslow, affords the only information as to his mode of life for several subsequent years. They were boarders at Jones' hotel. "Mr. Colburn," (says the witness,) "left Boston without satisfying his creditors. Is of the impression that Mr. Colburn stated to witness that he was willing to pay his creditors twenty cents on the dollar. Thinks whatever settlement he did make was made on that basis. Is satisfied that he did not reacquire his credit in Boston. Witness and Mr. Colburn lived as many as eighteen years in the boarding-house in Charleston." Among the general principles to assist the Courts in determining questions of domicile, Mr. Justice Story enumerates the following: "Ninthly, the place where the family of a married man resides is generally considered as his domicile.

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But this *may be controlled by circumstances. For if the place is only a temporary establishment for his family, or for transient objects, it will be otherwise. Tenthly, if a married man has his family fixed in one place and does his business in another, the former is considered the place of his domicile." Story Conf. L. § 46.

Who can undertake to say that, so late as the year 1836, the domicile of James S. Colburn was not determined by these principles? that, at any earlier period, he had (in the language of Sir John Nicholl) "completely abandoned the forum originis,"—the home of his childhood and of his riper years—the unchanged residence of his wife and children—the place of his father's sepulture? Or, that during those years, when he was endeavoring, in his own way, to make terms with his Boston creditors, he did not always look to a return to his family and home, and that he was any other than a lodger and sojourner in the city of Charleston? In that year (1836) great changes took place. His wife had ceased to live. His two sons were with him in Charleston. He had failed to re-establish his credit with the merchants of Boston. In his new abode he had found men, who (in the grateful language of his will) "proved themselves friends in prosperity and adversity," and he was content to pass with them the remainder of his days—to make South Carolina his permanent domicile. An eminent writer, already cited, says: "Sometimes, where there has been a removal for temporary purposes at first, there may be engrafted on it, subsequently, an intention of permanent residence, and, in many instances,

therefore, where we are called upon to decide upon questions of domicile, the length of time of the residence becomes a material ingredient." All these considerations fix beyond doubt the domicile of James S. Colburn, after the year 1836.

In any view that may be taken, the Court would experience great difficulty in recog-

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nizing the position indispensable to the plaintiff's success, to wit: that at the period of his mother's decease she was domiciled in South Carolina.

But the judgment of the Court is based on other and independent considerations. Whatever rights the plaintiff had on 7th Dec. 1859, when his bill was preferred, he enjoyed equally in March, 1837, when he attained his majority. *Riddlehoover v. Kinard*, (1 Hill, Eq. 376,) decided nearly forty years since, has become one of the landmarks of the law. It is commended to approval, as well from the authority of the distinguished jurist, who was the organ of the Court, as from the cases cited, and the wisdom and policy of the principles announced. *Uriah Wicker* died in 1808, leaving a widow and some collateral relations. His widow proved, in common form, an instrument supposed to be his will, by which his entire personalty was bequeathed to her, and she took out letters of administration with the will annexed. She, and those claiming under her, held the property for more than twenty years. After the death of the widow, and at the instance of the collateral relations the will was required to be proved in solemn form, and was ultimately set aside, and proceedings instituted by the plaintiffs for a distributive share of the estate. "If" (says Chancellor Harper) "there had been no will, and no administration, and defendants, without color of title, had taken possession of the property, and kept it for so long a time, I suppose their title would be good, under the decisions in *Reed v. Price*, (Harp. State Report, 3.) and *Hutchison v. Noland*, (1 Hill, 222); administration would have been presumed, and that defendants had acquired a title from the administrator. The lapse of twenty years is sufficient to raise the presumption of a grant from the State, of the satisfaction of a bond, mortgage or judgment, of the grant of a franchise or the payment of a legacy, or almost anything else that is necessary to quiet the title of property. After twenty years a bill of review

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will not lie. This is the general *equitable bar." Again, "it is hardly necessary to say that legal presumptions are not founded on actual belief. As observed by Lord Erskine, in *Hillary v. Waller*, (12 Ves. 267,) mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle, to take the place of in-

dividual and specific belief. Presumptions must be sometimes made against the well-known truth of the fact. If twenty years have elapsed without payment of interest, or any acknowledgment of the bond, we must presume it paid, notwithstanding the fullest conviction that it never has been paid. In *Hutchison v. Noland*, it was proved by the ordinary that no administration had ever been taken out till granted to the plaintiff. As said in that case, we will presume whatever is necessary to give efficacy to long possession. If it were necessary (adds the Chancellor) to make any specific presumption in this case, I would presume, that the parties of full age at the time of the probate, released to Catharine Wicker their interest in the estate, or their right to contest the will." Adverting to the relative situation of the testator, and his two sons, (the plaintiff and B. P. Colburn,) in 1837, the application of these principles seems immediate and irresistible—other remarks are not less pertinent. "If defendants would have been protected, if there had been no administration or probate, what makes the case worse for them, under present circumstances? Is it that instead of being trespassers, committing a known wrong, they took possession under an apparently good title, for aught that appears bona fide, believing the property to be their own? Their possession was still adverse—they claimed for themselves—this was known to all the world, and must be presumed to have been known to the complainants."

Such presumptions are not permitted to screen fraud, or work injustice to the ignorant.

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ant. But fraud is not to be *presumed—especially against the dead—nor ignorance inferred where there is "light and liberty." To these objections it is difficult to add anything to the satisfactory answers embodied in the Master's report, which has been adopted as the decree of the Chancellor. As to the Boston property, so called, both the plaintiff and his brother knew as much in 1837 as they ever knew afterwards. The plaintiff actually preferred his claim after the death of his mother, and while the fund was still in the hands of Mr. Ward. That claim was not pursued. Whatever may have been the motive, it seems a misapplication of terms to ascribe his acquiescence to ignorance of his rights, with all the means of information before him, or to any fraud practised on his credulity. Much more natural is it to ascribe the subsequent silence and acquiescence, both of his brother and himself, (as the Chancellor has done,) to their filial deference, or "prudential reasons for not making the demand in the lifetime of their father."

But in reference to this "fund," it may not be uninteresting to inquire how far the facts, imperfectly developed as they are, after this great lapse of time, and death of the parties

interested in and cognizant of the transactions, are in accordance with the legal presumptions. To afford any groundwork for the plaintiff's claim, it is indispensably necessary to establish not only an interest of Mrs. Colburn in the Boston fund, but such absolute interest as was transmissible to her representatives. F. A. Colburn testifies, (and all the evidence confirms his statement,) that "when his father left Boston, he was deeply indebted and bankrupt; and had he left any property, or owned any there at that time, it would have been taken by his creditors to pay his debts." Finding himself in this situation, and being about to leave Boston for an indeterminate period, and also leave there his family, consisting of a wife and three sons, (the eldest about ten years of age,) he,

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in the summer of 1819, *executed an absolute conveyance to Samuel D. Ward, Esq., a lawyer of Boston, of "a certain dwelling-house and appurtenances, situated in Beacon street, Boston." Immediately after executing this conveyance, James S. Colburn started for Charleston, and never afterwards returned to Boston. At a subsequent period, these premises were sold and conveyed by S. D. Ward to Augustus Thorndike, for the consideration of twenty thousand dollars.

It is not remarkable that, at this distance of time, the details of this arrangement are involved in obscurity. It was not intended to be otherwise. The prominent objects of the parties are too patent to be misapprehended then or now. To three persons, and three persons only, all was fully known and they never misunderstood each other. The only survivor of these, (Mr. Ward,) neither party has thought proper to interrogate. But Mrs. Colburn was thoroughly acquainted with every feature of a transaction, in which no one was so deeply interested as herself. She knew of the deed to Mr. Ward, and was familiarly acquainted with the terms on which he had received it. While the Beacon street property was yet unsold, she received the rents and profits; and, when converted into other securities, the interest and dividends were enjoyed by her. So late as February, 1835, she thus writes to her husband, in relation to his suggestion of taking an interest in stock of the Bank of Charleston, to stand in the name of Mr. W. and her son, B. P. Colburn: "It may be excellent property, but I do not think it would be as safe as it ~~now~~ is. I should not like to do it. If I did, I should never expect to see either principal or interest. But if you choose it must be ~~done~~, I must consent. You always told me to take care of myself, and I think it will be much more safe with me than in Charleston." "I should have sent you an exact memorandum how my property is placed, but Mr. Ward is out of town. I hold all the papers, &c." "I

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wish *you would give me some paper, so I

could hold all the furniture; I requested Benjamin to mention it to you." Again, in her letter of 16th May, 1835, adverting to his urgency about the Bank of Charleston stock: "You still wish me to purchase some shares in the new bank, but I would rather not. I think it would not be as safe as it is now. If you were in want of money, I would let you have it. I know you have got more than I have, and I think the little I have I had better take care of it myself. It will be better for both of us for me to keep what I have got under my own control. At any rate, I could not do it now without I sold bank stock, as the other money is loaned for one year from this time. Mr. Ward has no money of mine, and I have not any. I know there will be a time that you will thank me for wishing to keep the money myself. I shall never touch one cent of the principal without your advice. I shall keep it in such a way that no one can get it, let what might occur, but you. If I should die to-morrow, the children could not get one cent of it; it would belong to you." Mrs. Colburn died in the following year.

Mr. Ward (a lawyer of position) was aware of the nature of the trust which he had assumed, and of the responsibilities which he had incurred. Within a few months after the death of Mrs. Colburn, he accounted for, and paid over to James S. Colburn the entire fund which he had received for the Beacon street property intrusted to him in 1819. The only remaining party was James S. Colburn himself, and he has not left to inference his entire satisfaction with the manner in which Mr. Ward had conducted, and had finally discharged the duties confided to him by the original arrangement. The declarations, and the conduct of every person cognizant of the transaction, unite in the conclusion that, when the family were dispersed, and Mrs. Colburn was no longer alive, the

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purposes of Mr. Ward's stewardship were accomplished, and the trust was at an end. And such, too, is the presumption arising from long acquiescence.

But it is said there was also separate property in Charleston. Certainly, it appears from the Master's report, that, at the time of Mrs. Colburn's death, there were standing in the name of "Mrs. Sarah Dunn Colburn," certain stocks, to wit: 24 shares in the Planters' and Mechanics' Bank, 6 shares in Bank of South Carolina, 9 shares in the Union Bank, and 3 shares in State Bank, valued, in the aggregate, at \$1,645. The Master says, "The origin of these investments is involved in even more obscurity than that of the property in Boston. The pleadings give no information as to when or by whom the investments were made, nor to whom the dividends were paid, and the testimony is entirely silent upon the subject." "Mr. Colburn" (as one of the witnesses said) "kept

his pecuniary matters to himself." But, so late as 1835, his wife had written to him from Boston, for "some paper from him by which she could hold all the furniture." It is vain to conjecture as to the history of this stock. It is known only that, from the death of his wife, James S. Colburn claimed all as his own. In 1837, he applied to the Union and State Banks for a transfer of the shares into his individual name. His son, Benjamin P. Colburn, on that occasion, signed the following certificate:

"I certify that there was no marriage settlement, either before or after marriage, between my father, James Smith Colburn, and my mother, Sarah Dunn Colburn, and that there is no claim on the part of myself or any other member of the family to prevent his marital rights attaching on certain shares in the Union Bank, standing in the name of my said mother, (now deceased,) which shares can be transferred to my father in his own name.

"(Signed) B. P. Colburn.

"Charleston, November 10th, 1837."

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*William Lance, Esq., Solicitor of the bank, thereupon certified.

"Mr. Colburn can have the shares transferred into his own name, he being legally, as husband, entitled to them.

"(Signed) Wm. Lance,
"Solicitor."

The shares were accordingly transferred.

In his bill the plaintiff adverts to this fact, and states that "the said James Smith Colburn did possess himself of certain bank stock and other property of the said Sarah Dunn without administering upon the estate;" but that two of the banks refusing to pay him the dividends unless he administered, he, the said J. S. Colburn, in 1843 or 1844, applied to the Ordinary for letters of administration; that the plaintiff opposed the application of his said father, "he, J. S. Colburn, still insisting that he was entitled to the whole estate of the plaintiff's mother." The petition of J. S. Colburn, filed late in 1843, sets forth the reasons of the application, and that the petitioner was desirous of having the shares and dividends transferred to him. The petition for letters was granted, notwithstanding the plaintiff's opposition.

It is nowhere averred or suggested—the contrary is manifest from what has been said—that the plaintiff was ignorant of the transfer in 1837, and of his father's persistent claim to the entire fund. The Master remarks, "Mr. Colburn's subsequent acts as administrator, show that his sole object in taking out administration was to aid him in converting the stock to his own use as husband of the deceased." The concluding summary of the Master is entitled to consideration: "As to the Charleston bank stock, the plaintiff knew in 1843, when he opposed the application of his father for administration,

that a portion of the shares had already

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been converted by him to his own use, and that the sole object of the application was to enable him to convert the rest. All this was stated in the petition for administration, which the plaintiff was opposing, &c." "As to Benjamin P. Colburn, the evidence of notice is, if possible, still more clear." "It seems to me incontrovertible." (concludes the Master,) "that the present claimants have, for twenty years slept upon their rights, and permitted the claim of the father to the entire estate to be asserted without protest or interference on their part, and his enjoyment of the property under said claim to continue undisputed up to the time of his death."

Nor, in the judgment of this Court, is the defendant's plea of the statute of limitations a less formidable difficulty in the way of the plaintiff's success. In *Moore v. Porcher*, (Bail. Eq. 197,) Chancellor Harper says. "I am of opinion, from the reason and analogy of the law, that when a trustee does an act, which purports to be a final execution of his trust, the statute will begin to run from that time so as to bar an account." Again, "The possession of a trustee is not adverse; it is the possession of the cestui que trust, and the statute does not apply; but when he does an act purporting to be an execution of the trust, he shakes off the character of trustee, and thenceforward stands in an adverse relation. If the cestui que trust supposes that the trust has not been fully and faithfully performed, he is put upon the assertion of his right." In *Long v. Cason*, (4 Rich. Eq. 60,) Chancellor Wardlaw announced the judgment. "Technical trusts, as to claims between trustees and beneficiaries, are not within the statute of limitations. But, to use the language of our last reported case on this subject, (*Brockington v. Camlin*, 4 Strob. Eq. 196.) 'if the trustee does an act which purports to be a termination of the trust; if he has a settlement which is intended to be in full; if he settles as to part and claims the residue in his own right; if he denies the trust in the presence of the cestui que trust;

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*these acts, or any of them, will so far disturb and dissolve the strictly fiduciary relations between the trustee and his cestui que trust, as that the statute of limitations will commence to run from the date of such acts.' This doctrine" (adds Chancellor Wardlaw) "is fully supported by authority."

In 1843, the plaintiff knew that J. S. Colburn claimed the bank stock in his own right and for no one else. Knowing this, he opposed the grant of administration. When the letters were granted, James S. Colburn, on 30th October, 1844, filed an inventory still claiming the shares as his own property, and filed an account, and again in 1847. The last return made was 14th July, 1853, which was accompanied by an affidavit of the adminis-

trator that the entire assets of the said estate had long since vested in and exclusively belonged to him, and that he, as administrator, had assented to and received the same in his own right, and that the accompanying certificates (referring to the certificates of William Lance, Solicitor, and B. P. Colburn, already cited) will further confirm the above statement; and that, in all other respects, the assets of said estate were fully administered and settled, and prays the same may be so declared. Whereupon the Ordinary, on the same day, made the following entry: "I do hereby certify that I have this day examined the foregoing account; that James Smith Colburn, administrator, upon his oath declared that he had received no other moneys on account of the estate of Sarah D. Colburn, deceased; and as appears by annexed affidavit and certificate, that annexed account is a true statement of the actual condition of funds therein stated, and that the same be declared to be fully administered and settled, and that he acknowledges the receipt, in his own right, of all the estate mentioned in return.

"Final settlement.

"(Signed) George Buist, O. C. D."

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*In 1843, then, when J. S. Colburn assumed his official character, he denied that he held for the plaintiff. In the language of the authority, he "denied the trust in the presence of the cestui que trust." Thenceforward he was put on the inquiry. As is said in 1 Hill Eq. 380, "the Ordinary's office was open to him." But much more in July, 1853. After the plaintiff had been advised of the adverse holding and put on the inquiry, when the final settlement was made with the Ordinary, the administrator "shook off the character of trustee, and, thenceforward, stood in an adverse relation. If the cestui que trust supposed the trust had not been fully and faithfully executed, he was put upon the assertion of his right." (Bail. Eq. 198.) Certainly, from this date the currency of the statute commenced, and in four years the plaintiff was barred. Nor is this result in any manner affected by the petition filed in March, 1858, in which the petitioner sets forth that "he was sole heir and distributee of the estate," but prays for an order for the sale of some of the stock, as he was advised such order was necessary. The right was barred by the statute before the petition was filed. But the proceeding was purely formal, and obviously for the sole purpose of meeting the difficulty arising out of the construction given to the Act of 1824.

Having arrived at the conclusion that the plaintiff's claim cannot be sustained without a violation of established principles of this Court, the remaining duty of the Court is to dismiss the bill. But it is manifest from the history of the transaction that, whatever may have been the errors of the plaintiff in

his intercourse with his father, he was "much more sinned against than sinning." The mysterious character of his father's transactions, and the solemn mockery with which (as it appears) he, in his last moments, trifled with the natural expectations of his son, were well calculated to awaken suspicion and to provoke inquiry.

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*It is ordered and adjudged that the bill be dismissed, each party to pay his own costs.

WARDLAW, A. J., and GLOVER, J., concurred.

Bill dismissed.

14 Rich. Eq. *245

*ANNIE I. LAURENS v. B. H. READ and Others.

(Columbia. April and May Term, 1868.)

[Wills. ⚭822.]

Pecuniary legacies and annuities, bequeathed by a will, which took effect before the Act of December, 1858, was passed:—*Held*, not to be charged upon residuary real estate which passed under a later clause of the same will, devising "all the rest and residue" of the testatrix's real and personal estate to trustees in trust, &c., the testatrix when she made her will, and at the time of her death, having sufficient personal estate to satisfy the legacies and provide for the annuities.

[Ed. Note.—Cited in *Moore v. Davidson*, 22 S. C. 94, 104; *Jaudon v. Ducker*, 27 S. C. 299, 3 S. E. 465; *Allen v. Ruddell*, 51 S. C. 375, 29 S. E. 198.

For other cases, see Wills, Cent. Dig. § 2120; Dec. Dig. ⚭822.]

Before Lesesne, Ch., at Chambers, May, 1868.

This case came before the Chancellor on exceptions to the Master's Report, and was heard at Chambers by consent. The point decided by the Court arose under the will of Margaret H. Laurens, which was admitted to probate on the 5th June, 1858, and is as follows:

"In the name of God, Amen: I, Margaret Harleston Laurens, being in good health and sound mind, do make this my last will and testament, revoking and annulling all former wills by me made. Item: I give to my adopted grandson, Alfred Raoul Walker, twenty thousand dollars, to be paid to him as soon as he complies with the conditions I hereby annex, but not before he arrives at the age of twenty-one years, the interest to be applied to his support and education, or such portion of it as my executors and his guardians think fit so to appropriate, until he receives the capital, and surplus, if any, to be added annually to the principal. It is my wish and intention that he shall receive no part of the capital until he studies

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and acquires *a profession, and receives the best classical education the institutions of South Carolina afford; and I earnestly recommend to him not only to acquire a profession, but to practice it. I leave it at his option, should his turn of mind or interest make it most advisable to pursue business, to do so; but he must either have a profession, or enter into business with the approbation of his guardians before he receives what I leave him in this will, my desire being to start him in life, free from pecuniary embarrassments, and not to make him an idler; but should ill health, or any unforeseen cause occur to incapacitate him from acquiring a classical education or profession, or following business, then at twenty-one years he shall receive what he is entitled to under this will; and I direct that, should it please God in His wise Providence to remove me before he is of an age to protect himself, that he be placed under the care and domestic charge of his god-mother and kind friend, Miss Susan Quash, and that a suitable provision be paid to her annually for his support and clothing.

"Item: I give to my servant, Sarah, now about me, and fifteen years of age, one thousand dollars, to be vested in good and safe stock, and the interest to be paid her in quarterly payments, for her comfort and support during her life, and at her death to be equally divided among her issue alive at the time of her death. I constitute and appoint my friends, named as my executors, her guardians and trustees, and request them to aid and assist her in any way they can in her occupation and business; and I further direct that her taxes, doctor's bills, and professional advice and counsel, be paid out of my estate. I direct that she be allowed to work out, and the wages she makes be applied to her support, and that of her children, should she have any, and that her children be placed under her care, and the profits of their work be applied to their support, and that they be put to trades as soon as

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they are old *enough, and any expenses incidental thereto to be paid out of my estate, and they be allowed to remove from the State should it be for their advantage to do so. Should I be removed before she grows up and is able to take care of herself, I direct that she be placed under the charge of my mother's waiting-woman, Mary Ann. I give to old Sue, the servant of my father and mother, fifty dollars a year, while she lives, to be paid to her monthly. I give to Mary Ann, fifty dollars a year, while she lives, and her time, and direct that she be allowed a little girl to wait on her and assist her while she lives—the fifty dollars to be paid to Mary Ann in quarterly payments. I give to my sister, Mrs. Eliza R. Toomer,

one thousand dollars. I give to my sister, Mrs. Ramsey, five hundred dollars. I give to Mrs. Margaret A. Dawson, five hundred dollars. I give to my cousin, Caroline A. Ball, wife of Isaac Ball, one thousand dollars, for her sole and separate use, not subject to her husband's debts. I give to my cousin, Thomas Corbett Simons, five hundred dollars. I give my gold watch which I am now wearing, to my little cousin, Louisa Rutledge Ball. I give my brooch, containing my father's picture, to my cousin, Mary M. Allen. I direct that five hundred dollars be paid annually to my sister, Mrs. E. R. Toomer, for her house rent while she lives. Item: All the rest and residue of my estate, real and personal, of which I am now possessed, or may be possessed of at the time of my death, or may be entitled to from any quarter whatever, I give to my friends and relatives, John Harleston Read, Sr., John Harleston Read, Jr., Benjamin Huger Read, Captain D. N. Ingraham, John Laurens, to have and to hold in trust for the use of my granddaughter, Annie Isabel Laurens, during her life, not subject to the control, liabilities, debts, or contracts, of any husband or husbands she may marry, but for her sole and especial use, and the income to be paid

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only to her order and receipt, and at *her death, I give and bequeath the same to her issue alive at the time of her death, to be equally divided among them, if more than one, share and share alike, to them and their heir or heirs forever; and I further direct, and it is my will, that when my grand-daughter marries, that a settlement be made of all the property to which she is entitled as her father's estate, and that her marriage settlement be made after the model of my father and mother's marriage settlement, which provides liberally for the husband, and secures the property at the death of both to the children, and the representatives of such as may be deceased. Should it so happen that my granddaughter dies, leaving no issue alive at the time of her death to take the estate, then I direct that it be divided in such manner as I hereby specify, one-half to my niece, Elizabeth Corbett, during her life, and at her death to her children, the other half to be equally divided (except one thousand dollars, which I directed to be added to what I have given my servant, Sarah, to be vested in the same way, and disposed of as I have above mentioned in her legacy) between my adopted grandson, Alfred Raoul Walker, Mrs. Caroline A. Ball, Louisa Nichols, wife of Rev. Mr. Nichols, being the daughters of my cousin, Edward Rutledge, Mrs. Eliza R. Toomer, Mrs. Eleanor Ramsey, and Corbett Simons, and I constitute and appoint my friends and relatives, John Harleston Read, Sr., John Harleston Read, Jr., Benjamin H. Read, Captain D. N. Ingraham, and John Laurens, my executors and the

trustees of my estate, and request them to be the guardians of my granddaughter and of my adopted grandson, and my servant, Sarah. I recommend to my grandson, Alfred Raoul Walker, to assume the surname of his great-grandfather, Mr. Pinckney. Item: Should it so happen that my grandchild should leave minor children, and those minor children should die before they arrive at years of discretion to take the estate, then

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I direct that the estate be distributed *as I have directed in the event of her dying without issue. Should my niece, Elizabeth Corbett, die leaving no issue, then the portion which she may, in the contingency of my grandchild's death without issue receive, is at her death to revert and be disposed of as I have directed—be divided between Alfred Raoul Walker, Caroline A. Ball, Louisa Nichols, Mrs. Toomer, Mrs. Ramsey, and Corbett Simons, to them and their heirs forever. I give to my cousin, Caroline A. Ball, while she lives, five hundred dollars a year for the education of her children and her comfort, unless by any circumstances not now foreseen, she or her children become possessed of an income of two thousand dollars a year, in which event, this annuity of five hundred dollars a year shall cease; this is independent of the legacy already mentioned in this will."

The case was referred to Mr. Tupper, one of the Masters, who submitted the following report:

Margaret H. Laurens, by her last will and testament, gave the following pecuniary legacies, viz.: to Alfred Raoul Walker, \$20,000; to Eliza R. Toomer, \$1,000; to Mrs. Ramsey, \$500; to Mrs. Margaret Dawson, \$500; to Caroline A. Ball, \$1,000; to Thomas Corbett Simons, \$500; and the following annuities, viz.: To Caroline A. Ball, \$500, and to Mrs. Eliza Toomer, \$500. She also specifically bequeathed to Louisa R. Ball, a gold watch, and to Mrs. Mary M. Allen, a brooch containing her father's picture. After giving these legacies and annuities, she then gave "all the rest and residue of her estate, real and personal," to certain trustees for the use of her grand-daughter, Annie I. Laurens. The testatrix died in May, 1858. Her will was proved by J. Harleston Read, Sr., and Benjamin H. Read, who alone qualified as executors, and accepted the trusts conferred

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upon them by the residuary *clause of the will. Mrs. Laurens left a large amount of real and personal property, which was all sold a short time after her death. The assets of the estate consist at present of the following securities:

1. Several bonds given for the purchase of negroes.
2. Cash, the proceeds of personal property.
3. A bond of B. H. Read to James W. Gray, secured by a mortgage of the Hagan

plantation, and purchased with funds derived partly from the sale of the real estate, and partly from the sale of the personal property of Mrs. Laurens.

4. A bond of John B. Irving, given in part payment of the purchase-money of Farmfield, one of the plantations belonging to Mrs. Laurens' estate.

At the death of the testatrix, her estate was amply sufficient to pay all the legacies and annuities, and to leave a large surplus for the residuary legatee and devisee, but in consequence of the losses it has sustained from investments in Confederate securities and other causes, it is now insufficient to pay the pecuniary legacies and annuities.

The single question which has been argued before me is whether the annuities and pecuniary legacies are a charge upon the proceeds of the real estate devised to the trustees.

It was strongly urged in argument that it is a well established rule of this Court that legacies are not entitled to have the assets marshalled against the devisees of real estate, whether given specifically or in the form of a residue, every devise of land being in fact specific.

Very high authority can certainly be cited in favor of this proposition. In the case of *Forrester v. Lord Leigh*, where the devise was of all the testator's real estate in several counties named or elsewhere, pecuniary legatees claimed to throw the specialty debts upon those estates, and it was urged that the devise was not specific, but Lord Hardwicke refused the relief, observing that every de-

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vises of land was specific, and assigning as his reason that personalty given by will fluctuates, but land does not, as no more passes than the testator had at the time of making his will. The same view of the law was taken by Lord Henley in *Scott v. Scott*, Amb. 383, and by Lord Alvanly in *Keeting v. Brown*, 5 Ves. 359. Mr. Jarman sums up the results of the English cases in these words, "But legatees are not entitled to have the assets marshalled against the devisees of real estate either specific or residuary." 2 Jarman, 601.

The doctrine on this subject, however, has fluctuated, and it is difficult to reconcile all the cases. In *Hanby v. Roberts*, Amb. 127, Lord Hardwicke says: "If one having land and personal estate makes his will, being indebted by specialty, and gives specific legacies, and then gives the rest and residue of his real and personal estate, if creditors exhaust the personalty, the legatees may stand in their place and come upon the residuary devisee, because he has only the rest and residue."

In the more recent case of *Spong v. Spong*, decided in the House of Lords, and reported in 3 Bligh, 84, N. S., the contest was between a residuary devisee and a specific de-

viser. The testator, after devising some particular lands to one person, and giving certain legacies, charged and made liable all his real and personal estate with the payment of his aforesaid legacies, and then gave to his son the residue of his real and personal estate. It had been held in the Court of Exchequer, that the lands specifically devised, and those which passed under the residuary clause, were equally liable to the payment of the legacies upon the principle that as all devises of freehold were specific, there was no ground for any distinction. In the House of Lords this was otherwise decided, with the concurrence of Lord Eldon and Lord Redesdale, who appear to have been consulted. The decision certainly pro-

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ceeded upon a distinction between lands specifically devised and a residuary devise of lands, as to which should be primarily liable to a general charge created by the will to which both were subject, and in delivering the judgment, Lord Manners says: "By the general rule a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule applicable to a residue." The judgment of Lord Coltenham in *Mirehouse v. Scaife*, 14 E. C. R. 696, in which he reviews all the preceding authorities, shows that as late as 1837, this question was still regarded by the English Courts as unsettled. No subsequent case has been brought to my attention in which it has been set at rest.

The only case in our own reports bearing upon this point is *Brown v. McMillan*, 2 Hill Eq. 457. There the testator devised to his son, all his lands not before disposed of for life, remainder to his eldest son, and Johnson, Ch., on the circuit held, "that unless these lands had been disposed of in due course of administration, being general and not specific legacies, they were unquestionably liable for the testator's debts before personalty specifically bequeathed." The attention of the Court does not appear to have been drawn to the point now under discussion, and no appeal was taken from this part of the circuit decree. I cannot, therefore, regard the case as a decisive authority.

But I do not think it necessary to discuss the question whether pecuniary legacies are as a general rule a charge upon real estate devised under a residuary clause, inasmuch as I am of opinion that under the terms of this will the legacies and annuities are well charged upon the land. The gift to the trustees is of "all the rest and residue of the estate real and personal." The words "rest and residue of my estate real and personal," must mean what remains of those estates after deducting some matter or thing which would diminish their amount or value. The

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testatrix having made no precedent gift of any part of her real or personal property,

the only matters or things referred to in the will which could cause such diminution are the legacies and annuities previously given.

That a bequest of legacies, followed by a gift of all the residue of the testator's real and personal estate, operates to charge the entire property with the legacies, is established by the uniform current of the English decisions.

In *Hassell v. Hassell*, 2 Dick, 526, where the testator devised and bequeathed certain legacies, and then gave, devised, and bequeathed, all his real and personal estate not therein before disposed of, Lord Ballhurst held that the legacies were charged upon the real estate. In *Brundell v. Boughton*, 2 Atk. 268, Lord Hardwicke seems to have thought that where a testator gave certain legacies, and then the rest of his estate real and personal to A., whom he appointed executor, the legacies were charged upon the land. In *Bench v. Biles*, 4 Madd. 187, where the testator gave all his real and personal estate to his wife for life, and, after her death, gave various legacies and all the rest, residue, and remainder of his real and personal estate he gave, devised, and bequeathed to his nephews, P. and W., share and share alike, Sir John Leach, V. C., held that the legacies were charged upon the whole estate. "The testator," he said, "here gives all his real and personal estate to his wife for life, blending them together as one fund for her use, and, after her death, he gives several pecuniary legacies, and then the rest, residue, and remainder of his real and personal estate to his nephews. He plainly continues after his death to treat them as one fund, the rest, residue, and remainder of which, after payment of his legacies, is to go to his nephews." In *Cole v. Turner*, 3 E. C. R. 714, testator gave an annuity and pecuniary legacies, and then devises all the rest, and residue, and remainder of his freehold, copyhold, and

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leasehold estates to trustees, *for the use and benefit of his children. It was held that the annuity and pecuniary legacies given prior to the devise were well charged upon the freehold, copyhold, and leasehold estates. The Master of the Rolls in delivering judgment, says: "The freehold, copyhold, and leasehold are not devised to the trustees, but the rest and residue of these estates, that is, what remains of these estates after some prior purpose is thereout satisfied. But what prior purpose could the testator here contemplate, except the satisfaction of the annuity and legacies previously given." In *Mirehouse v. Scalfie*, a testator after bequeathing certain pecuniary legacies, declared his will to be that all his debts and all the above legacies should be paid within six months after his decease, and all the residue of his estate, both real and personal, the testator gave to A. It was held by Sir L. Shadwell, V. C., and afterwards by Lord Cot-

tenham on appeal, that by these words the real estate was charged as well with the legacies as with the debts. "To attribute different meanings to the same words in the same sentence," says Lord Cottenham, "may sometimes be necessary, but nothing but necessity can justify it, and when the testator spoke of the rest and residue of his personal estate, he certainly meant what would remain after payment of his debts and legacies. Is it not natural to suppose that he used those words in the same sense when applicable to his real estate?"

These authorities seem to me to be conclusive of the present case. I find that the pecuniary legacies and the annuities given by Mrs. Laurens are well charged upon the lands devised to the trustees.

It was urged in argument that even if the realty and personalty are to be regarded as a common fund for the payment of the legacies, inasmuch as Mrs. Laurens died leaving abundant personal estate to pay the legacies, and the present deficiency in the assets has

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been caused by the *devastavit of the executor, the legacies and devisee must abate proportionally, and that there being at the testator's death a residue of a certain sum, the residuary legatee is entitled to rank as a legatee of that sum.

In *Dyose v. Dyose*, 1 P. Wm. 305, Lord Cowper in the case of deficiency by a devastavit, held that what remained of the estate was devisible not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator. This decision came under the consideration of Lord Thurlow, in the cases of *Fonnereau v. Pointz*, 1 Br. Ch. C. 468, and *Humphreys v. Humphreys*, 2 Cox, 186, on both occasions the doctrine of it was condemned, and this condemnation was approved by Sir Wm. Grant, in *Page v. Linpingwell*, 18 Ves. 466.

I am, therefore, of opinion, and so find, that the pecuniary legatees and annuitants are entitled to be paid in full before any part of the estate can be applied to the payment of the residuary bequest to the trustees of Annie Isabel Laurens.

The complainant, Annie I. Laurens, excepted to the Master's Report upon the following grounds:

1. Because the Master erred in holding that the pecuniary legacies and annuities were charged upon the land devised to the trustees of Annie I. Laurens under the residuary clause of Mrs. Laurens' will.

2. Because the estate having become insufficient to pay all the legacies, by reason of the devastavit of the executor, the residuary legatee is entitled to claim as a legatee of the amount of the residue as it stood at the death of the testatrix.

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*Lesesne, Ch. This cause came up on the Master's report and exceptions thereto by the complainant. As the object of the parties is to obtain, without delay, the judgment of the Appeal Court upon the legal questions involved in the case, and as the points are fully discussed in Mr. Tupper's report, I proceed to comply with the wish expressed by the counsel that a formal decree should be rendered overruling the complainant's exceptions.

It is ordered and decreed that the exceptions be overruled, and the Master's report be confirmed and made the decree of the Court.

The complainant appealed from the decree of the Chancellor on the following grounds:

1. Because his Honor erred in holding that the pecuniary legacies and annuities were charged upon the land devised to the trustees of Annie I. Laurens under the residuary clause of Mrs. Laurens' will.

2. Because the estate having become insufficient to pay all the legacies, by reason of the devastavit of the executor, the residuary legatee is entitled to claim as a legatee of the amount of the residue as it stood at the death of the testatrix.

Porter & Conner, for appellant.

Pressley, Lord & Inglesby, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. By an Act of our Legislature, passed in 1858, (12 Stat. 700,) it is enacted that real estate acquired after the making of a will, shall pass thereunder as personal estate does. This takes away the

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reason under which a residuary devise of real estate was held to be specific,^(a) because it was made definite by reference to ownership at the making of the will. (Forester v. Leigh, Amb. 171,) but it does not affect the case before us, for here the will was made, and the testatrix died before the Act was passed. In speaking of the law, I must then be understood to mean the law which governs the case, and to save words I will speak of it as if it still remained unchanged.

The agreement of counsel at the bar brings before this Court some circumstances which do not appear in the Master's report. The testatrix at the making of the will had one granddaughter, an orphan of tender years, her only descendant. She had previously adopted for a grandson a youth, who was a stranger to her blood and her family. She owned two plantations, a house and two sepa-

(a) Under the twenty-fourth section of the English Wills Act, (1 Vict. c. 26,) which makes the will speak as if it had been made immediately before the death of the testator, and is, therefore, in effect the same as our Act of 1858, residuary devises of land are held to be specific. Hensman v. Fryer, Law Rep. 3 Ch. Ap. 420; Gibbins v. Eyden, Law Rep. 7 Eq. Cas. 374.

rate lots in Charleston, ninety-six slaves, two pews in St. Philip's Church, plantation utensils, &c., all of which were in 1860 sold, under some order of Court, partly for cash and partly for bonds, at prices amounting to about \$105,000, to wit, the realty for about \$50,000, and the personalty for about \$55,000. Of the proceeds of sale, \$40,000 or more, paid to the executor or uncollected, have been lost, so that the balance, which may be realized from the sales of the personalty, will be insufficient to meet the pecuniary legacies and annuities.

The only specific legacies given by the will are a watch and a brooch. The pecuniary legacies (the largest being \$20,000, to the adopted grandson, of which payment was long deferred) amount to \$24,500, and the an-

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nuities (besides occasional aid to an old servant) to \$1,150 per annum, which latter might have been expected soon to diminish by the death of the annuitants. To meet the annuities by interest would probably have required at first a capital of \$16,500—so that the whole amount of legacies and annuities might have required the investment of about \$41,000—or \$3,000 in cash and annual profits equivalent to the interest on \$38,000, with accumulated means for the remote payment of \$20,000.

The will shows no introductory grouping of all the property under such words as my worldly estate, but the sweeping extent of the residuary clause leaves no room for intestacy except as to real estate that might have been subsequently acquired.

The first item relates to the adopted grandson; the second item contains all the other legacies except an annuity, directed to cease upon a remote contingency, which is given in the last clause; the third item is in these words: "Item: All the rest and residue of my estate, real and personal, of which I am now possessed, or may be possessed of at the time of my death, or may be entitled to from any quarter whatever, I give to my friends and relations," (five gentlemen named,) "to have and to hold in trust for the use of my granddaughter, Annie Isabel Laurens, during her life, not subject to the control, liabilities, debts, or contracts of any husband or husbands she may marry, but for her sole and separate use, and the income to be paid only to her order and receipt; and at her death I give and bequeath the same to her issue alive at the time of her death, to be equally divided among them, if more than one, share and share alike, to them and their heirs forever." Following are directions concerning a settlement to be made, when her granddaughter marries, "of all the property to which she is entitled as her father's estate;" and provisions in case of the granddaughter's death

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leaving no issue "to take the estate." By another item provision is made for distribu-

tion of the "estate," in case of the issue of the granddaughter dying before they arrive at years of discretion "to take the estate." The five gentlemen before named are appointed "my executors and trustees of my estate," and are requested to be guardians of the granddaughter, the adopted grandson, and the servant, Sarah; but neither to them, nor to either of them, is given any beneficial interest or any express power to sell real estate.

No devise precedes the gift of the residue, nor is there anywhere, except in the residuary clause, mention of real estate.

No direction is given that the legacies shall be paid, either general or by the executors, besides the incidental introduction of the words to be paid, to be applied, he shall receive, in the instruction concerning the grandson, and to be paid quarterly, to be paid monthly, to be paid out of my estate, to be applied, in reference to some of the annuities; all of which words seem to look to the acts of the executors, especially the discretionary allowance for the grandson is "as my executors and his guardians think fit to appropriate."

There is no mention of debts, although there were some, nor of expenses, although of course they occurred.

Has the real estate been charged with the pecuniary legacies, either in common with the personal estate, or as an auxiliary, in case of the insufficiency of the latter?

Ordinarily, as it is acknowledged, the personal estate is the fund from which pecuniary legacies must be paid. A devise of land is specific, and there can be no abatement of specific devises or legacies to answer the pecuniary legacies; but for the pecuniary legatees, the appellees, it is urged that every testator may charge his real estate at pleasure, that this testatrix, by blending her estate, real and personal, in the gift of the residue.

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has subjected the *whole to the payment of the legacies, by deduction of which the residue is to be ascertained, and that such gift of land in a residue is not a specific devise.

The power of the testatrix to charge her real estate with legacies is unquestionable. Has she done so, presents a question of construction, to be resolved by ascertaining the intent of her testamentary dispositions. Upon those who seek to change the general rule, is the burden of showing sufficient indications of her intent to do so.

The case of *Spong v. Spong*, in the House of Lords, (3 Bligh, 84, N. S., 1 Y. & Jer. 300,) decided that where real estate was charged, the portions of it contained in a residuary devise should answer the charge, before the portions that were specifically devised; but that, too, was a question of construction and intention, and the general rule remains that every devise is specific, however subject it may be to the power of the testator to encumber it with charges and conditions. (*Clifton*

v. Burt, 1 P. Wm. 678; *Warley v. Warley* Bail. Eq. 409.)

In England, before the Act which made lands not specially charged, assets in equity for the payment of debts, very slight and uncertain indications of a testator's intent to charge his real estate with his debts, sufficed to authorize the Courts to indulge the desire, frequently avowed, to make testator just to their creditors before they became generous to their devisees. (*Astly v. Paris* 1 Ves. Sen. 483; *Godolphin v. Pinneck*, 2 Ves. Sen. 271; *Williams v. Chitty*, 3 Ves. 551.) Where legacies were contained in the same sentence with debts, both were naturally brought under the same rules of construction; but there were grounds for distinction between them, inasmuch as debts existed apart from the will, whilst legacies depended wholly on it, and creditors had given meritorious and valuable consideration, but legatees were objects of voluntary bounty, no more

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worthy of favor than devisees whom the *general law preferred. (*Kightley v. Kightley*, 2 Ves. Jun. 328; *Keeling v. Brown*, 5 Ves. 359.) Therefore, where legacies stood alone in a clause, under which debts standing alone would have been charged, a determination against the legacies involved no palpable inconsistency, and prevented the irregularity of giving to specific devises less effect than to pecuniary legacies.

The cases in which lands have been charged with legacies, may be ranged under the following six heads. If in any case there cannot be found some one or more of the circumstances, which are essential to some one of these heads, I think there is no authority for charging real estate in such case.

1. Where the charge is express. Here it may be observed that according to the ordinary and proper meaning of the term charged, lands charged become only auxiliary to the personal estate, which still remains primarily liable. Exoneration of the personal estate or subjection of lands to legacies in common with it, is in the power of a testator, but is more rare and difficult of establishment.

2. Where there is a general direction that legacies shall be paid, (that is, be paid indefinite, not be paid by executors, or be paid out of a special fund, or the like,) accompanied by something in the text or context, whence may be inferred that they shall be paid first, or that the devisees shall be enjoyed after their payment. (*Toot v. Vernon*, 1 Vern. 708; *Clifford v. Lewis*, 6 Mad. Rep. 33; *Donce v. Torrington*, 2 Myl. & Keen, 600.)

Under this head, with confirmation drawn from the sixth head, falls also the case of *Mirehouse v. Scaife*, (2 Myl. & Cr. 695,) greatly relied on here by the appellees. In it Vice Chancellor Shadwell overruled a demurrer upon one of two grounds that were argued,

and Lord Chancellor Cottenham, upon appeal, concurred in overruling, but favored the other ground. The Lord Chancellor founded

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*his opinion upon the terms rest and residue, used in the sense of the estate diminished by debts and legacies, "coupled with the direction to pay his debts and legacies." In the devise following a direction to pay debts and legacies he considered the case to be like *Hassell v. Hassell*, (2 Dickens, 527,) and he answered the observation, that the direction to pay the debts and legacies was only intended to fix a time for the payment of them, by saying that "that, no doubt, was part of the object, but that it was not the whole object, may be inferred from the gift which follows, of the rest and residue of the real and personal estate, which the observation leaves untouched." The will contained this clause, "It is my will that all my debts, and all the above legacies, be paid and discharged within six months after my decease, and all the next residue of my estate, both real and personal, lands, messuages, and tenements, I give unto Mary Newton, &c.," thus in one breath directing payment and showing by what diminution the residue should be ascertained. Amongst the legacies was the bequest of a field called Gilfoot. The bill alleged the insufficiency of the personal estate, and this the demurrer admitted.

3. Where there is a direction that legacies shall be paid by the executor, and a devise to him, the land so devised is charged with legacies.

Under this head fall some cases that have been urged by the appellees. (*Aubrey v. Middleton*, 4 Vin. Ab. 460, Charge D. Pl. 15; 2 Eq. Ca. Ab. 429, Pl. 16; *Alecock v. Sparhawk*, 2 Vern. 228, 1 Eq. Ca. Ab. 298, Pl. 4.)

To this, as well as the second head, may also be referred *Hassell v. Hassell*, and from this may be had confirmation of the decision made in *Cole v. Turner*, (4 Russ. 376,) which the appellees have presented as almost identical with the case in hand, and which will be further noticed under the sixth head. (*Hennell v. Whitaker*, 3 Russ. 343; *Bratfawaite v. Britain*, 1 Keen, 206.)

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*The principle involved in this head is that by the devise to the executor means were afforded to him for payment, and by the direction a condition imposed upon his acceptance; this does not apply where the devise is to one only of several executors. (*Warren v. David*, 2 Myl. & K. 49; *Wasse v. Herlington*, 3 Myl. & K. 495.)

And it may be inferred that a power in the executor, to raise money for legacies from lands devised to him in trust, is essential to charge such lands with legacies. (See *Dover v. Gregory*, 10 Sim. 393; *Powell v. Robins*, 7 Ves. 209.)

4. Where the real and personal estate are blended together, and indication given that

from the mass legacies shall be paid. (*Bench v. Biles*, (4 Madd. R. 187,) where, after a wife's enjoyment of real and personal estate as one fund for her life, that fund, diminished by legacies, was to be divided.)

5. Where the legatee stands in a position entitled to peculiar favor, as where the legacy has been given in satisfaction of a creditor's debt, a widow's dower, the legatees claim to devised land or other meritorious right, such as in England a younger child's right to a portion. (*Webb v. Webb*, 2 Eq. Ca. Ab. 504, Pl. 42; *Kightley v. Kightley*, 2 Ves. Jun. 328; *Van Winkle v. Van Houten*, 2 Green's Ch. R. 192, New Jersey.)

6. Where, at the making of the will, the testator must have known that the legacies could not be paid without the aid of the real estate.

This head is plainly illustrated by the case of *Nichols v. Postlethwaite*, (2 Dall. [Pa.] 131 [1 L. Ed. 319]). To it, also, may be referred the case of *Hassinelever v. Tucker*, (2 Binn. 525,) where it is said that "the personal estate was nominally adequate to pay debts and legacies, but was really insufficient," and "if the legacies were not to be paid out of the land, they were a mockery of benevolence."

And under this head, in connection with

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the third, may *be found distinctions between the case of *Cole v. Turner*, (4 Russ. 376,) before mentioned, and the case now in hand. There, it is said, that "the sum for which the copyholds had been sold, was in fact the only fund out of which the annuity to the widow and the legacy and annuity to her daughter could be satisfied" and there is nothing to repel the presumption that such was the condition of the estate when the will was made. There, too, a power of sale, almost discretionary was given to the executors, to whom, after the gift of pecuniary legacies, the residue of everything real and personal was given in trust for four children by a former marriage.

Under this head, as well as the second, may be found circumstances confirmatory of the effect which was given to rest and residue in *Mirehouse v. Scaife*, above mentioned.

The case now in hand cannot be fairly brought under either of these heads. Here there is no direction that legacies shall be paid, besides the incidental references to payment that are contained in instructions concerning the time and mode of payment. By the gift of a pecuniary legacy, and no more, a testator signifies his intent that it shall be paid, that it shall be paid by the executor, and be paid out of the fund which goes to the executor for its payment, the personal estate not specifically bequeathed.

Here there is no devise to the executors. They are, to be sure, the same persons to whom, as trustees for the granddaughter, the residue is given; but from the devise

to them no means for payment of legacies could have been derived, without power in them to sell lands for that purpose. If the legal title remained in them, as certainly it would have done if the granddaughter had been a married woman, no power to sell lands was expressly given to them, and none could be implied without plain manifestations of the testatrix's intent to that effect. Where lands have been plainly charged with debts,

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although the devise of them to *trustees is expressed to be for other purposes, the trustees may sell for payment of debts, the power being held to be included in the charge. (*Ball v. Harris*, 4 Myl. & Cr. 264; *Shaw v. Barrer*, 1 Keen, 559.) But it would be going beyond the strongest case on this subject to imply the charge first and from that to imply the power; and still more extravagant would it be to argue in a circle by inferring the charge from the power, and the power from the charge.

Here there is no blended fund created by the will from which, according to the intent of the testatrix, legacies shall be paid. In fact, blending for the first time could have been contemplated, when the residue as one estate should come to the use of the granddaughter. Before that it could not have taken place, for before that the two kinds of property, according to the law which the testatrix must be supposed to have understood, must necessarily have continued to exist separately—the personal in the hands of the executors as legal owners subject to debts and legacies, the real in the devisees to whom subject *sub modo* by our law to debts, and subject to the charges and trusts contained in the will, it passed at the death of the testatrix. (*Hull v. Hull*, 3 Rich. Eq. 91.) In *Cole v. Turner*, above mentioned, the Master of the Rolls declared that “the freehold, copyhold, and leasehold estates are not devised to the trustees, but the rest and residue of those estates, that is, what remains of those estates after some prior purpose;” this consists with the supposition of a power in the executors to sell and pay legacies, so as to fix the residue which they should hold as trustees for the four older children, but is not reconcilable with our case, where clearly all the real estate passed under the residuary clause to the devisees, whether charged or not.

Besides the words “rest and residue of my estate, real and personal,” nothing in the will now before us affords any ground for imply-

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ing that the testatrix intended to *charge the real estate with the legacies; and after much search, I have found no case in which these words occurred, and an implication of charge on the real estate was raised, where I could not discover some confirmatory circumstance. The words are ambiguous; they occur here in a clause, the purpose of which

was to give, not to charge; they indicate something less than the whole, but do not direct what deductions shall be made, or in what way deductions shall affect the two kinds of property. (*Lupton v. Lupton*, 2 Johns. Ch. 614.) Their meaning may be what shall remain after specific dispositions previously made, or after payment of debts and expenses, or after payment of debts, expenses, and legacies previously given; and if the last, this payment may have been intended to be as the law directs—from the general personal estate, and that only,—or to be from a mixed fund, composed of real and personal estate, which are to contribute rateably, or from such mixed fund charged as one entirety, without regard to the sources from which it proceeded. There is nothing which renders any construction preferable to that which interprets the words as if they had been, everything else that I own, subject to the deductions which the law makes, that is, all the real estate, and the residue of the personal. The testatrix must be presumed to have known the difference between specific and pecuniary dispositions, as well as the fund from which, without some indication of her contrary intention, the legacies would be paid.

The appellees lay great stress upon rest and residue as necessarily implying diminution, and diminution effected by deduction of legacies, the only thing in the will that preceeds. If so far right, they are not helped, unless they can further establish that the two kinds of property are blended into one mixed fund for payment of legacies. The blending I do not think can be fairly implied. If it could be established, it would, perhaps as matters now are, be comparatively unim-

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portant to the parties, whether the *realty was charged as an auxiliary, or rateably, or indiscriminately with the personalty. In settling a principle of construction, it may not, however, be amiss to look to what would have been the result if the heir and residuary devisee had been different persons, and large real estates had, at the cost of the personalty, been acquired after the making of the will. These subsequently acquired real estates would have descended to the heir, and would in equity have been liable to debts, after the personal property bequeathed in the residuary clause, but before the real estate there devised; (*Pell v. Ball*, Sp. Eq. 518;) but they would not have been at all liable to the legacies, which would, under the construction contended for by the appellees, have had a right to seek satisfaction from the lands devised, as well as from the residue of the personalty. It must be remembered that throughout this opinion I ignore the before mentioned Act of 1858; (12 Stat. 700;) also, that the Act of 5 Geo. II. c. 7, (2 Stat. 571.) under which an order in the liability of various classes of property to

debts has been fixed different from what prevailed in England, does not extend to legacies, and that a general direction for payment which, as to debts, is here superfluous and unimportant, is still of much avail as to legacies. (*Warley v. Warley*, Bail. Eq. 405-410; 2 Jarm. on Wills, 546; *Pell v. Ball*, Sp. Eq. 519; *Henry v. Graham*, 9 Rich. Eq. 100; *Brown v. James*, 3 Strob. Eq. 24.)

It should not be deemed strange that a difference is recognized between real and personal property in respect to their liability to the payment of legacies, when both are given by the same clause in the same residue. From early times, and in many respects, the law has made distinctions between the two kinds of property under the same words embracing both, as concerning limitations, ever since the case of *Forth v. Chapman*, (1 P. Wm. 665,) concerning the rights of heir and residuary legatee in case of lapse, *Cheves v. Haskell*, (10 Rich. Eq. 534;) concerning the

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order in *which they shall meet debts. (*Farmer v. Spell*, 11 Rich. Eq. 541; *Loyd v. Loyd*, 10 Rich. Eq. 469.) The distinction between the heir and the devisee and the executor, runs throughout the law, and has been adverted to several times above. It would be observable in legal titles and modes of proceedings, even if both were expressly blended into a common mass for payment of legacies. That the testatrix herself looked to the distinction is shown by the words of the residuary clause respecting her future acquisitions, but we are bound to presume that she knew that these words would apply only to her personal estate, whilst the devise would be confined to the realty, specific and fixed as it was at the making of the will.

In the conclusion, unfavorable to the pecuniary legatees in the first ground of appeal, which has been attained from the words of the will, this Court is strengthened by what have been called the extrinsic circumstances. Resort to these has been frequently condemned, and is particularly deprecated by Sir John Leach, V. C. in the case of *Parker v. Fearnley*, (2 Sim. & Stu. 592.) This case has been criticised because it departed from the course of decision, (2 Jarm. on Wills, 526,) which had sustained the charge of real estate devised, where the devise followed a general direction that legacies should be paid; but in the view taken by the Vice Chancellor, the express charge upon the residue of the personalty rebutted the implication of a charge upon the realty, as had been held in the case of *Davis v. Gardener*, (2 P. Wm. 187.) In this view the condition of the estate was unimportant, and therefore, perhaps, it was the more readily treated as unfit for consideration.

Every Court in the construction of a will is required to place itself in the situation of the testator, (*Wigam on Wills*, Pl. 76-80,) with knowledge of the circumstances that

surrounded him. The extrinsic testimony,

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necessarily *admitted to give this knowledge is not allowed to show the testator's intention as an independent fact distinguished from the contents of the written instrument, but may show the meaning of what is said in that instrument. Where, upon the face of the will, there is an ambiguity, which the light of surrounding circumstances may explain without varying the instrument, the exclusion of that light would be the rejection of the means of doing justice with safety. The opinion given by Lord Tharlow, upon the rehearing in the case of *Tonnereau v. Pointz*, which was cited upon another point, is a leading authority on this subject; and in our own case of *Rosborough v. Hemphill*, (5 Rich. Eq. 105,) Chancellor Johnston has clearly laid down the principles which authorize and limit the admission of explanatory circumstances. (See *Pell v. Ball*, Sp. Eq. 66-80.)

The state of the family and condition of the property may be looked to. Under the state of the family may come the ages and other particulars respecting children and other relations, and from that may be drawn any inferences, in regard to the meaning of doubtful expressions, which arise without dangerous speculation and conjecture, but it would be inadmissible to undertake to graduate the affections of a testator toward the several members of his family, for in accommodating his intent to our notions of duty and probable inclination, we would forget that the law imposes no checks upon whim and perverted feelings, but inquires what is the will, not what it should have been. The condition of the property may, however, be more safely considered. Everybody instantly admits that where pecuniary legacies have been given, and the whole estate was real and has been devised, there must have been an intent to charge the devisees with the legacies; and in many of the cases respecting this question of charging the real estate, the insufficiency of the personal estate appears to have entered into the inquiry, and to have been influential, however

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im*proper for consideration it may have been thought. E converso, the ample sufficiency of the personalty is a strong circumstance to exclude the implication from doubtful words of an intent to charge the realty. In the case before us, it is fair to conclude that the testatrix did not mean to charge her real estate with the legacies, because her words, if doubtful, should not receive such construction as to indicate her intention to guard against an insufficiency of her personal estate, not even remotely probable when she made her will. Much more probable than this it is, that looking to the very tender ages of the two principal objects of her bounty, the comparative smallness of the legacies giv-

en to other persons, the long time before large payments would probably be required, and the powers usually exercised by executors over planting estates, she expected that debts and legacies would be paid from the annual profits of her plantations, and the estate unincumbered pass to her granddaughter when she came of age or married.

Upon the questions which have been discussed concerning devastavit and abatement, this Court has not been sufficiently informed of the facts, and has formed no opinion.

The Chancellor's decree, so far as it holds the pecuniary legacies and annuities to be charged upon the land devised under the residuary clause of Mrs. Laurens' will, is reversed, upon other points it is set aside, and further inquiry is directed.

The order by which matters were referred to the Master is renewed, with the instructions contained in this opinion, and with leave for him to report special matter.

Decree reversed in part, other part set aside, and further inquiry directed.

DUNKIN, C. J., and GLOVER, J., concurred.

14 Rich. Eq. *271

*O. N. BOWMAN v. D. LOBE and Others.

(Columbia. April and May Term, 1868.)

[Deeds ⇐126.]

A., by deed, assumed to be valid as a covenant to stand seized to uses, conveyed certain tracts of land to his six sons by name "during their natural life," and "if any of my sons die without an issue of the body," remainder to the sons then living. He then by the same deed conveyed other lands to his four daughters for life, with remainder to the survivors, on the same contingency. And further, after reserving to himself a life-estate in all the lands, he directed that "at my death it," meaning all the lands, "shall be immediately transferred to my sons and daughters, as above mentioned, to their heirs or assigns." B., one of the sons, survived A., and then died, without issue, leaving two of his brothers surviving him: *Held*, that B.'s estate in the lands did not descend to his heirs, and therefore that his share could not be subjected to the claims of his creditors.

[Ed. Note.—Cited in *Smith v. Clinkscales*, 85 S. E. 1066.

For other cases, see *Deeds*, Cent. Dig. § 449; Dec. Dig. ⇐126.]

Before Johnson, Ch., at Orangeburg, January, 1867.

The decree of his Honor, the Chancellor, is as follows:

Johnson, Ch. On the 8th of January, 1827, George Bowman executed a deed (a) by

(a) "This indenture, made between George Bowman, of the District of Orangeburg, of the one part, and David Bowman, George P. Bow-

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man, John Wesley Bowman, Reddick Asbury Bowman, Lovie Ephraim Darley Bowman, Sebastian Fletcher Bowman, of the other part, witnesseth that the said George Bowman, as well for and in consideration of the love and affection which he, the said George Bowman, hath and beareth unto the said David Bowman, George P. Bowman, John Wesley Bowman, Reddick Asbury Bowman, Lovie Ephraim Darley Bowman, Sebastian Fletcher Bowman, as also for the better maintenance and supports of them the said" (naming all the sons over) "hath given, granted, aliened and confirmed, and by these presents doth give, grant, alien, enfeoff and confirm unto the said David Bowman, John Wesley Bowman, during their natural life, all that plantation or tracts of land containing sixteen hundred and twenty-four acres I purchased from Samuel Funches, and another tract

man, John Wesley Bowman, Reddick Asbury Bowman, Lovie Ephraim Darley Bowman, Sebastian Fletcher Bowman, of the other part, witnesseth that the said George Bowman, as well for and in consideration of the love and affection which he, the said George Bowman, hath and beareth unto the said David Bowman, George P. Bowman, John Wesley Bowman, Reddick Asbury Bowman, Lovie Ephraim Darley Bowman, Sebastian Fletcher Bowman, as also for the better maintenance and supports of them the said" (naming all the sons over) "hath given, granted, aliened and confirmed, and by these presents doth give, grant, alien, enfeoff and confirm unto the said David Bowman, John Wesley Bowman, during their natural life, all that plantation or tracts of land containing sixteen hundred and twenty-four acres I purchased

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from *Samuel Funches, and one hundred acres from George Patrick, David and John Wesley is to pay out of the land two hundred dollars to Reddick and Lovie Ephraim Darley, Sebastian Fletcher, to be equally divided between the three. Hath give," &c., using same words, "and by these presents doth," &c. "unto the said George P. Bowman during his natural life, all that plantation or tracts of land containing two hundred and eighty acres I purchased from John King, and two hundred acres of the land I purchased from Jacob Ott, joining my son George's land. Hath give, grant," &c., (same words,) "unto the said Reddick Asbury Bowman, Lovie E. D. Bowman, Sebastian F. Bowman, during their natural life, all that plantation or tracts of land whereon I now reside, and all the agents lands and the lands I purchased from Jacob Ott, except the two hundred acres I give to George P. I desire that if any of my sons die without an issue of the body, the lands mentioned above to be equally divided among my sons above mentioned that are then living.

"Hath give, grant," &c., (same words) "unto the said Margaret Felder, Barba Shuler, Catharine Crum, during their natural life, all that plantation or tracts of land on Ridge bay. I give, &c., unto Clarissa Scott, during her natural life, all that plantation or tract of land I purchased from Joseph Bowman.

"I desire that if any of my daughters die without an issue of the body, the lands mentioned above to be equally divided among my daughters above mentioned that are then living.

"I reserve to myself, however, the right of using and keeping this property during my life; and at my death, it shall be immediately transferred to my sons and daughters, as above mentioned, to THEIR HEIRS OR ASSIGNS. I hereby revoke all gifts of said property heretofore made, and hereby declare my firm intention not to make any other disposition to any other person but my sons, David, George, John, Reddick, Lovie, Sebastian, and Margaret, Barba, Catharine, Clarissa, of the above named property." Given under my hand and seal, &c., and signed and sealed in presence of four witnesses, 4th October, 1826.

Proved 8th January, 1827. Recorded in office of Register M. C. Charleston, 26th February, 1867. In R. M. C. Orangeburg, 14th February, 1846.

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containing one hundred acres, which he had purchased from George Patrick. In the said deed, after donations were made to all his children for life, it is provided that if either of the sons of the donor should die without issue of the body, that the lands given to such sons should be divided among his other sons who should be living at the time; and near the close of the said deed, the donor reserves to himself "the right of using and keeping" this property "during (his) my life," "and at (his) my death it should be immediately transferred to (his) my sons, as above mentioned, to their heirs or assigns."

After the death of the donor, David Bowman died intestate without leaving issue of his body living at the time of his death. He left as his heirs at law two brothers, Reddick A. and Lovie E. D. Bowman, and various children of his deceased brothers and sisters.

The complainant, who is a nephew of the intestate, soon after his death, took out letters of administration upon his estate, and sold all the personal property, the proceeds of which, he alleges, are not sufficient for the payment of his debts. The bill states that D. Lobe has commenced suit against the complainant; and that the lands belonging to the estate of the intestate, which are made up of three several tracts, will have to be sold for the payment of the intestate's debts. The bill prays that D. Lobe and other creditors may be enjoined from prosecuting suits at law for the collection of their claims, and that the lands of the intestate may be sold for the payment of debts. The defendants, Reddick A. and L. E. D. Bowman, in their answers, admit all the allegations of the bill, except that the tract of land therein described as containing five hundred acres, more or less, and bounded by lands of P. E. Dukes, Gabriel Dukes, E. Funches, and John P. Berry belongs to the estate of the intestate. This tract of land is the same that was conveyed in the said deed to the intestate; and his surviving brothers claim that by a proper con-

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*struction of the said deed they are entitled to the same as remainder men. And that is the only question of controversy in the case.

The other heirs at law of the intestate insist that the scheme of the deed is to give an immediate vested estate in the lands to his sons, with cross-remainders to each other in case of dying without issue in his (the donor's) lifetime. But to all who survive him, an absolute estate in fee simple—the estates given saddled with his use during his life, as in the case of *Chaplin v. Turner*, 2 Rich. Eq. 136. And it is insisted that the arrangement of the different clauses of the deed strengthens this view of the case; and that this construction would give validity to every portion of the deed.

In the case of *Chaplin v. Turner*, the whole estate was to be divided upon the youngest of three grandsons arriving at the age of twenty-one years. In this case there is no provision made for any division even of lands which are given to more than one of the sons of the donor, and the tract of land given to George P. Bowman is given to him alone, and the remainder men in the second clause of the deed are all the surviving sons of the donor, and not those who can demand a division of a certain portion of the lands which are given to them directly, to take effect at the donor's death.

It is the opinion of the Court that the words, "their heirs or assigns," in the latter part of the deed, cannot be reconciled with the other portions of it, and must be rejected; and that David Bowman only took a life-estate in the said tract of land; and that Reddick A. Bowman and Lovie E. D. Bowman, the surviving brothers, are entitled to take the same as remainder men, and it is so ordered and decreed. And it is also ordered and decreed that the parties be permitted to take further orders at the foot of this decree. And it is further ordered that the costs of these proceedings be paid out of the estate of the intestate.

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*The complainant appealed, and now moved this Court to reverse the decree:

Because a proper construction of the deed made by George Bowman on the 8th of January, 1827, shows that David Bowman was, at the time of his death, seized in the land in dispute of an estate in fee simple.

Hutsons & Legare, for appellants.
Simonton & Glover, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. This is a contest between the creditors of David Bowman, on the one side, and his brothers, who survived him, on the other. It presents one of those puzzling questions which frequently arise in the construction of instruments, unskilfully drawn, yet stuffed with terms of art, in the construction of which the mind naturally struggles to give effect to what is believed to be the intention, notwithstanding technical rules to the contrary.

Although the instrument here sounds like a will, and was in fact a disposition of property designed to avail only after the donor's death, yet it was irrevocable, was recorded soon after it was made, and has by all parties, been, without question, treated as a deed. It is a deed which, according to the case of *Chancellor v. Windham*, (1 Rich. 164 [42 Am. Dec. 411],) and other cases decided in our Courts, must be considered a covenant to stand seized to uses, whereby a freehold may be limited to commence in futuro; and it may be noticed in passing, that our Act of 1853, (12 Stat. 298,) which removes all diffi-

culty as to the general words "die without issue of the body," extends to both deeds and wills. The indulgence respecting executory

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devises and untechnical words *allowed to carry a fee simple, which has been accorded to wills is, however, denied to deeds.

An examination of the whole instrument, it is believed, will show that the intention of the donor was to divide his lands amongst his children, reserving to himself enjoyment thereof during his life, and separating his children into two classes according to sex; to give to each child enjoyment for life; and if he or she should die, leaving children, to let his or her heirs or assigns take his or her parcel; but if any of them died without leaving children, to require that the parcels of those so dying should pass to survivors—sons' parcels to surviving sons, and daughters' parcels to surviving daughters. The provision for survivorship upon contingency to take effect whenever the contingency might happen, was, I apprehend, the controlling idea of the instrument; for if the intention was merely to confer upon each child that might be living at the donor's death, a fee simple in the parcel allotted to him or her, and also in shares of the parcels of those that might have died in the donor's lifetime—in effect to prevent lapse—much cumbrous phraseology might have been easily avoided by the use of a few simple words, which common sense would suggest even to the unskilled who undertake to become conveyancers.

If this instrument was a will, there would be no difficulty in carrying out the supposed purpose; but we must remember that by deed a fee cannot be mounted on a fee, nor a fee simple be created without words of inheritance. To simplify the case, let us look only to what concerns the sons. There is, first in the order of the time for enjoyment, a life-estate in the father; second, a life-estate to each son; third, upon the death of a son without issue of his body, a life-estate in the other sons then living—there being no words of inheritance, nor gift to the issue, and our cases forbidding implication of such gift; fourth and last, this provision, "at my

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death, it" (the whole property conveyed *by the deed shall) "be immediately transferred to my sons and daughters, as above mentioned, to their heirs or assigns." When and to whom did the fee simple created by this final provision pass? It passed immediately upon the death of the donor to every son and daughter in respect to his or her parcel, but was in each a vested remainder. "As above mentioned" does not mean the sons and daughters above named; for, if so, they would have taken the whole property as tenants in common; but it means in such parcels and under such limitations as are above mentioned. There was then given to each son a life-estate, with mediate remain-

der to his heirs, and thus, under the rule in *Shelly's case*, the son, as ancestor, took both the life-estate and the fee simple; but the intermediate contingency prevented a merger of the life-estate in the fee. Upon the happening of the contingency—his death without issue of his body—a deceased son's fee simple passed to his surviving brothers, his fee simple opening to admit the limitation to survivors as it arose. (4 Kent Com. 210, § 59, *Shep. Touch.* 128, ch. 6.) There was not a fee mounted upon a fee, but a fee made subject to a contingency, whereby it was defeated. When by the rule in *Shelly's case* the seeming inconsistency between the two grants, one for life and the other in fee, has been overcome, the only remaining question is whether the fee is absolute or conditional; and by the plain limitation to the sons that are "then living," that question is determined. That such contingent or conditional limitation may be made by deed, the authorities cited in the standard works, to which reference has just been made, will show.

If, however, it should be resolved that the construction here given to the first clause takes too much liberty with its words, the same result is reached, as the Chancellor reached it, by regarding the two clauses of the instrument as repugnant, and applying the rule that in a deed of two repugnant clauses, the first shall prevail. This rule we

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*regard as one for final resort, when all reasonable modes of reconciling apparent repugnancy have failed; and we think that here a construction may be adopted which gives effect to every part of the instrument.

For the creditors, who desire to establish in *David Bowman*, now deceased, an absolute fee simple which may be subject to their demands, reliance has been placed upon what is said to be a rule of construction, that "where a gift is to take effect in possession immediately on testator's death, words of survivorship refer to the date of the testator's death, and are intended to provide for the contingency of the death of the objects of his bounty in his lifetime, unless some other point of time be indicated by the will." Extending to this deed, designed for posthumous effect, the supposed rule, which hitherto has been confined to wills, and acknowledging the propriety of its application in *Pressley v. Davis*, (7 Rich. Eq. 107 [62 Am. Dec. 396].) we find that, even as there said, "if the enjoyment be postponed by the interposition of a particular intent, such as a life-estate, or by fixing a future period for division such as the attainment of the legatee to full age, the words of survivorship more naturally relate to the period of division and enjoyment." Here a life-estate was interposed, a contingency specified, and a future period indicated by the words "then living." The survivorship then relates to the period when the enjoyment of the survivors

was to begin—the death of the son who first took the parcel without issue of his body. Those who desire to see the history and present extent of the supposed rule, which the creditors invoke, may find the whole compressed into brief compass by Mr. Jarman. (Jarman on Wills, 450, 631, ch. 48, § 3.) There the steps by which a doctrine once established upon infirm reasoning, was overthrown, have been traced, the potency of a contingency exhibited, and the result attained that “the rule which reads a gift to survivors, simply as applying to objects living

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*at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred; and that when such gift is preceded by a life-estate or other prior interest, it takes effect in favor of those who survive the period of distribution, and to those only.”

This case does not involve any question between brothers and children of a pre-deceased brother, nor any concerning accruing shares, and no intimation of opinion upon any of those questions is intended to be made.

The decretal order of the Chancellor is affirmed.

DUNKIN, C. J., concurred.

INGLIS, A. J., absent at the hearing.

Decree affirmed.

14 Rich. Eq. *280

*LUCY A. MOBLEY v. EDWARD D. MOBLEY and Others.

(Columbia. April and May Term, 1868.)

[Dower ◊49.]

A wife cannot make a valid renunciation of her right of dower to one who is in possession of the husband's land, without title, but with his consent, and under expectation of a conveyance from him, according to the provisions of his will already executed, and who afterwards acquires title under the will.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 172; Dec. Dig. ◊49.]

Before Carroll, Ch., at Fairfield, July, 1867.

The bill was filed by Lucy A. Mobley, widow of David Mobley, deceased, late of Chester District, against Edward D. and Samuel W. Mobley, executors of David Mobley, and against others, the children of David Mobley,—all of the defendants, except two infants, being his children by a former marriage.

The testator died on the 10th of February, A. D., 1866, possessed of a large real estate of near 4,500 acres of land, and leaving of force a will which had been executed by him on the 28th July, A. D., 1860; which will, inter alia, contained the following clauses:

“First. I bequeath to my wife, Lucy A. the following slaves, to wit: Emeline, Dilcey, Sally, (Lipford,) Ellen, (Lipford,) and Eliza, (Lipford,) together with such increase as they may have between this date and my death. Also a note on Gen. John Buchanan for \$3,831.54, and all the furniture she brought with her on our marriage. The above bequest to be in lieu of dower.

“Second. To my sons, Edward D., Samuel W., and David M., I devise the tract of land situated in Fairfield District, on Wateree creek, bought of Thos. R. McClintock, togeth-

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er *with the several tracts which I have added thereto, (except the tract bought of Thos. Brown, which I have sold to my son Edward,) the said lands containing a body of about 2,747 acres. The lines of division I purpose to have run, and when done to execute titles to each of my said sons for his separate portion; but in the event of my death, without having done so, I direct that the same be divided, allotting to Edward, 915 acres, to Samuel, 917 acres, and to David, 915 acres.”

In the fall of the year 1860, after the will had been executed, the testator called in a surveyor and himself made the division of these lands among his three sons, allotting to David Mobley, 908 acres; to Samuel W., 913 acres; and to Edward D., 912 acres. Plats of each portion were prepared by the Surveyor and were certified in the following form:

“South Carolina.—The above plats represent two tracts of land laid off from David Mobley to his son D. M. Mobley, containing nine hundred and eight acres, situated in Fairfield District, on the waters of Rocky creek and Wateree creek, and hath such shape, form, marks, and boundaries as represented by the above plat.

“(Signed) J. Y. Mills, D. S.

“Laid, Sept. 27th and Nov. 3d, 1860.”

Each son was by the testator put in possession of his respective portion, but no deeds of conveyance were executed.

In the lands thus allotted to these sons in severalty, the complainant, on the 11th day of October, A. D. 1862, executed to each son respectively her relinquishment of dower, in this form:

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“The State of South Carolina,
“Chester District.

“I, J. Y. Mills, a Notary Public for said District, do hereby certify unto all whom it may concern that Lucy A. Mobley, the wife of David Mobley, of said State and District, did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release, and forever relin-

quish unto David M. Mobley, son of David Mobley, all her interest and estate in a tract of land lying and being in Fairfield District and State aforesaid, on the waters of Wateree and Rocky Creeks, containing nine hundred and eight acres, and bounded by lands of Joseph Stewart, E. D. Mobley, Samuel Stewart, estate of John Ratteree, Dr. William Thorn, Samuel W. Mobley, and others, as will more fully appear by reference to a plat made out by J. Y. Mills, D. S., and dated September 27th and November 3d, 1860; and also all her right and claim of dower of, in, or to all and singular the premises above described.

"Given under my hand and seal, this eleventh day of October, Anno Domini, 1862.

“(Signed) Lucy A. Mobley. [L. S.]

“J. Y. Mills,

“Notary Public and Magst. ex off.”

Relinquishments in like form were at the same date executed to Edward D. and Samuel W.; and were all recorded July 9th, 1866.

The sons were in possession, each of his several lands, when the testator died in 1866; and had paid taxes thereon in their own names before his death.

On the day of his death (Feb. 10th, 1866) the testator attempted to execute another

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will, but died in the act of *affixing his signature. The unexecuted paper contained the following provision:

“I bequeath to my wife, Lucy A. Mobley, and our two children, Cicely A. and David Woodward Mobley (1305) thirteen hundred and five acres of land in Fairfield District, on the waters of Wateree creek, and adjoining lands of Dr. Thorn, Mr. Du Bose, and E. P. Mobley. I also give them the following mules, viz., Beck, Peter, Jake and Dash. Also all my cattle, hogs, and sheep, to be equally divided between them and my two daughters, Catharine Amelia and Mary, and my son, William D. Mobley. I do hereby declare as to the land and other property given to my wife and her two children, to be in lieu of all dowry or dower, to my estate or any part thereof, and shall be held subject to the following limitations, that is to say, at her death or marriage the above land and other property to pass over to my two children, Cicely A. and David Woodward, equally, and should either of them die leaving no issue, to pass over to the surviving child, and should both of them die, leaving no child or children, the land to pass over to my other children equally.”

Two days after his death the following agreement was entered into in reference to the unexecuted will, and signed by the widow and all of the children of the first wife:

“State of South Carolina,

“Chester District.

“We, the undersigned, heirs-at-law of the late David Mobley, of Chester District, and

legatees under his last will and testament, bearing date the 28th day of July, A. D., 1860, in consideration that the said David Mobley had prepared another will which he was unable to sign, but which we believe to

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contain his wishes in reference to *the final disposition of his estate—said last mentioned paper being in the handwriting of Col. Samuel W. Mobley, and bearing date the tenth day of February instant—do hereby agree to carry out the provisions of the last mentioned paper, and to execute to each other such deeds of conveyance, release, and relinquishment, as we shall be advised are necessary to effect said agreement.

“Given under our hands and seals this 12th day of February, 1866.

“Lucy A. Mobley, [L. S.]

“Edward D. Mobley, [L. S.]

“Saml. W. Mobley, [L. S.]

“David M. Mobley, [L. S.]

“William D. Mobley, [L. S.]

“Catharine A. Mobley, [L. S.]

“Mary E. Mobley, [L. S.]

“Witnesses: Wm. J. Henry,

“John Sweat.”

The bill was filed by the complainant in May, 1866, for dower in all of the lands of testator, for an account of certain funds received by David Mobley of her separate estate, and to set aside as to the complainant, the agreement entered into on the 12th February, 1866, if it should be pleaded in bar of her dower.

The defendants waived the agreement, but in bar of her dower in the lands, devised to David M., Edward D., and Samuel W. Mobley, they pleaded the releases executed by her to each of them respectively. Her dower in other lands was conceded.

So much of his Honor, the Chancellor's, decree as relates to the question raised by the plea in bar of dower, is as follows:

Carroll, Ch. Several questions were dis-

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cussed at the *hearing. The first relates to the validity and effect of the releases of dower executed by the plaintiff to the defendants, Edward D., Samuel W., and David M. Mobley, respectively, on the 11th October, 1862. By his will, bearing date 28th July, 1860, David Mobley, their father, had devised to these defendants the lands mentioned in those releases, and they were respectively in possession of the same in October, 1862. They are not understood, however, to claim otherwise than as devisees under his will. Indeed, two of them, Edward D. and Samuel W. Mobley, having proved his will and assumed the office of his executors, are precluded from setting up any opposing title; and as to the origin of David M. Mobley's possession of the land in his occupancy, we are only and vaguely informed by the testimony that it began in 1860.

The renunciations or releases of dower referred to pursue the general form prescribed by the Act of Assembly of 1795 (5 Stat. 256). The wife's relinquishment of dower in such mode was obviously designed to operate in conjunction with the husband's conveyance of the land. It was meant to be adjunct and ancillary merely to the conveyance of the husband, but not to have effect as a separate and independent alienation by the wife. With the advance of civilization, population, and wealth, the necessity became more and more manifest of providing for the conveyance of the entire and absolute ownership of land divested of all lien or charge whatever. To meet this very necessity were framed the various devices of fine, recovery, the joint deed of husband and wife, with her acknowledgment of the same duly certified and recorded, and lastly, the modes of renunciation indicated by the Acts of 1795 and 1785 (7 Stat. 233). In all of them the wife is regarded as acting concurrently with the husband, and not solely and apart from him. Under the Act of 1785 her "relinquishment of her right of dower and acknowledgment of the

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same in *Court or before a Commissioner," and such acknowledgment recorded, are declared effectual in law to convey and pass away her right. But to whom is it transferred? Not to the husband undoubtedly, but to the person to whom he shall have previously conveyed the land. Nothing could be more explicit in that regard than the terms of the Act of 1795. The married woman is there designated as the wife of "any grantor conveying real estate," by the form of deed prescribed, and she is empowered, in the mode indicated to "renounce and release her dower to the grantee and his heirs and assigns in the premises mentioned in such deed." Such mode of relinquishing the right of dower assumes, therefore, the execution of a prior conveyance by the husband, and without it is wholly inoperative as a statutory renunciation, transfer, or release.

The plaintiff's releases of dower to the three sons of the testator occurred in his lifetime. He survived for more than three years afterwards, and died as late as the 10th February, 1866. As devisees under his will, the sons, of course, took no interest whatever in the lands devised until the death of their father. In no just sense can they be regarded as being his grantees, or alienees on the 11th October, 1862, and unless they were so, they can derive no benefit whatever from the plaintiff's renunciations, or releases in their favor.

It is contended that we have here the concurrence of alienation of the land by the husband, and releases of dower by the wife, and that the mere order in which they occurred ought not to affect the rights of the parties under them. The general legal disability of the wife to dispose of her estate is not re-

moved, even in her regard to her right of dower, by the statutes referred to. She is regarded as being invested by them with a special power of disposition, which can only be effectually exercised in the mode and subject to the conditions which they prescribe.

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*It has been adjudged to be the settled law of this State, that even where property is secured to the separate use of a married woman, she cannot charge, encumber, or dispose of it, except by strictly pursuing the power to do so conferred by the instrument creating her estate. "She can in no manner or respect," remarks Chancellor Harper, as the organ of the Court, "be considered a feme sole. A feme sole disposes of or charges her property by her own act, and according to her own will, by her inherent power as owner. A feme covert exercises a delegated power and cannot exceed it. She is enabled to execute a power, as in some instances any third person, even though having no interest in the property, might be enabled to execute it and bind her by their act." *Reid v. Lamar*, 1 Strob. Eq. 42.

The doctrine of this Court seems to be in conformity to the opinion expressed by Sir Thomas Plumer, that a married woman, with a special power of appointment, cannot bind herself by contract to sell the property. Her disability as a married woman is taken away if she pursue her power. But when the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement it is invalid. *Martin v. Mitchell*, 2 Jac. and Walk. 413.

It is, therefore, considered that the instruments purporting to be renunciations or releases by the plaintiff to the defendants, Edward D., Samuel W., and David M. Mobley, respectively, are ineffectual to exclude her from dower in the lands referred to.

Dower, by metes and bounds, has been assigned to the plaintiff under the writ for that purpose ordered by Chancellor Lesesne, in all the lands in Fairfield District, of which the testator Mobley died seized. If she is not precluded by her releases to certain of the defendants, as has been here adjudged, then

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none of the parties are understood *as objecting to the assignment of dower proposed by the Commissioners in their return to that writ.

It is ordered and adjudged that the return of the Commissioners appointed for that purpose, assigning to the plaintiff her dower by metes and bounds in the lands in Fairfield District, of which her late husband, David Mobley, died seized, be confirmed and be made the decree of the Court.

It is further ordered and decreed that an account be taken of the rents and profits of the said lands accrued since the death of the testator, David Mobley, which have been re-

ceived by the defendants or any of them; that the one-third part thereof is due and payable to the plaintiff in respect of her dower out of said lands; and that the Commissioner inquire and report which of the defendants should contribute, and in what proportion, towards paying the plaintiff her third part of said rents and profits.

The defendants appealed on the ground:

Because his Honor has erred in decreeing that the releases executed by the complainants to the defendants, Edward D., Samuel W., and David M. Mobley, are ineffectual to exclude her from dower in the lands referred to.

Melton and Melton, for appellants.

Rion, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. Since Lampet's case, (10 Co. R. 48.) it has not been doubted that the inchoate right of dower, which a wife has

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during her husband's life, is a releasable *interest; and if coverture imposes no disability, the wife might by her single act release it to any person, who by possession or privity of estate was in a situation to accept an assignment of a thing in action. But for protection of *femes covert*, the English practise, before the dower Act of 3 and 4, W. 4 c. 105, required for bar of dower, the privity examination of a wife when she joined in a fine or common recovery, the modes of conveyance there in use for the purpose of binding a wife. In this State, as in most of the States of our Union, fine and recovery having never been introduced, other more simple forms have been prescribed for barring a wife's dower, and the rule as to both dower and inheritance prevails which was laid down in *Brown v. Spand*, (2 Mill. 12.) and recognized in *Hays v. Hays*, (5 Rich. 38.) viz., "a married woman is not capable of binding herself by deed, unless authorized so to do by an Act of the Legislature, and then only in the manner and to the extent prescribed by such Act."

We have then in this case only to inquire whether any Act of force in this State authorizes a wife to release her contingent right of dower to a person, who is in possession of the husband's land without title, but with consent of the husband, and under expectation of a conveyance from him, according to the provisions of his will already executed, but of course ambulatory. As the release made by Mrs. Mobley shows no reference to a will, or to any act done or to be done by her husband, the question might be narrowed to this, whether a wife by her single release, independent of her husband's act, made to a person in possession of her husband's land, can bar her dower?

The forty-sixth section of the County Court Act of 1785, (7 Stat. 233.) provides for the

relinquishment by the wife, where she has joined the husband in the conveyance, and where she has relinquished without having joined, where she can appear in Court to

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acknowledge, and where she *makes acknowledgment before Commissioners specially appointed; but it cannot now have application, because there is no County Court to take acknowledgment, or to issue the commission and receive the return as there directed.

The Act of 1795, (5 Stat. 256.) extends, perhaps, only to conveyance in fee simple, made according to the form there prescribed, or any other form theretofore in use within this State; at any rate, in the renunciation of dower it manifestly contemplates a grantor, and a release by the wife to the grantee, endorsed upon the grant or release of the husband, or written as a separate instrument referring thereto.

Under the twenty-ninth section of the Quit-rent Act of 1731, (3 Stat. 303) and its amendments made in 1767 (7 Stat. 176. § 7,) a mode was provided for barring a wife of her estate, inheritance, dower, or thirds, which extends to all interests, and which sometimes is yet used; but that looks to the wife's joining her husband in the conveyance of the land, and to an acknowledgment before the Chief Justice, an Assistant Judge, or some person by either of them thereto appointed, and also to recording in the office of pleas—formalities which have not been complied with in this case.

We have no other Act on the subject, and even if we should regard the husband's will as a conveyance made effectual by his death, we cannot perceive that any law of force here gave validity to the supposed release, which the wife made without the forms and conditions required by any legislative Act to which it may be referred.

The motion is dismissed.


DUNKIN, C. J., and INGLIS, A. J., concurred.

Motion dismissed.

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*JOHN A. SNELLING and ELIZABETH,
His Wife v. JOSHUA McCREARY.

(Columbia. April and May Term, 1868.)

[Trusts  217.]

By a decree made in 1859, a trustee was ordered to invest certain moneys in slaves, if in his judgment "said investment can be made on advantageous terms, and that, until said investment be made, he do pay the annual interest accruing on said trust-fund to his *cestui que trust*." The trustee made no investment in slaves, but retained the trust-fund in his own hands (paying the interest for several years to his *cestui que trust*) until 1863, when he invested it in Confederate seven per cent. bonds, having first, on his own petition, and without notice to his *cestui que trust*, obtained an or-

der for leave to make the investment: *Held*, that the trustee was not justified in making the investment in Confederate bonds, and he was ordered to account for the fund to his cestui que trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 303; Dec. Dig. ⚡217.]

[Trusts ⚡217.]

Where a trustee is left to the exercise of his own discretion in making an investment, what a prudent man would do in the management of his own affairs, is the measure by which his liability is to be determined, but where the particular mode in which the investment is to be made is prescribed, he must adopt that mode, and no other.

[Ed. Note.—Cited in *Womack v. Austin*, 1 S. C. 438.

For other cases, see Trusts, Cent. Dig. §§ 301-304, 306-309; Dec. Dig. ⚡217.]

[Trusts ⚡217.]

The Act of 1861, authorizing trustees to invest in Confederate securities, did not apply where the property or securities, in which the investment was to be made, had been prescribed by the Court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-304, 306-309; Dec. Dig. ⚡217.]

[Trusts ⚡178.]

An order made on trustee's ex parte petition, and without notice to the cestui que trust, will not justify the former in departing from the terms of a previous decree, by which both were bound, directing a particular mode of investment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 232; Dec. Dig. ⚡178.]

Before Lesesne, Ch., at Barnwell, February, 1868.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. The bill in this case was filed on the 18th June, 1866, by John A. Snelling and Elizabeth, his wife, against Joshua McCreary, the trustee of Mrs. Snelling, for an account, and involves the investment of cer-

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tain funds *of the trust estate in Confederate seven per cent. bonds in the year 1863. The facts of the case, so far as it concerns the questions submitted for my determination, are comprised in the following statement. It appears that on the 7th of February, 1859, in a certain cause then depending in this Court, (*McCreary v. Willis*), the present defendant, Joshua McCreary, was appointed by a decretal order of Chancellor Dunkin, the trustee of the complainant, Elizabeth Snelling, the wife of said John A. Snelling, and required to enter into bond, with two or more sureties, in the penal sum of \$7,000, conditioned for the faithful performance of his trust. It was further ordered that upon the defendants complying with the terms of his appointment and receiving the trust fund, "he do invest it, as is expressed and set forth in the order made in said cause by Chancellor Wardlaw, on the 2d of February, 1858, if in the judgment of the said Joshua McCreary, said investment can be made on advantageous terms; and that until said investment be made, he (the said Joshua Mc-

Creary) do pay the annual interest accruing on said trust fund to his cestui que trust." On reference to the decretal order of Chancellor Wardlaw, on the 2d of February, 1858, it is found to be in substance as follows. It confirms the report of the Commissioner of this Court, recommending Joseph Heightower as a suitable person to be appointed trustee of Mrs. Snelling, and requires him to enter into bond, with sureties, for the faithful performance of his trust; and after authorizing a specific appropriation of a portion of the trust fund in the bond of John A. Snelling, given to the Commissioner for the purchase of slaves, it directs that the balance of said fund (which is the fund now in question) be invested in the purchase of other slaves, to be held by him on certain terms and limitations, and with further directions, immaterial however to the questions now submitted for adjudication in this case. It

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appears that said Joseph Heightower *afterwards declined his appointment as trustee of Mrs. Snelling, and hence the appointment of the defendant, Joshua McCreary, in his place under the subsequent decretal order of Chancellor Dunkin, on the 7th of February, 1859. It further appears, that on the 21st of March, 1859, soon after his appointment, the defendant, McCreary, received the trust fund in question (\$2,382.56) from Mr. Hagood, the Commissioner, and, in pursuance of the decretal order appointing him trustee, continued for several years to pay the interest on said fund to the complainants. The investment in slave property was never made by the defendant; but it appears, that on the 27th of June, 1863, a petition was filed by him in this Court, requesting authority to invest the trust fund, then alleged to be in his hands, amounting to \$2,382.56, in seven per cent. Confederate bonds. And on the 4th of November, 1863, the Commissioner of this Court, to whom the petition was referred, having previously reported in favor of said investment, a decretal order was made by Judge O'Neill, authorizing the petitioner, Joshua McCreary, to invest the said fund held by him in trust for Mrs. Snelling, in bonds of the Confederate States of America, bearing interest at seven per cent. per annum. It is proper to state, that this application of defendant to Judge O'Neill was entirely ex parte, and that it does not appear that complainants had any notice either of the petition, or of the investment of the trust fund in Confederate bonds, until after the termination of the war. At the trial of the cause, testimony was produced on both sides, which does not appear to me very material, as the facts on which my decree is founded are apparent from the pleadings. It was however proved by Mr. Hagood, who, at the date of this transaction, was the Commissioner of this Court, that though he has no recollection of the par-

ticular circumstances of this case, it was then, (1859,) and during his official term, a

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general custom *for persons to seek the appointment of trustees for the purpose of getting the use of the trust funds. And the complainant, Mr. Snelling, who was examined as a witness, testified that when application was made to defendant for his consent to act as a trustee for Mrs. Snelling, he at first objected, on the ground that if he took the trusteeship, he would soon be compelled to invest the funds in negroes; but on being assured that the *cestui que trust* did not desire such investment to be made, and that he could use the money as long as Mrs. Snelling lived, he paying the interest, he agreed to assume the office. This is also corroborated by the statement of Judge Aldrich, then the solicitor in the cause of *McCreary v. Willis*, who says that the impression left on his mind is, that the moving cause which induced Mr. McCreary to take the office of trustee was the use of the fund for the time, as his recollection is that it was then important for him to have the use of the money. This alleged agreement also appears to be further confirmed by the very terms of the decretal order of 7th of February, 1859, as already set forth. In behalf of the defendant, it was also proved by Mr. R. J. Davant, formerly Commissioner in Equity for Beaufort District, Mr. Patterson, the present Commissioner for Barnwell District, and J. J. Maher, Esq., that investments by guardians and trustees of trust funds in Confederate bonds were very generally made in 1863. Mr. Davant says such was the case so far as his range of observation extended, embracing Beaufort District and the lower part of Barnwell, and thinks it was common throughout the State, though he has known some to invest in property. Mr. Patterson says, that he knew prudent business men during the war to invest in eight per cent. Confederate bonds, or in seven per cents., if they could not get the eight per cents. The great anxiety of people seemed to be to get rid of Confederate money on any terms. The sum of

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\$2,300 would not, he thinks, in 1863, *have purchased a tract of land of any value; a good negro might have been bought for that sum. He adheres to the opinion expressed in his report on defendant's petition in 1863. Mr. Maher thinks that in 1863 investments in Confederate bonds were regarded as best and safest, but he himself as a trustee would not have been willing to receive a gold debt, well secured, in Confederate currency, and would not have advised a client trustee to do so.

Such is the substance of the testimony (as taken from my notes) produced at the trial of the cause. But apart from this evidence, I am of opinion that the question as to the validity of the investments now under consideration may be determined on the case set forth in the

bill, and admitted by the answer of defendant. Considering the decretal orders of 1858 and 1859 as orders in *pari materia*, and therefore to be interpreted by the well-known rule of construction, I cannot but regard them as equivalent to a decree of this Court, prescribing to the defendant a specific rule for the investment of the fund in question. The preferred mode of investment was the slave property; but until said investment could be made on advantageous terms, he (the defendant) was to pay the annual interest, accruing on said trust fund, to his *cestui que trust*. It appears to me, therefore, that the defendant was authorized, under the decree of the Court, to invest this fund in only one of two ways: 1st. In slave property. 2d. In a loan to himself on his own personal liability, secured of course by his bond as trustee to the Commissioner of this Court, with adequate sureties. The second mode was adopted; and as the fund was never invested in slaves, the said investment in his own bond has been, by the very terms of the decree, continued to the present time. This conclusion can only be controverted by showing that the decree of the Court, directing the investment, has

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in some way or other been *overruled, and a different mode from what it prescribes directed by higher authority.

The question, then, is, whether the defendant has been able to make out such a case of justification. The right to invest this fund in Confederate seven per cent. bonds has been rested by defendant's counsel, on three several grounds:

1st. The general authority of a trustee to invest the funds committed to his charge, and his exoneraton from responsibility, if he has used the same diligence and sagacity which a prudent man is expected to exercise in his own affairs. In the case of *Taveau v. Ball*, (1 McC. Eq. 464,) and *Bryan v. Mulligan, Ex'or*, (2 Hill Eq. 364,) the rule is laid down that persons acting in a fiduciary capacity are bound to manage the funds committed to their charge, with the same care and diligence that a prudent and cautious man would bestow on his own concerns. And in the late case of *Boggs v. Adger*, (4 Rich. Eq. 408,) cited at the bar, it was held, that where a trustee, in investing funds, acts faithfully, and with common diligence and sagacity, he will not be liable, if the funds are lost. I am not aware that this rule has been ever questioned, but it is only applicable to cases in which no specific investment of the fund has been directed by competent authority, and the trustee, therefore, left to the exercise of his own sound discretion. Where it is otherwise, and the trustee is ordered by a decree of the Court to invest in a certain way, it is evident that such decree becomes the law of the case, and any investment of the fund different from the prescribed mode is unauthorized and illegal, and any loss resulting therefrom chargeable exclusively to him.

2d. The next plea in justification of this investment by the defendant is the Act of Assembly of this State in 1861, (p. 87,) entitled "An Act to authorize trustees to invest funds in bonds of the Confederate States." This

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*Act provides that guardians, trustees, executors, &c., holding funds in trust for investment, are hereby authorized to invest the same, &c. Now, in the present case, the trust fund was already invested in the defendant's bond, and the case, therefore, would seem to be excluded from the purview of the Act by its very terms, but, in addition to this, the fund was so invested by a decree of this Court, directing the continuation of said investment until the occurrence of a contingency which never did happen. The question, then, is whether, supposing the present case within the provision of the Act, this decree of the Court could be reversed, altered or amended by an Act of the Legislature. I think not. I hold that a decree of this Court, between parties properly before it, and in a case within its jurisdiction, is not only conclusive between said parties, as *res adjudicata*, until reversed, but that it could only be reversed by paramount judicial authority. It is essential to the character of a constitutional government that the several departments—legislative, executive, and judicial—should be confined to its appropriate sphere of action, as defined by the fundamental law, and any intrusion of one department on the province of another would be an infringement of the constitutional barriers which limit their respective authorities, and therefore unwarranted and invalid. By the Constitution of South Carolina the judicial authority of this State is vested in the Courts of Law and Equity, and it can only be by the action of the Courts of Appeals and Errors, as established by the Legislature, that a decree of this Court, which obviously pertains to the judicial functions of the government, could be legitimately altered, amended or reversed. I am, therefore, of opinion that the Act of 1861, could not, in contravention of such decree, afford any justification for the investment of this fund in Confederate bonds.

3. The last position assumed in behalf of

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the defendant, *as to this investment, is the decretal order of Judge O'Neill, on the 4th of November, 1863. It is sufficient to state, in reply to this ground of justification, that said order was made on the *ex parte* application of the defendant at the trustee of Mrs. Snelling; and it does not appear that the complainant had any notice of the petition, or the order to invest in Confederate bonds, until after the termination of the war. The proceedings, therefore, on that occasion can only be considered as *res inter alios acta*, and not binding on the present complainants. Story's Eq. Plead., (§ 207, 208) and the case of *Sollee v. Croft*, (7 Rich. Eq. 42,) in which it was decided that orders obtained on the *ex parte*

petition of a trustee do not bind his *cestui que trust*, are conclusive as authority on this point. The views I have taken of this case avoid any question as to the right of a trustee to change an investment made in 1859, in currency equivalent to gold, into Confederate seven per cent. bonds, at par, in the year 1863; as to which I now express no opinion. It is ordered and decreed that the Commissioner of this Court do take an account from the defendant, Joshua McCreary, of the interest due on the sum of \$2,382.56, (two thousand three hundred and eighty-two dollars and fifty-six cents,) the principal of the fund received by said defendant as the trustee for the complainant, Elizabeth Snelling, on the 21st of March, 1859, from the date of said receipt to the date of said accounting, and that the sum found due by the said defendant be paid by him to the complainants. It is further ordered and decreed that defendant do deposit, with the Commissioner of this Court, by or before the first day of May next, sufficient securities in the form of safe and productive bonds or certificate of stock to the amount of the principal of the said trust fund; said securities to be approved by the Commissioner, and held subject to the further order of this Court; and that in default

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of defendant to deposit such securities, *the Commissioner be, and is hereby authorized and directed to collect by *fieri facias* the said sum of two thousand three hundred and eighty-two dollars and fifty-six cents, with whatever interest may be found due, and hold the same subject to the further order of this Court. And it is also ordered, that defendant do pay the costs of this suit. The parties, or any of them, to have leave to apply at the foot of this decree for any further orders that may be proper in the cause.

The defendant appealed, and now moved this Court to reverse the decree on the following grounds:

1. Because the defendant, Joshua McCreary, was directed (by the order of 7th February, 1859, referred to in the decree,) to pay the annual interest to his *cestui que trust*; and the investment of the fund by him in seven per cent. bonds of the Confederate States for the purpose of raising the annual interest, until the investment in slaves, was prudent and proper.

2. Because the order of February 7th, 1859, did not prescribe the mode of raising the annual interest required to be paid, which was, therefore, left to the discretion of the defendant; and the investment of the funds in seven per cent. bonds of the Confederate States, was prudent and discreet.

3. Because, until the investment of the trust fund in slaves, the defendant was authorized to invest the same temporarily to raise the annual interest; and the investment in seven per cent. bonds of the Confederate States, for that purpose, was judicious and proper.

4. Because an investment of the trust

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funds in the bond *of the defendant, or the use of the same in his own business, was not authorized or required by the order of 7th February, 1859, nor permitted by law and the principles and practice of this Court.

5. Because the Act of the General Assembly of this State entitled "An Act to authorize trustees to invest funds in bonds of the Confederate States" (A. A. 1861, 13 Stat. 87,) did authorize the investment which was made by the defendant in seven per cent. bonds of the Confederate States, whether made as a permanent or a temporary investment.

6. Because the said decree is contrary to law, equity, and evidence.

Hutson & Townsend, for the motion.

Finley, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. J. The general principles which should regulate the conduct of trustees, and the measure of their accountability, are stated in the case of *Boggs v. Adger*, (cited in the decree,) and have been repeatedly recognized. When left to his own judgment, the trustee must exercise his discretion in the manner in which a prudent man would in the management of his own affairs. If he is at a loss as to the mode of investment, or if the condition of the parties or of the estate may seem to require a particular mode of investment, it is at once the duty and the privilege of the trustee to seek the instruction of the Court, and thereby insure its protection. It is hardly necessary to say, that if he departs from the instructions thus sought and received, he acts on a responsibility which he must be prepared to vindicate.

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*By the order of February, 1859, (made in a cause in which the trustee and cestui que trust were all parties, and under which the trustee received his appointment,) it was provided that, upon receiving the trust fund from the Commissioner in Equity, the trustee should invest the same in slaves, "if, in the judgment of the trustee, said investment can be made on advantageous terms, and that, until said investment be made, he do pay the annual interest accruing on said trust fund to his cestui que trust." The order is plain and unambiguous in its terms, scarcely susceptible of misinterpretation; yet it is a departure, in some respects, from the ordinary practice and policy of the Court. The circumstances which seemed to justify this departure are fully stated in the decree of the Chancellor, and the parol testimony exhibited the motives which probably actuated the several parties in assenting to the arrangement. Twelve months previously, a different person had been appointed trustee, (the defendant, according to his answer, having then declined,) but when the person thus appointed ascertained that he was to give

bond and sureties, and thereupon invest the fund in slaves, or in consequence of some other consideration, he declined to comply with the terms of his appointment. Thereupon, the application to the defendant (who, it was said at the bar, is a brother of Mrs. Snelling,) was renewed, and he was assured that, if he would accept the trust, the parties did not wish the investment in slaves, and he could have the use of the money during Mrs. Snelling's lifetime, paying to her the annual interest on the fund. Mr. Hagood, the former Commissioner, proved that such was considered a desirable arrangement for trustees, and the solicitor in the cause testified that the pecuniary condition of the defendant rendered it particularly convenient to him, and, he believes, influenced his determination. Whatever may have been the motive of the parties, the order was made with the concur-

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rence of all. The fund *was to be held by the trustee until, in his judgment, it could be advantageously invested in slaves, and, until such investment, he was to pay to Mrs. Snelling the annual interest. If, on 7th February, 1860, the defendant had been called on for the interest, it would scarcely be deemed a satisfactory reply that, finding it inconvenient or impracticable to make seven per cent., he had invested the fund in six per cent. United States stock, or in his neighbor's bond, well secured, but the interest not yet due, and had thus exercised the discretion, properly confided to trustees. The fallacy of the reply would be transparent on reference to the order. Does it make any difference in his favor that he had paid the annual interest regularly for several years, as prescribed by the order, and then, *sua sponte*, had adopted this mode of applying or investing the trust fund. The order of February, 1859, though not properly a decree, was an administrative order, and was equally obligatory upon the parties until authoritatively rescinded or modified, after due notice to those interested. That order left no room for the exercise of the defendant's discretion, except as to the investment in slaves, and provided, in the meantime, for the security of the fund in defendant's hands, and for his payment of the annual interest. If, in the course of time, and in the progress of events, circumstances changed, and either, or all of the parties desired a modification or rescission of the order, it was his or their obvious course, upon proper notice, to submit their application to the Court, which, upon hearing the parties, would make such order as the circumstances would seem to require or render expedient. It is due to the candor of the defendant's counsel to state his disavowal of the position that the *ex parte* application, in November, 1863, was of this character. Upon this point, the judgment of the Court in *Sollee v. Croft*, (7 Rich. Eq. 34,) is as conclusive as the reasons are satisfactory. Until the order

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of February *1859, had been regularly modified or rescinded, its continuing efficacy and obligation remained. In one of our cases it is said by Chancellor Harper, that where a decree or order is made by consent, it is the parties' own act, and they should take such decree as they can abide by. Such was obviously the character of this order. The effect of it was that, until invested in slaves, the fund should stand secured by the defendant's official bond, he paying the annual interest. Under such circumstances, the provisions of the Act of 1861, whatever may be its efficacy, have no application. The parties had themselves agreed upon a mode of investment mutually satisfactory, which had received the sanction of the Court, and which had been carried into effect.

It is ordered and decreed that the appeal be dismissed.

WARDLAW, A. J., concurred.

INGLIS, A. J., absent at the hearing.

Decree affirmed.

14 Rich. Eq. *304

*JAMES B. ADAMS and MARGARET E.,
His Wife, v. C. H. LATHAN, Executor.

(Columbia. April and May Term, 1868.)

[*Guardian and Ward* ⇨153.]

Where a guardian charged himself in his annual return with a gross amount received "in notes," his estate after his death was held properly chargeable with the amount as so much cash received, and with interest thereon from the end of the year, his executor not being able to show how much, if any, of the amount was interest due on the notes.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 508; Dec. Dig. ⇨153.]

[*Guardian and Ward* ⇨54.]

As a general rule, a guardian should be charged interest on cash received only from the end of the year on the balance then in hand, and even where, in an exceptional case, he is charged interest before the end of the year, in the absence of proof that interest had, in fact, been made, some reasonable time for making an investment should be allowed, and no interest charged during that time.

[Ed. Note.—Cited in *Livingston v. Wells*, 8 S. C. 364.

For other cases, see *Guardian and Ward*, Cent. Dig. § 250; Dec. Dig. ⇨54.]

[*Guardian and Ward* ⇨54.]

A guardian received \$1,147.47 on 23d February: there being no need to retain any part of this sum in hand, held that he was chargeable with interest from the 1st June of the same year.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 242-253; Dec. Dig. ⇨54.]

[*Evidence* ⇨121.]

Where a guardian delivered money to A., declaring at the time that it belonged to his ward, and requesting A. to purchase with it Confederate bonds as an investment for his ward, and further stating, at the same time, that he had previously made an investment for

his ward in Confederate bonds, which his son had sold by mistake, and that the money now produced was the proceeds of that sale, held that so much of the declarations as stated that the money belonged to the ward, and the guardian's object in making the purchase, was admissible, as part of the res gestæ, for the purpose of showing that the guardian was entitled to credit for the investment, but that so much as related to the past alleged transactions was inadmissible.

[Ed. Note.—Cited in *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 485.

For other cases, see *Evidence*, Cent. Dig. § 316; Dec. Dig. ⇨121.]

[*Guardian and Ward* ⇨151.]

Under the Act of 1859 the estate of a guardian is entitled to commissions on his executor's paying to the ward a balance which remained in the guardian's hands at his death.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 501; Dec. Dig. ⇨151.]

Before Lesesne, Ch., at Lancaster, June, 1867.

The plaintiff, Margaret E., had been the ward of Samuel Faulkner, who died in 1865.

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The defendant is his *executor, and this bill was for an account of the estate of the ward which came to the hands of her said guardian. The testator had also been guardian of Jesse C. and James P. McDow, two brothers of Margaret E., who both died during the period of his guardianship.

The accounts of the testator were referred to the Commissioner who made a report, dated 25th June, 1866, by which, amongst other things, he charged the guardian with the following items taken from his returns as guardian, and with interest thereon as stated at the foot of each item:

"1851, November 15. Received by guardian in notes from administrator of John J. McDow" (father of Margaret E.) "full share of Margaret E. in personal estate."	\$1,225 66
"By commissions on above at 2½ per cent....."	30 64
	1,195 02
"Interest from 15th November, 1851, to 25th June, 1866....."	1,222 23
	\$2,417 25
"1853, July 15. Received share of Margaret E. in estate of her deceased brother Jesse C., being one-third thereof...."	\$ 421 38
"Interest from 15th July, 1853, to 25th June, 1866....."	381 81
	803 19
"1863, February 23. Received share of Margaret E. in estate of her deceased brother James P., being one half thereof....."	\$1,147 47
"Interest from 23d February, 1863, to 25th June, 1866....."	268 18
	1,415 65."

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*The Commissioner then credited the estate of the guardian with \$3,000, invested in Confederate bonds, and with interest thereon from 1st January, 1865, and after deducting other credits stated, the balance due by the estate on 25th June, 1866, to be \$785.25, and on this balance he allowed no commissions.

The guardian had not credited himself in his annual returns with the \$3,000 alleged to have been invested by him for his ward, at 90 cents in the dollar, in Confederate bonds to the amount of \$3,300, but to prove that such investment had, in fact, been made, bonds to that amount, which the testator held at his death, were produced, and a number of witnesses examined. Among the witnesses was Dr. J. J. Williams, who testified that in the year 1865, some time after 1st July, the testator delivered to him \$3,000, and requested him to purchase that amount in Confederate 8 per cent. bonds; said the money belonged to the plaintiff, Margaret E., and he wanted the bonds as an investment for her; that some time before then he had made an investment for her in Confederate bonds, but his son had sold the bonds by mistake; that the money he then handed to the witness was the produce of those bonds, and that he wanted to purchase other bonds to replace those his son had sold. The witness further testified that he purchased bonds as requested in Charlotte, North Carolina, at 90 cents on the dollar, and delivered them to the testator. Other witnesses testified to similar declarations made by the testator at other times.

All the declarations of the testator were objected by the plaintiffs as incompetent, but the Commissioner held that so much of the declarations to Dr. Williams as stated to whom the money belonged and for whom the investment was to be made, was competent as part of the *res gestæ*, all the rest being inadmissible.

The case came before the Circuit Court

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on exceptions to *the report on all the points above indicated. His Honor sustained the ruling of the Commissioner on the questions of interest, commissions, and evidence, but overruled him on the question as to the investment in Confederate bonds.

The defendant appealed, and all the points above stated were brought by the appeal before this court.

Williams & Allison, for appellant.
Moore, contra.

The opinion of the Court was delivered by

INGLIS, A. J. If the shares of the ward in the several estates of her father, and her brothers, Jesse C. and James P., or any of them, were received by the guardian, in whole or in part, in promissory notes or oth-

er choses in action, bearing interest, and such shares, as charged to the guardian, embraced interest then in arrear on any or all of such notes, &c., it was incumbent on the guardian to have distinguished in his appropriate return between the principal and such interest, or, at least, upon those who now represent him to have shown definitely at the hearing what part of such receipts, if any, was interest. In the absence of such showing at the proper time, it is not seen how the Commissioner could have done otherwise than he has done in charging the gross amount of each share as cash received, at its proper date. The very truth of things would certainly have required that the guardian, in his annual return next after the receipt thereof, should have stated exactly in what form the share of the ward came into his hands, and have charged and credited himself only with his actual cash receipts and disbursements, at the proper date of each. Not having done this, he must abide by the only means of information which he has furnished.

The general rule of accounting is that the

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guardian, &c., *is not to be charged with interest on sums of money received for his ward during the year in which they are received, but only on the balance found to remain in his hands upon making up his account at the end of the year. But this rule is subject to some qualifications and exceptions, under peculiar circumstances. When sums of money, large compared with the current expenditures of the estate, are received, and there is no occasion to retain them to meet claims upon them, they ought to be invested, and not suffered to lie idle and unproductive. A reasonable time will, however, be allowed the guardian for making such investment, varying of course according to circumstances; and interest should be charged only after such time, unless it appear that interest has in fact been made sooner. (*Baker v. Lafitte*, 4 Rich. Eq. 392.) In the present case, the sum of \$1,195.02, received on the 15th November, 1851, within less than two months from the end of the year, and the sum of \$421.38, received on the 15th July, 1853, ought not to bear interest from the date of receipt respectively, but only the annual balance appearing due at the end of that year thenceforward. The sum of \$1,147.47, representing the share of the ward in the estate of her brother, James P., was received so early in the year 1863, as on the 23d February. From the account contained in the brief, it appears that there was at that time already in the guardian's hands an interest-bearing fund of more than two thousand dollars. (\$2,000,) the annual income from which far exceeded the current expenditures of each year, and there was therefore no need to retain any part of this considerable sum of money in hand. It ought to have

been invested within a reasonable time, and, in the absence of any proof of special circumstances affecting his ability to obtain proper investments, a period of three months may fairly be allowed for this purpose. On this sum of \$1,147.47, the guardian ought to be charged with interest only from the 1st

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June following its *receipt, (1863,) and not from 23d February, the day of its receipt.

Under the express provisions of the Act of Assembly of 1859, (12 Stat. 825,) the estate of the guardian ought to have been allowed the usual commissions, for the payment over by his executor of the balance of the ward's money remaining in his hands at his death, inasmuch as the payment here is to be directly to the ward, and not to another guardian.

The declarations or statements of the guardian to the witness, J. J. Williams, when commissioning him to purchase Confederate bonds, in reference to the proprietorship of the funds with which, and the use for which, they were to be purchased, were properly admitted in evidence as part of the res gestæ, accompanying and giving character to the act. But the recital of past transactions, though having some relation to the act, was properly excluded. (Haynes v. Rutter, 24 Pick. 242.) There is no just ground of exception to the Chancellor's ruling in this particular.

In order to determine the fact and also the legal propriety, if made, of the alleged investment in Confederate bonds, it seems to the Court important, in the circumstances of this case, that the precise time, when it is claimed the ward's funds were originally so invested, should be ascertained. The Chancellor, in his decree, says this was in 1863, and refers for his authority for this statement to the return made after the guardian's death by his executor in December, 1865. But upon examining the account of the guardianship contained in the brief, made up, it is presumed, from the guardian's returns, it is found that no date whatever is there assigned to this investment. Important parts of the testimony seem to make it probable that the original purchase of Confederate bonds, if any such was made at all for the ward's estate, was in the spring of 1864. It would be unfortunate if the interest of

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*either party should be prejudiced by a mere inadvertence or mistake of fact on the part of the Chancellor touching the date of a transaction. Further inquiry on this point must be had.

It is ordered that the Commissioner of the Court of Equity for Lancaster District, where this cause is pending, restate the account of the guardianship in respect to the items of interest and commissions herein mentioned, in conformity with this opinion, and that he inquire and report to the Circuit Court par-

ticularly concerning the fact, and the dates and propriety of the investment, if made, of the ward's funds in Confederate bonds, originally and subsequently, and any special matter touching the same; and that the cause be remanded to the said Circuit Court for a further hearing and judgment on the matter thus opened.

Circuit decree modified, and cause remanded.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Decree modified.

14 Rich. Eq. *311

*RICHARD T. PARKS v. WILLIAM D. JENNINGS and Others.(a)

(Columbia. Dec., 1867.)

[*Specific Performance* ⇨121.]

The evidence examined and specific performance of a contract to execute conveyance in fee simple decreed, although the answer alleged that the contract, which had been lost, was to convey only for a limited time.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 387-395; Dec. Dig. ⇨121.]

[*Specific Performance* ⇨121.]

The evidence as to the loss of the contract also examined and the loss held to be established by the proof.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 387-395; Dec. Dig. ⇨121.]

[*Estoppel* ⇨94.]

If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against such person.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 245-247, 276-284; Dec. Dig. ⇨94.]

[*Specific Performance* ⇨49.]

[A. sold land to B., giving him a receipt for titles. B. sold the same to C., and never having called on A. for the titles, authorized A. to deliver the titles to C. In a suit by C. to compel A. to make good titles to C., it was held that want of consideration for B.'s contract with C. was no defense.]

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 140; Dec. Dig. ⇨49.]

Before Johnson, Ch., at Edgefield, June, 1866.

The decree of his Honor, the Chancellor, is as follows:

Johnson, Ch. On the 4th day of December, 1861, William L. Parks and Felix G. Parks, under a power conferred upon them by the will of their late father, Richard Parks,

(a) This case was decided in December, 1867, and among the cases of that term it should properly have appeared.

sold at public sale, two tracts of land. One of which was known as the "Parks' Mill Tract," containing about fifteen acres, and the other was known as the "Kimbrel Tract," containing one hundred acres, more or less. The former was bid off by W. L. Parks, for seven hundred and fifty dollars; the latter was bid off by the complainant for three hundred dollars. The terms of sale have been complied with, but from some cause, the title deeds have never been executed.

On the 27th day of June, 1862, William L. Parks sold and conveyed an undivided three-fourths interest in the Parks' Mill Tract to

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W. D. Jennings, G. C. Robertson and *C. L. Blair, for the sum of six hundred dollars; and upon that being done, the joint owners of the land entered into a copartnership for the purpose of running the mill, &c., and appointed W. D. Jennings, President or general agent of the firm.

On the 24th day of December, 1863, the complainant sold and conveyed the "Kimbrel Tract" of land to the said firm for one thousand dollars. And soon after this, James A. Bass, from Virginia, purchased from W. D. Jennings, as the agent of the firm, the Parks' Mill Tract and the Kimbrel Tract of land for twenty thousand dollars, which was paid by him, and W. D. Jennings gave him a receipt for titles. And soon afterwards, Bass entered into the possession of the land, and erected valuable improvements on the same, and purchased a small tract adjoining the same (which increased his whole tract to one hundred and thirty acres) from M. N. Cartledge.

On the 5th day of April, 1865, Bass sold the whole tract of land to the complainant, Richard T. Parks, for forty-five thousand dollars, in cash. Twenty-one thousand dollars of which the complainant borrowed from C. L. Blair, for which C. L. Blair required him to pay him five thousand dollars in cash, and to agree to pay him one-half of the net profits of the mills for two years, and to give him his note for the whole amount of twenty-one thousand dollars, secured by a mortgage of the premises; and on the same day Bass gave R. T. Parks a receipt for the money in full payment for a certain tract of land, containing one hundred and thirty acres, more or less, &c., and also signed and delivered to R. T. Parks an instrument in writing of which the following is a copy, to wit:

South Carolina,
Edgefield District. }

Having never received titles to the tract of

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land above *described, I hereby authorize and request W. D. Jennings & Co., to make titles to R. T. Parks. I have received only a receipt for the purchase-money of the tract of land above described, never having called

upon the parties for titles. Witness my hand, this 5th April, 1865.

J. A. Bass, [L.S.]

In presence of

Thos. G. Bacon,

Angeline M. Bacon.

The receipt given by W. D. Jennings, as the agent of the firm, to J. A. Bass, had either been lost, or was said to have been lost, at the time the sale was made to R. T. Parks, but it is not denied by any of the parties, that a receipt for the purchase-money of the land had been given to him, and also for titles.

The bill was filed for the purpose of compelling the defendants to execute good and sufficient titles to the complainant for the whole of the said tract of land, and of having account taken between the complainant and the defendant, C. L. Blair, but the questions involved in such accounting, are such as cannot now be considered and passed upon, in consequence of the late order of Major General Sickles, and they are therefore reserved.

W. D. Jennings, in his answer, denies having sold to J. A. Bass, or to any other person, the fee simple in the said tract of land, but acknowledges that he did sell to J. A. Bass the "right and privilege of occupying and using the said land, and tannery, and distillery, and mill for and during the war."

The other members of the firm, in their answers, admit that they, or their constituted agent for them, sold the land, with all the improvements upon it, to J. A. Bass, and that, at the time the sale was made, and for some time afterwards, they regarded it an

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absolute sale of all the interest *that the firm had in the same, but that Dr. Jennings had subsequently told them, that they would get the land back after the war was over, and cautioned them against making titles to J. A. Bass, or to any other person.

So, the first question that has to be decided is, what interest in the land was sold to Bass, and for this purpose, it will be necessary to refer to certain parts of the evidence.

Wm. Elkins testified, that he was sent by R. T. Parks to J. A. Bass to buy the mill for him, and Parks told him to ask Bass about the title to the land. Bass told him he would have to see Dr. Jennings about the titles.

E. H. Chamberlain testified, that, at one time, he had an idea of purchasing the mills, in connection with Spann Hammond, who was negotiating with Bass for them, and that he went to see W. D. Jennings about the titles and he told him to see Bass, and take a receipt from him for titles, that he had given Bass no titles, but a receipt for titles, which was as good as a title. "He told" witness "to get a receipt from Bass, or if witness did not think that was enough, to take a quit claim from Bass, and they would make me (witness) titles to the place." "Heard Dr.

Jennings say repeatedly, that he had sold the mill; heard him say the reason why he sold it was, that they had an overshot wheel, and that when the dam got a little old, they feared it would not answer the purpose they expected. Witness was present at conversation between Jennings and R. T. Parks. Jennings said to R. T. Parks, Mr. Blair will assist you in the purchase; Parks said he hated to call on Mr. Blair,—Mr. Blair had proposed to go into partnership with him; and Dr. Jennings told him not to be afraid, that he would write a note to Mr. Blair, and if Blair did not have the money, they could and would get it. Understood the receipt from Jennings to Bass was for full title for life time—a fee simple title.”

Benjamin Roper testified, “that he was at

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the Parks” *Mills since the surrender, and heard Dr. Jennings say to R. T. Parks, that he would send a man to take possession of the mill next week. Parks said he would die before he would give it up. Witness loaned Dr. Jennings \$18,000, in Confederate money; thinks it was on sale-day in April, 1865,” and took the promissory note of Dr. Jennings, C. L. Blair and A. A. Glover for the same. And that in the conversation which he had heard at the mill between Jennings and Parks, Jennings said this matter had commenced in rascality, and should end in it.”

S. Harrison testified that he was present when Jennings sold the mill to Bass, and that he wrote a receipt for nine thousand dollars in part payment for the same.

J. W. Dougherty testified that he had heard all the company, except Jennings, speak of having sold the mill, and thought that they were all satisfied with the price which they had received for it; and witness thought that the price paid was the full value of the land at the time the sale was made.

M. N. Cartledge testified that he was boarding with Dr. Jennings when the mills were sold, and that he had heard him say that he had sold the land to Bass for \$20,000, and witness thought this was a high price for it.

H. T. Wright, Confederate Tax Collector, testified that during the war Dr. Jennings paid taxes on certain mills as the agent of J. A. Bass.

All the witnesses, who were interrogated on the subject, testified that the land was sold by the firm for its full fee simple value. All the parties interested, except Jennings, regarded the sale as an absolute one for all the interest they had in the same. There was one witness present when the sale was made by Jennings to Bass, and various witnesses heard Jennings speak of the sale afterwards, but no one, until after the surrender, and until after Bass had left the State,

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ever heard him intimate, that *the sale was not a real one for all the interest the firm

had in the land. And on one occasion assigned a reason for the sale, which is totally irreconcilable with the statements of his answer.

Taking all the evidence together, I am forced to the conclusion that the sale made by Jennings, was for all the interest which the firm had in the land, and that the idea of its being only a lease for the continuance of the war, was an after thought of Jennings, and a determination on his part, at least, that the matter should end in “rascality.” In addition to the above reasons, Jennings and Blair encouraged the complainant to make the purchase, and really assisted him in getting the money with which to pay for the land; but under circumstances that do not entitle them to much credit, even though they supposed the complainant was getting a good title, but much less if they knew that the title of Bass was only for a limited period.

The only question that remains to be considered, and the only one in the case that presents any real difficulty is this, is there such privity existing between the complainant and the defendants as will entitle him to come into this Court and require that they should execute titles to him? At law, it is very clear that there is no such privity between the parties as would be recognized by the Courts, but the general rule in equity is, “that when the specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between all parties, claiming under them in privity of estate, or of representation, or of title.” 2 Story's Eq. 788; Hopkins v. Hopkins, 4 Strob. Eq. 207 [53 Am. Dec. 663]; 6 Johns, Ch. 398; Hays v. Hall, 4 Porter, 374.

I have not been able to find any case, the facts of which are similar to this, but from the general principles laid down in the authorities referred to, and many others of a similar character, I am of the opinion that there is such privity between the complainant and the defendants.

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*It is ordered and decreed, that the Commissioner of this Court do convey to R. T. Parks the one hundred and thirty acres, more or less, described in the bill, which conveyance shall be valid and binding, not only against all the members of the firm, but also against J. A. Bass, and the executors of R. Parks, and against all persons claiming under them, or either of them.

It is also ordered and decreed, that W. D. Jennings, C. L. Blair, G. C. Robinson and W. L. Parks do pay the costs of these proceedings, which have heretofore accrued, and which may accrue, until the title deed is executed, including the costs of the same.

The defendants appealed and now moved this Court to reverse the decree on the following grounds, viz.:

1. That the evidence is conclusive that W.

D. Jennings sold to J. A. Bass only "the right and privilege of occupying and using the said land, and tannery, and distillery, and mill, for and during the war."

2. That said agreement was illegal as it was entered into by W. D. Jennings and J. A. Bass to enable the said J. A. Bass to avoid the Conscript Act of the Confederate States of America, said action being against the public policy of the said Confederate States.

3. That said contract was void ab initio, it being a gross fraud upon the military rights of the Confederate States of America.

4. There was no legal consideration, the Confederate money paid for said lease being inadequate, illegal and worthless.

5. That there was not such privity exist-

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ing between the *plaintiff and the defendants as will entitle him to come into this Court and require that they should execute titles to him.

6. That his Honor, the Chancellor, has erred in stating as evidence in his decree, upon which his decree is based, that no one denied that a receipt for titles was given by W. D. Jennings to said J. A. Bass for the land. His Honor further erred in stating that no one, until after the surrender, and until Bass had left the State, ever heard him (W. D. Jennings) intimate that the sale was not for all the interest the firm had in the land.

7. That at the time of the purchase of said lands by said R. T. Parks, from said J. A. Bass, the consideration, which was Confederate money, was worthless, the contract was based upon no consideration, and was clearly "nudum pactum."

8. That the contracts between all parties were void as being against the public policy of the United States of America.

Gary, for motion.

Abney and Wright, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. Upon questions of fact, this Court rarely interferes with the conclusions of the Chancellor, or the verdict of a jury.

The only foundation for the three principal grounds of appeal, is the uncorroborated statement in the answer of William D. Jennings. The interrogatories in the bill, when

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*taken in connection with the charges, amount to no more than an inquiry as to the payment of the money, and the cause of the omission to make titles at the time. This the defendant might have answered in the affirmative, or negative, but instead of this, he insists by way of avoidance, on a distinct fact—an agreement entered into in violation of the laws of the land. It is very questionable how far, in such case, the answer is evidence of such fact. (See Green

v. Hart, 1 John R. 590; Hart v. Ten Eyck, 2 Johns. Ch. 38.)

But the answer was received and weighed by the Chancellor. And this Court is entirely satisfied with his judgment, that it is not only inconsistent with the testimony in the case, but with his own declarations and conduct. It is a familiar principle of equity, that "if a person having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right." (2 Sugd. Vend. 262.) Spann Hammond was negotiating with Bass for the purchase of this land and mill. On application to Jennings as to the titles, Jennings said "he had given Bass a receipt for titles which was as good as a title, and if the witness would get a receipt from Bass, the parties would make Hammond a title," &c. The same witness proves that he, Jennings, actually encouraged the plaintiff in the purchase of the property, and in case of necessity proffered to aid him with the means. It cannot be supposed that about 5th April, 1865, Spann Hammond was negotiating for the purchase of the right to "occupy and use the land, and tannery, and distillery, and mill, during the existence of the war," which was then waging, &c., or that Jennings proffered to assist the plaintiff in raising forty-five thousand dollars, for the purchase of such right at that time.

In the sixth ground error is imputed to the Chancellor, in stating that "no one denied that a receipt for titles was given by W. D. Jennings to said J. A. Bass for the land."

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*The language of the decree is, (referring to the loss of the receipt,) "but it is not denied by any of the parties, that a receipt for the purchase-money had been given to him, (Bass,) and also for titles." Parties means of course, the parties to the sale. No denial is made in the answer of Robertson, W. L. Parks or Blair, and these with W. D. Jennings constituted the Company. The answers of Jennings (although the bill alleged that "the instrument of writing had been lost, mislaid or destroyed") neither denies the execution of the paper, nor the loss: but in his conversation with the witness Chamberlain, Jennings stated explicitly that he "had given Bass a receipt for titles; he had given him no titles, but a receipt for titles, which was as good as a title."

Then as to the loss of the receipt. A loss, says Lord Langdale, in Cackell v. Ridgman, (4 Beav. 500,) "may be more or less susceptible of proof, according to circumstances. In some cases, it may be clearly and distinctly proved: in other cases, it may be reasonably inferred from circumstances, and every case must to some extent, depend upon its own circumstances." Bass had left the State; Cartledge, one of the witnesses, "heard Bass say he had been robbed at the mill, and did not care for what he had lost, but a receipt

he had in his coat pocket, the receipt from W. D. Jennings & Co." John E. Bacon said he was called on by "W. D. Jennings, Blair, and the plaintiff, (R. T. Parks,) to draw what he (witness) conceived to be a deed, from Bass to R. T. Parks; witness drew the deed, and left it in the possession of Parks; the deed was for a certain mill; witness has an indistinct recollection of a lost paper being mentioned by the parties; witness did not consider Parks as his client; he looked to Dr. Jennings in the matter." However strong this may be as to the conviction of Jennings and Blair, that Bass was entitled to convey to the plaintiff, and that they so represented,

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it would be inconclusive as to the *fact of loss of the instrument given by Jennings to Bass. But, taken in connection with the other circumstances of the case, it was sufficient to satisfy the Chancellor. So far back as December, 1863, (says Blair in his answer,) James A. Bass did purchase from William D. Jennings & Co. the tract of land, &c., for twenty thousand dollars. It was proved that the consideration money was divided between the parties; that Bass went into possession,

and continued in possession until April, 1865, when he sold to the plaintiff, who has since held possession. If there had been no transfer by Bass to the plaintiff, and these proceedings were by J. A. Bass against W. D. Jennings & Co., to complete the title, the usual practice of this Court would entitle him to a decree.

Nor can the seventh ground of appeal avail the defendant. It was for J. A. Bass to estimate the value of the consideration on 5th April, 1865, when, under his hand and seal, he directed W. D. Jennings & Co. to make titles to the plaintiff for the tract of land, with the tannery, distillery, and mill thereon, for which he had on that day received full payment. The effect of the decree is only to require that to be done now, through the Commissioner, which should have, at that time, been done by the parties themselves.

It is ordered and decreed, that the decree of the Circuit Court be affirmed, and that the appeal be dismissed.

WARDLAW, and INGLIS, A. JJ., concurred.

Decree affirmed.

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT
OF
SOUTH CAROLINA

VOLUME I

FROM NOVEMBER TERM, 1868, TO NOVEMBER TERM, 1869, INCLUSIVE

BY J. S. G. RICHARDSON

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUSTICES OF THE SUPREME COURT.

HON. F. J. MOSES, CHIEF JUSTICE.

“ A. J. WILLARD, ASSOCIATE JUSTICE.

“ S. L. HOGE, ASSOCIATE JUSTICE. (*a.*)

JUDGES OF THE COURTS OF COMMON PLEAS AND GENERAL SESSIONS.

1ST CIRCUIT—HON. R. B. CARPENTER.

2D “ “ Z. PLATT.

3D “ “ J. T. GREEN.

4TH “ “ J. M. RUTLAND.

5TH “ “ L. BOOZER, (*b.*)

6TH “ “ W. M. THOMAS.

7TH “ “ T. O. P. VERNON.

8TH “ “ J. L. ORR.

ATTORNEY GENERAL.

D. H. CHAMBERLAIN, Esq.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

(*a.*) Resigned, and Hon. J. J. Wright elected February, 1870, to fill the vacancy.

(*b.*) Died, and Hon. S. W. Melton elected to fill vacancy.

ADVERTISEMENT

THIS Volume of Reports contains the decisions of the Supreme Court from the commencement of its first session, in November, 1868, until March, 1870, when the session commencing in November, 1869, was finally closed. They were prepared for publication, and are now published, under a contract made with the Justices of the Supreme Court, by virtue of the authority, to that end, conferred upon them by the Joint Resolution of the General Assembly of the State, approved March 2d, 1871, (14 Stat., 704).

As the modes by which many of the cases came before the Court are different from that by which cases were taken to the Court of Appeals, which it superseded, and whose latest decisions may be found in 14 Rich. Equity, and 15 Rich. Law, it may not be amiss to state, briefly, what was the old practice in reference to the manner of appealing, and the practice introduced by the present Constitution of the State, and the Acts passed since its adoption, and also to indicate what seems to be the principal difference between the jurisdictions of the two Courts.

The Court of Appeals was, as its name indicates, strictly an appellate tribunal. As a Court of Appeals at Law, it had jurisdiction to hear and determine motions in arrest of judgment, motions for new trials as well for errors of law in the instructions and rulings of the Circuit Judge as for errors of fact in the findings of the jury; and, generally, to correct the errors of the Circuit Court. As a Court of Appeals in Equity, it had jurisdiction to review the decrees and orders of the Circuit Chancellors upon questions of fact as well as upon points of law, and to reverse, modify, reform or affirm them, in whole or in part. It was not necessary that the judgment or decree appealed from should be final, for, in many cases, it heard and decided appeals from orders and rulings of the Circuit Courts, whether of law or equity, in matters that were of an interlocutory nature. Indeed, it may be said that it never heard appeals from final judgments at law; appeals from the Circuit Courts of Law being always taken, not from the judgment, but from the instructions or rulings of the Judge, or the verdicts of juries. The mode of appealing from the Law Court was simply this: The appellant, or his attorney, served the Judge who presided at the trial, or who made the ruling appealed from, and the attorney on the opposite side, with a notice, stating that he appealed, what motion he would make in the Court of Appeals, and when, and setting forth his grounds of objection to the Judge's charge or other rulings, or to the verdict. The Judge then made a report of the case, stating so much of the facts as, in his judgment, was necessary to show how the points arose, and his charge or other rulings, and, where the appeal was from the verdict, he stated the evidence. Upon this report and such papers, if any, as were necessary, the appeal was heard. Appeals in equity were taken very much in the same way, except that it was not usual to serve the Chancellor with the notice of appeal, his decree answering in the place of the Judge's report.

The present Constitution of the State—the first and only plebiscitum (using this term in its modern acceptation) ever adopted by the people of South Carolina—was ratified by the registered voters of the State, on the 14th, 15th and 16th of April, 1868. By its 4th Article, the Judicial power of the State is vested in a Supreme Court, consisting of a Chief Justice and two Associate Justices, in two Circuit Courts, one of Common Pleas, "having civil jurisdiction" and "jurisdiction in all matters of equity," and one of "General Sessions, having jurisdiction in criminal matters only," and in Courts of Probate and other Courts of limited and inferior jurisdiction. The jurisdiction of the Supreme Court is stated in Section 4 of the same Article as follows: "The Supreme Court shall have appellate jurisdiction only in cases of Chancery, and shall constitute a Court for the correction of errors at law under such regula-

tions as the General Assembly may by law prescribe: Provided, That said Court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other Courts in the State." In two or more cases contained in the present volume, it was decided that the Supreme Court has no power to grant new trials for errors of fact in the findings of juries, and it would seem clear that it has no such power where the case is brought before it by writ of error or by any form of procedure substituted for such writ. Whether it may exercise such jurisdiction, in exceptional cases, by virtue of the power conferred by the above recited proviso, remains to be determined.

By "An Act to regulate appeals and writs of error to the Supreme Court," passed August 20th, 1868, (14 Stat., 12,) appeals to the Supreme Court "from final decrees and judgments in equity," were provided for, and it was also provided that "final judgments and decrees in civil and criminal actions in the Circuit Courts * * * may be re-examined, reversed or affirmed in the Supreme Court by writ of error."

By "An Act to organize the Supreme Court," passed September 18, 1868, (14 Stat., 73,) it was provided that two sessions of the Supreme Court should be held annually at the seat of Government—one session commencing on the 4th Tuesday of November, and the other on the 1st (now the 3d) Tuesday of April, (see Act of March 9, 1871, 14 Stat., 661); and, by Section 5 of the same Act, it was provided that all books of record, all files, and all property of the Court of Appeals of Law and Equity, and of the Court of Errors, shall be transferred to the Supreme Court, "and all causes pending in (said) Courts, under the laws of the late Provisional Government, shall have day, be heard, tried and determined in the Supreme Court without change of process or form of procedure, with all rights respected and preserved."

The first session of the Supreme Court commenced on the 4th Tuesday of November, 1868, and the foregoing statement indicates the modes by which the cases in this volume came before it for hearing and decision. Considered with reference to those modes, the cases may be divided into four classes as follows: 1st—Those, whether of Law or Equity, which were taken by appeal, under the old practice, to the Court of Appeals, and, not having been determined by that Court, were, under the 5th Section of the Act of September 18, 1868, transferred to the Supreme Court. To this class belong the cases of the State v. Bailey, p. 1, Carroll v. Alston, p. 7, and many others. 2d—Those actions at law, whether civil or criminal, which were brought up by writ of error, under the Act of August 20, 1868. Cosgrove v. Butler, p. 241, is the first case of this class. 3d—Those cases in Equity which were brought up, under the same Act last mentioned, by appeal from the Circuit Courts of Common Pleas. Meetze v. Padgett, p. 127, is the first case of this class. And, 4th—Those cases which were heard by virtue of the original jurisdiction conferred upon the Court by the proviso to the 4th Section of Article IV of the Constitution. There are several cases in the volume of this class, the State Ex Rel. Pillsbury v. The Acting Board of Aldermen of the City of Charleston, p. 30, being the first.

It may not be amiss to add that on the 1st March, 1870, the General Assembly passed "An Act to revise, simplify and abridge the rules, practice, pleadings and forms of the Courts in this State." This Act, known, by an ellipsis, as the Code, is divided into two parts. The first part relates "to Courts of Justice and their jurisdiction;" and the second part, which, with an occasional change or omission, is a literal copy of the corresponding part of the New York Code of Procedure, abolishes the distinction between actions at Law and suits in Equity, and provides that there shall be but one form of action in civil cases, and that shall be called a civil action. It also abolishes "writs of error in civil and criminal actions," and provides that the only mode of reviewing a judgment or order in a civil or criminal action shall be by appeal, in the manner prescribed by the Act. The next volume of Reports, now in press, will contain the first cases taken up by appeal under the provisions of this Act.

Hitherto it has been the practice in this State to publish law and equity cases in separate volumes, but that was when the two systems of law and equity were

administered by separate Courts, and through the instrumentality of entirely different forms of pleadings and practice. Under the present Constitution of the State, that condition of things no longer exists. We have now no Courts of Equity or Chancery. The body of substantive rules which they formerly administered has been transferred to the jurisdiction of the ordinary Courts of Law, and the Code, adopted in conformity to an express provision of the Constitution, has abolished the adjective rules of both systems, and constructed a new system of procedure, by which all substantive rules, whether of law or equity, are to be administered. As, therefore, the former practice of publishing the law and equity cases separately cannot be observed after the Code has gone into operation, it was deemed best to begin with this volume the practice of publishing the cases as if they belonged to one system. Indeed, if it is true, as it doubtless is, that the distinction between law and equity, (using the latter term in its technical sense, as a body or system of positive law,) is peculiar to England and those States which have derived their systems of law from her, and that the distinction is not necessary or essential, but purely accidental, and arose, as an eminent writer expresses it, "from the sulkiness and obstinacy of the Common Law Courts, which refused to introduce certain rules of law or procedure, which were required by the exigencies of society," thus imposing it, as a necessity, upon the Court of Chancery, to usurp a jurisdiction which the ordinary tribunals could just as well have exercised, then it would seem that even the term (equity) itself had as well be dropped, and but one term (law) applied to the rules of both systems, now blended, for all practical purposes, into one.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER AND DECEMBER, 1868.

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.(a)

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

HON. S. L. HOGE, ASSOCIATE JUSTICE.

I S. C. *1

*THE STATE v. MARTIN BAILEY AND CHARLES BAILEY.

(Columbia. Nov. and Dec., 1868.)

[*Appeal and Error* ⇨987.]

The Supreme Court has no power, in a criminal case, to set aside the verdict of a jury and grant a new trial, upon the ground that the verdict is unsupported by evidence.

[Ed. Note.—Cited in *Floyd v. Abney*, 1 S. C. 115; *State v. Rankin*, 3 S. C. 447, 16 Am. Rep. 737; *Sullivan v. Thomas*, 3 S. C. 544; *State v. Stephens*, 11 S. C. 321; *Steele v. Charlotte, C. & A. R. Co.*, 14 S. C. 332; *State v. David*, Id. 430; *Southern Power Co. v. White*, 92 S. C. 221, 75 S. E. 459.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 3893-3896, 3913; Dec. Dig. ⇨987.]

[*Criminal Law* ⇨781.]

A confession made by the prisoner was received in evidence, but upon its appearing that it had been obtained by undue means, the presiding Judge ruled it out, and in his charge to the jury instructed them "that the confession was incompetent as evidence, and had been ruled out." *Held*, That this was equivalent, in effect, to an instruction to the jury, that the confession was not to be considered by them, or to have any weight or influence in their deliberations.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1867; Dec. Dig. ⇨781.]

[*Criminal Law* ⇨763, 764.]

The presiding Judge stated, in his report, that he "instructed" the jury relative to the proper inference of fact to be drawn from certain portions of the evidence. *Held*, That it was not a necessary or reasonable inference, from the report, that the Judge did more than communicate his impressions, leaving the jury to accept or reject them; and, therefore, al-

(a) During the latter part of the Term.

though an instruction as to a material fact that virtually displaces the proper functions of the jury is error, yet that no such error was committed in this case.

[Ed. Note.—Cited in *Benedict v. Rose*, 16 S. C. 630.

For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. ⇨763, 764.]

[*New Trial* ⇨1.]

[Cited in *State v. David*, 14 S. C. 431; *Southern Power Co. v. White*, 92 S. C. 222, 75 S. E. 459, to the point that by virtue of their inherent powers the circuit court may grant new trials.]

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

[This case is also cited in *State v. Syphrett*, 27 S. C. 32, 2 S. E. 624, 13 Am. St. Rep. 616, as to powers of jury.]

*2

*In the District Court, Laurens, May Term, 1868.

Every thing necessary to a full understanding of this case is stated in the opinion of the Supreme Court.

Sullivan, for appellant.

Todd, Deputy Solicitor, contra.

Dec. 23, 1868. The opinion of the Court was delivered by

WILLARD, A. J. Martin Bailey, one of the defendants, appeals from a conviction at Laurens District Court, May Term, 1868. Charles Bailey and two of the children of Martin Bailey were detected in the possession of stolen property, tending to fix upon them the charge of a larceny.

Certain circumstances tended, as was

thought, to attach suspicion to Martin Bailey. A confession made by Martin was given to the jury; but upon its being discovered that there were grounds for supposing that it had been obtained by undue means, the Judge instructed the jury that the confession was incompetent.

A question of venue was raised. The evidence left to inference the question whether the place where the larceny was committed was within the District of Laurens. The Judge says: "I thought that he, (the witness,) living in the District, near to Clinton, and attending to Mrs. Holland's (the complainant's) business, though he did not say that Mrs. Holland lives in the District, or that the smoke house (from which the property was stolen) was in this District, the only inference that could be reasonably drawn was, that Mrs. Holland's smoke house was in this District, and so instructed the jury."

The Judge charged the jury "that the confessions of Martin were incompetent as evidence, and had been ruled out; that the only circumstances that could lead them to conclude that Martin was engaged in the affair was, that the other three were his children, and that a fourth man was seen, but made his escape; that this was a suspicious circumstance, but did not amount to proof of guilt." The jury found a verdict of guilty, as to both defendants.

The first ground of appeal is, that there was no evidence against Martin to found a verdict of guilty upon. The authority of this Court to grant a new trial, upon the

*3

ground that the verdict is unsupported by evidence, is directly involved in the question thus raised.

The late Court of Appeals possessed undoubted power in such a case; and the present appeal was taken on the supposition that that Court would hear the case.

The foundation of the authority of this Court is Section 4, Article IV, of the Constitution, and is in the following words: "The Supreme Court shall have appellate jurisdiction only in cases of Chancery, and shall constitute a Court for the correction of errors at law, under such regulations as the General Assembly may, by law, prescribe." A certain limited and defined original jurisdiction is conferred by the same Section, but having no bearing on the present question. Section 1, Article IV, partitioned the judicial power between the Supreme, two Circuit Courts, and certain local and subordinate Courts. Section 4 marks out the appropriate sphere of the Supreme Court under this partition of judicial power; and Section 15 defines the proper jurisdiction of Circuit Courts as follows: "The Courts of Common Pleas shall have exclusive jurisdiction in all cases of divorce, and exclusive original jurisdiction in all civil cases and actions ex delicto which shall not be cogniza-

ble before Justices of the Peace, and appellate jurisdiction in all such cases as may be provided by law. They shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect." Section 18 declares: "The Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." Section 9, Article XIV, declares as follows: "The General Assembly shall provide for the removal of all causes which may be pending when this Constitution goes into effect, to Courts created by the same."

Laying out of view matters originating in a Court of Equity, and which come here by appeal, and it is not difficult to understand, in regard to all actions and criminal proceedings, the relation of the Supreme and the Circuit Courts. The former is a Court for the correction of errors at law, and the latter Courts of general original jurisdiction.

When power over a verdict, to the extent of setting it aside, as against law and evidence, is not derived from statute authority, it resides in, and properly appertains to, a Court of original jurisdiction, and not to one deriving its jurisdiction through a writ of error.

*4

*The Court of King's Bench, at common law, exercised this power as an incident of its original jurisdiction in criminal cases. Blackstone says, (Com., Book 4, p. 361): "Yet, in many instances, where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench;" and that it was, at common law, denied to a Court having authority to correct error at law, appears sufficiently clear from the following citation from the same author, (Book 3, p. 406): "The writ of error only lies upon matter of law, arising from the face of the proceedings; so that no evidence is required to substantiate or support it, there being no method of reversing an error in the determination of facts, but by an attain, or a new trial, to correct the mistakes of a former verdict."

The nature and antiquity of the general power of Courts over verdicts is illustrated by the following observation from Coke upon Littleton (227, a.): "A verdict finding matter incertainly and ambiguously is insufficient, and no judgment shall be given thereon."

The Constitution has conferred upon the Courts of General Sessions and Courts of Common Pleas original powers, as ample as those appertaining to the Courts of King's Bench and Common Pleas of Great Britain, and we may fairly advert to the common law powers of those Courts to determine what are the necessary implications from so enlarged a grant. We have no difficulty in

recognizing the power of the Court over verdicts as clearly embraced in this grant. We would naturally conclude that, in a partition of jurisdiction, that which properly appertained to one of the members would be denied to the other in the specific form conferred upon the first. As, for instance, if the particular power in question appertained to Courts of original jurisdiction, it would be denied to one exercising appellate jurisdiction alone. If, on the other hand, it appertained to the jurisdiction capable of correcting errors at law, it must be denied to the Court of original jurisdiction.

But it may be said that the Court of General Sessions may exercise this power, as incident to its original jurisdiction, and yet no inconsistency exist in its exercise, as a branch of appellate jurisdiction. It would be an anomaly to conceive the power of setting aside verdicts for matters of fact conjointly exercised by the Courts of original and appellate jurisdiction, neither sanctioned at common law, nor by the former practice

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of this State. Formerly, in this *State, the Circuit Judges met in bank and granted new trials for both matter of fact and law. They thus sat in the exercise of original jurisdiction, and not strictly as an appellate Court, in the distinct and separate import of that term. While that power was exercised in bank it was not exercised by the Judges separately. In process of time the jurisdiction thus exercised in bank was erected into a separate Court, by statute authority, under which the Court of Appeals properly continued the same control over verdicts that had been exercised by the Circuit Judges, and the right to set verdicts aside became dormant in the Circuit Courts. This condition of things was brought about by statute authority, and was legitimate. The case now is different. The Constitution has employed well known terms of the common law to indicate the separate jurisdictions of the Courts, and has manifested an unmistakable intent to give to these Courts certain characteristics differing from the Courts that have been displaced. We must not, therefore, expect to find the key to the meaning of the Constitution in the statutes under which the displaced judiciary was organized, but in the well understood import of the terms used, as known to our system of common law.

It will be observed that there is an express denial to the Supreme Court of appellate jurisdiction, except in cases arising in Chancery. The manifest object of this expression was to prevent the exercise, under the name of appellate power, of all jurisdiction in cases at law foreign to the common law notion of a Court for the correction of errors; and, as such powers were in exercise by the Court of Appeals, we must conclude

that the clause in question acts specifically on those powers by way of inhibition.

A Court for the correction of errors at law, as known at common law, is one that has such jurisdiction as a writ of error can confer upon it. The Legislature so apprehended the intent of the Constitution, and have provided that judgments shall be brought into this Court by writ of error, (14 Stat., p. 12, Section II); and, as we have seen, upon the authority of Blackstone, the power to set aside verdicts for matter of fact does not appertain to such a jurisdiction.

That the view here presented was entertained by the Legislature may be gathered from the following clause of the Section (II) just cited: "There shall be no reversal, on such a writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the Court, or for any error in

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fact;" and, also, from the grant *to the Circuit Courts, in express terms, of the right to grant new trials, (14 Stat., p. 136.)

This would seem to conclude all further discussion; but it has been said that in criminal cases the juries are, to some extent, and in certain cases, judges of the law as well as the fact, and the question is asked whether an error at law, committed by the jury, is not as clearly within the jurisdiction to correct errors at law as the errors of a Judge or Court? The answer to this is, that at common law no such idea is recognized, and it would be a startling novelty for a judicial body to originate it. Besides, where the jury have, to any extent, been clothed with power of judging in matter of law, it has been done to remove their verdict from the control of the Judge, and to commit the right of parties to the dictates of natural law that resides in the breast of the citizen, rather than to the deductions of formal and scientific law, as administered by Courts. To allow verdicts in such cases to be reviewed, as to the matters of law entering into their composition, would not only subject them more thoroughly and effectually to the scrutiny of the Courts—thus defeating the very object in view in reposing this especial confidence in the jury—but would be impracticable, as requiring the Courts to analyze that which is incapable of analysis, namely, a general verdict, the mixed result of conclusions of law and fact.

No ground is found in theory or practice for such a conclusion, and we are constrained—though, under the circumstances of the present case, with the greatest reluctance—to conclude that this Court has no power to set aside the verdict on the first ground of appeal.

The second ground of appeal arises out of the confession put in evidence, but afterwards rejected by the Court. The appellant claims that the Judge should have instructed the

jury that it was not to be considered by them, or to have any weight or influence in their deliberations. We regard the charge of the Judge as equivalent, in effect, to the proposition contended for. Informing the jury that this confession was "incompetent as evidence, and had been ruled out," was a distinct instruction, which it is not conceived possible to have been erroneously interpreted by them. This exception is not well taken.

The third and last ground of appeal is, that "the venue was not found." The counsel for the appellant evidently understood that portion of the charge of the Judge that related to the sufficiency of the evidence on the point of venue as virtually taking the question of venue from the jury and deter-

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mining it as matter of law. It is *true that the report says that the Judge "instructed" the jury relative to the proper inference of fact to be drawn from certain portions of the evidence. It is equally true that an instruction, as to a matter of fact material to the issue, that virtually displaces the proper functions of the jury, is error. But it is not a necessary or reasonable inference, from the report, that the Judge did more than communicate to the jury his impressions as to the force of the evidence, leaving them free to accept or reject it as it accorded or differed from their own deductions. Had the Judge given such an erroneous charge as is imputed by this ground of appeal, it is fair to conclude that the ground of appeal would have been modified in form so as to make such erroneous instruction the specific ground of appeal.

The third ground of appeal is not well taken.

Many considerations in favor of the defendant are earnestly pressed upon the Court, by the counsel for the defendant, that are worthy of grave consideration before the tribunal or authority competent to weigh them. Some of them are doubtless proper for Executive consideration. It is doubtless a hardship that, in the change of the structure of the Courts, a right of appeal to the revisory power should be lost, but it by no means follows that the case is remediless because we are not authorized to apply the remedy.

It is ordered and adjudged that the appeal be dismissed.

HOGG, A. J., concurred.

I S. C. 7

CHARLES R. CARROLL, Executor of JOHN L. FRANCIS, v. GRACE ALSTON and Others.

(Columbia, Nov. and Dec., 1868.)

[Partnership [§255](#).]

On the 29th January, 1866, F and L, by written articles of that date, formed a copart-

nership in the business of barbering. The material stipulations were: (1.) That the copartnership should continue for ten years. (2.) That the business should be carried on at the building and lot No. 362, &c., owned by F, at a yearly rental of seven hundred dollars, to be paid him by the firm. (3.) That the parties should contribute equally, and the profits be equally divided. (4.) That regular books should be kept; and, (5.) That, if either party should die within the ten years, the copartnership should be regarded as ended, and a settlement be made: Provided, That if F should die within

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*the ten years L should have the right to retain the said building and lot until the expiration of that period "upon the same terms and annual rent which, by these articles, it is stipulated should be awarded to F for the use thereof." F died in September, 1866, and L continued to carry on the business at the same building and lot. *Held*, That the copartnership was dissolved by the death of F, and that L was not liable to account to F's executor for profits made after the dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 559; Dec. Dig. [§255](#).]

[This case is also cited in Campbell v. Bank of Charleston, 3 S. C. 393, as to facts.]

Before Lesesne, Ch., at Charleston, March, 1868.

Bill by the executor of John L. Francis, deceased, the testator in the cause, against his legatees, devisees and others, praying that the trusts of the testator's will may be performed—that the rights and interests of all the parties under the same may be ascertained and declared, and the plaintiff instructed upon all the complicated and grave questions arising thereunder.

To understand, however, the question raised by the appeal, it is only necessary to state: That on the 29th of January, 1866, the testator and Edward W. Lee, a party defendant, formed a copartnership "in the business of barbering and manufacturing segars," under written articles bearing that date. The articles stipulated: (1.) That the copartnership should commence on the day of the date of the articles and continue for ten years. (2.) That the name of the firm should be Francis & Lee, and the business should be carried on in the City of Charleston, at the building No. 362, &c., which belonged to the testator, at a yearly rental of seven hundred dollars, to be charged on the books of the copartnership against the firm, and to the credit of the testator. (3.) That each party should contribute an equal amount of money or capital, and that the net profits should be equally divided. (4.) That such regular books as are in use among merchants should be kept, and each party should be at liberty at all times to examine the same. And it was finally agreed and stipulated as follows: "In the event that either of the said partners should, before the expiration of the period specified for the continuance of the said copartnership, depart this life, the said copartnership shall be regarded as ended and determined, and a settlement be made by

the survivor with the executor or administrator of the one deceased: Provided, however, nevertheless, That if the said party of the first part (John L. Francis) should depart this life before the expiration of the said specified period for the continuance of the copartnership, the said party of the second part (Edward W. Lee) shall be at liberty, and have the privilege, to retain the build-

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ing, lot and appurtenances, herein*before set forth, and in which it is recited that the business of the copartnership is to be continued, until the period prescribed for the termination of the copartnership, upon the same terms and annual rent which, by these articles, it is stipulated should be awarded to the party of the first part for the use thereof."

The business of manufacturing segars was soon abandoned by the mutual consent of the partners, and the business of barbering was carried on by the firm at the building mentioned in the articles until some time in September, 1866, when the testator departed this life. The defendant, Edward W. Lee, continued to carry on the business of barbering at the same place. He offered to pay the rent of seven hundred dollars per annum, but the executor insisted that, by the terms of the articles, he was liable to account for one-half the net profits of the business as long as he occupied the building and lot; and this was the only question made by the appeal.

The decree of His Honor the Chancellor is as follows:

Lesesue, Ch. The articles of copartnership between the testator and Edward W. Lee contemplate the continuance of the copartnership for a term of ten years, and provide for the contingency which occurred, namely, the death of testator before the expiration of the term, in these words, to wit: "The said party of the second part (Edward W. Lee) shall be at liberty, and have the privilege, to retain the building, lot and appurtenances, until the period prescribed for the termination of the copartnership, upon the same terms and annual rent which, by these articles, it is stipulated should be awarded to the party of the first part, (J. L. Francis,) for the use thereof."

The building and lot referred to belonged to the testator, and the agreement was, that the business should be carried on on it, and the rent of the same should be \$700 per annum, which should be charged against the firm on their books, and credited to the testator. On the part of Lee, who availed himself of the privilege secured to him by the articles, it is contended that he is only bound to account for the rent of \$700 per annum. It is urged, on the other hand, that he is bound to comply with other terms set forth in the agreement. And the Court is of opinion that, in the abstract, the language of

the articles ("same terms and annual rent") demands the latter construction. There were

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other terms *besides the payment of rent, and its due effect must, therefore, be given to the word "terms."

What, then, are the other terms by which the firm became bound? They are: 1. That the business of barbering and manufacturing segars shall be carried on. 2. That each party shall contribute equal amounts of money or capital for the purposes of the business. 3. That the net profits shall be equally divided between the parties, and that books shall be regularly kept, which shall be examinable at any time by either one of the partners.

As to the first, it appears that no segars have ever been made, the business having been confined to barbering. But the testimony is, that it was mutually determined, in the life time of the testator, to abandon the department of segar making, the copartners having become satisfied that that business would not be profitable. The survivor, therefore, has not committed a breach of contract, and the executors have no just cause of complaint against him in this regard.

As to the second, the testator did not put in any capital, in the sense intended, and the other partner was, therefore, not bound to put in any.

As to the third, the Court is of opinion that the survivor, so long as he continues the business in pursuance of the privilege accorded to him by the articles of copartnership, is liable to account to the executors of the deceased copartner for one-half of the net profits of the business; and that it is his duty to keep clear accounts of the same. It may be that the good will of the stand was the consideration of this part of the agreement. But, whatever was the consideration, such is the effect of the agreement. It was, moreover, optional with the survivor to avail himself of it or not; and he may terminate it if he be so minded. But his omission, up to this time, does not operate a forfeiture of his right.

The judgment of the Court is in accordance with the foregoing views, and either of the parties may apply, at the foot of this decree, for any orders necessary or proper for carrying it into effect.

The defendant, Edward W. Lee, appealed, on the grounds:

1. Because, under the articles of copartnership between the testator, John L. Francis, and the said defendant, Edward W. Lee, the latter had the right reserved to him, in the event of his survivorship, to retain possession of the lot of land in King street for the remainder of the term of ten years, during

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which the partner*ship was to continue, upon the condition of paying a rental of seven hundred dollars per annum.

2. Because the decree is erroneous, in so

far as it directs an account between the executor of the testator and the defendant, Edward W. Lee, when no such claim is made or set up by the said executor, and the questions in dispute as to the articles of partnership, which arose and were discussed before the Chancellor, were between the two defendants, Laurens F. Campbell and Edward W. Lee, the former claiming from the latter the delivery to him, as devisee under the will, of the premises.

Buist, for appellant.
Whaley, contra.

Dec. 23, 1868. The opinion of the Court was delivered by

WILLARD, A. J. Plaintiff filed his bill in equity, as executor of J. L. Francis, to obtain the aid of the Court in performing and carrying into execution the trusts of the will of his testator. Laurens F. Campbell and E. W. Lee were made parties defendant, the former as devisee and residuary legatee under the will, and the latter as tenant in possession of a house and lot on King street, Charleston, which, by the sixth clause of the will, was specifically devised to L. F. Campbell for life, with remainders over as follows: as to a moiety thereof, to the children of L. F. Campbell living at his death; and as to the other moiety, to E. Houston and others.

The bill prayed that the trusts of the will of the said J. L. Francis may be performed and carried into execution by and under the direction of the Court, and that the rights and interests of all parties under the same, in the real and personal estate of the said J. L. Francis, may be ascertained and declared by decree, and the plaintiff instructed upon all complicated and grave questions arising under the will.

Lee answered, submitting to the Court certain rights claimed under articles of agreement, exhibited and forming part of the case, made between himself and the testator, J. L. Francis, on the 29th day of January, A. D. 1866.

L. F. Campbell answered the bill, submitting to the Court his right, under the agreement just referred to, for the construction of the Court.

Testimony was taken bearing on the rela-

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tive rights of Campbell and Lee, and a decree made, covering the questions at issue between the plaintiff and the two defendants last named.

The facts of the case, as far as they are necessary to explain the decree, are, briefly, as follows: The testator, during his life time, entered into an agreement with Lee to become partners in the business of barbering and sear making, to commence on the 29th of January, 1866, and continue ten years. Provision was made, as to the capital and

stock of the respective parties to be employed in the business, for an equal division of prouts, and as to other matters appertaining to a partnership business. The clauses of this agreement bearing upon the present case are as follows:

"The said party of the first part agrees to allow the said building, together with the lot of land on which the same is situated, and all the appurtenances thereto belonging, to be used for the purposes of the said copartnership during the whole time that the same is to continue, at a rental of \$700 per annum, to be charged on the books of the said copartnership against the firm, and to the credit of the said party of the first part" (J. L. Francis.) Also, as follows: "In the event that either of the said partners should, before the expiration of the period specified for the continuance of the said copartnership, depart this life, the said copartnership shall be regarded as ended and determined, and a settlement made by the survivor with the executor or administrator of the one deceased: Provided, however, nevertheless, That if the said party of the first part should depart this life before the expiration of the said specified period for the continuance of the copartnership, the said party of the second part shall be at liberty, and have the privilege, to retain the building, lot and appurtenances, hereinbefore set forth, and in which it is recited that the business of the copartnership is to be continued, until the period prescribed for the termination of the copartnership, upon the same terms and annual rent, which, by these articles, it is stipulated should be awarded to the party of the first part for the use thereof."

The Chancellor held "that the survivor, so long as he continues the business in pursuance of the privilege accorded to him by the articles of copartnership, is liable to account to the executor of the deceased copartner for one-half of the net profits of the business: and that it is his duty to keep clear accounts of the same."

The partnership terminated with the death

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of either party. Can the right to net profits survive that event? The consideration of the agreement, in the present case, was the mutual skill and services of the copartners, for the profits of the business did not depend on capital, but upon skilled labor, and, accordingly, ceased with the death of either of the copartners. The object of the copartnership was profits, and the equity of the agreement depended upon an equal division of the labors and the advantages of the enterprise. The house and lot cannot be regarded as capital, or as entering, otherwise than collaterally, into the common stock.

It was compensated for by a fixed rent, paid out of the profits, but enuring to the sole advantage of the testator. The right to net profits is the principal fruit and in-

cident of the copartnership, and, therefore, ceased with it. Upon any other construction, the language of the contract is nugatory. It would be virtually declaring as the intent of the parties, that, in the event of the death of one of the parties, his interest should continue for the benefit of his representatives, free from the necessity of either contribution to the common interest or liability for losses.

The language of the parties, the policy of the law that declares the death of a copartner a dissolution of his copartnership engagements, and the equity of the agreement in question, conspire to preclude such a construction.

The conclusion of the Chancellor was induced by a supposed necessity of finding some idea in the contract corresponding to the word "terms," employed in conjunction with "annual rent." It is assumed that the word "terms" is ambiguous, and that construction must be resorted to to fix its meaning.

However imposing that necessity may be, it certainly is not justifiable to unsettle the clearly expressed intent of the parties as to subjects that are free from obscurity.

To allow this would be to propagate an ambiguity, confined to one of those expressions that are very much a matter of form in legal instruments, throughout the body of the whole agreement. Such is not regarded as the proper office of construction, especially when it depends on verbal criticism.

It is not necessary to fix the precise object of the introduction of the word "terms," as it does not fall within the proper scope of the present bill to ascertain what interests, as between Campbell and Lee, depend upon it.

We are of opinion that the decree of the

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Chancellor, so far forth *as it directs an account to be taken of the profits of the business after the decease of the testator, is erroneous.

Judgment.

It is adjudged and decreed, that the decree of the Chancellor, so far forth as it adjudges the defendant, Edward W. Lee, liable to account to the complainant, as executor of John L. Francis, deceased, for one-half of the net profits of the business carried on by him, from and after the decease of the said Francis, and bound to keep clear accounts of the same, and as directs the said Edward W. Lee to account in respect thereof, be, in all things, reversed, and that the case be remanded to the Chancellor, to proceed therein as to all matters not adjudged hereby.

HOGUE, A. J., concurred.

U. S. C. 14

THE STATE v. EFF. MCGOWAN.

(Columbia, Nov. and Dec., 1868.)

[*Larceny* ⇨ 70.]

Indictment for stealing two hogs, the property of W. The proof was that W. lost two hogs, and about two weeks afterwards some pork, with marks thereon, supposed to identify it as meat of the lost hogs, was found in the prisoner's possession. The presiding Judge charged the jury, that, if they were reasonably satisfied the meat found was the property of W., it was their duty to convict the prisoner. Verdict, guilty. *Held*, That there was error in the charge, in point of law, because the jury were not instructed to inquire, in the first place, whether a larceny had been committed; and for such error a new trial was granted.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 182; Dec. Dig. ⇨ 70.]

Before J. J. Davis, Esq., District Judge, Laurens, May Term, 1868.

The report of the presiding Judge is as follows:

"This defendant was tried for stealing two hogs, the property of Stephen Williams, (freedman). On the 14th day of March last, Stephen Williams lost two hogs—a red one and a black one. He went to Mr. Coon's, the place where the hogs were in the habit of using, and where this defendant lived, where he met with this defendant, who then had blood upon his hands and shoes. He did not take out a search warrant, or do anything farther. On the 30th of March, (the same month), Dr. R. C. Austin lost a hog, and finding tracks going from his hog pen in the

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direction of the *house of this defendant, he procured a search warrant, and, upon searching his house, found about fifty pounds of pork—all parts of the hog—cut into small pieces, and packed in two boxes in ashes. This meat had never been scalded, but the hair was singed off, leaving some hair on it which was black and red. Dr. Austin took out a warrant for this defendant, alleging the meat to be his, and had him imprisoned until Court. When he told his story to the Deputy Solicitor, they came to the conclusion that the meat was the property of Stephen Williams, and the indictment was so framed, and Stephen sent for to make a witness of him.

"The defendant proved by James Bryson that he got seven pieces of meat from some person unknown to the witness, and paid him \$4.50 for the same; but this meat was bought the first Monday in March, and Stephen did not lose his hogs until the 14th of the same month, so it could not have been his hogs. I do not think the property was sufficiently identified, and so charged the jury, but told them this was a question for them, and instructed them that if, after maturely considering all the circumstances connected with this case, they were reasonably satisfied that the meat found in the posses-

sion of this defendant was the property of Stephen Williams, it was their duty to find the prisoner guilty, which they did."

The prisoner appealed, and now moved this Court for a new trial on several grounds, which it is deemed unnecessary to state.

Sullivan, for the motion.

Todd, Deputy Solicitor, contra.

Dec. 23, 1868. The opinion of the Court was delivered by

WILLARD, A. J. This was an appeal from the District Court of Laurens, tried at May Term, 1868. The charge was larceny. The proof showed that Stephen Williams lost two hogs; that, subsequently, fifty pounds of pork were found in the possession of the defendant, and some slight marks discovered, claimed as ground of identification with the property lost by Williams. Evidence was offered by the defendant to the effect that he had purchased a quantity of pork about a fortnight previous to the loss of Williams' hogs. The Judge charged the jury that if they were reasonably satisfied that the meat found in the possession of the defendant was the property of Stephen Wil-

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liams, it was their duty to find the prisoner guilty. The jury found a verdict of guilty.

We regard this charge as incorrect in point of law. It was not enough that the meat found in defendant's possession was that of Williams' hogs; it was necessary for the State to show that a larceny had been committed, and for the jury so to conclude. Before attaching importance to the identity of the property. The charge, as reported, was calculated to mislead the jury as to the necessity of distinct proof of the fact of a larceny, and the defendant, it must be assumed, has lost a substantial advantage thereby, which would have resulted from directing their minds to the true points at issue and the relation of the proofs of identity thereto. There must be a new trial.

HOGE, A. J., concurred.

I S. C. 16

ISAAC W. HAYNE v. WILLIAM HOOD,
Treasurer.

(Columbia. Nov. and Dec., 1868.)

[*Mandamus* ⇨ 106.]

A peremptory mandamus to compel the State Treasurer to pay a creditor of the State will not be granted, unless it clearly appear that a legal appropriation for the purpose has been made, and that there are moneys in the Treasury applicable to the claim.

[Ed. Note.—Cited in State ex rel. Conant v. Fuller, 18 S. C. 251.]

For other cases, see *Mandamus*, Cent. Dig. § 234; Dec. Dig. ⇨ 106.]

Before Glover, J., at Chambers, Orangeburg, April, 1868.

This was a suggestion by Isaac W. Hayne, Esq., Attorney General of the State, setting forth that there was due to him by the State, for his salary for the last six months of the year 1864, the sum of \$550; that said sum was standing on the books of the Treasury to his credit, and that William Hood, State Treasurer, had, upon demand, refused to pay the same; and praying that a rule may issue, directed to the said William Hood, commanding him to shew cause why a writ of mandamus should not issue, compelling him to pay the said sum.

A rule, according to the prayer of the suggestion, was granted by his Honor, returnable before him on the 28th April, 1868.

The respondent, William Hood, answered the rule under oath. He admitted that there was due by the State to the relator the sum of \$550, for his salary as Attorney General

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during the last two quarters of the year 1864, and that said sum was standing to his credit on the books of the Treasury. He referred to the Appropriation and Supply Acts passed in the years 1863, '5 and '6, a Joint Resolution passed in 1865, (Rep. and Res., p. 200,) and sundry Resolutions passed in 1866, providing for the payment of arrearages of salaries in special cases, and submitted, on several grounds stated in the return, that there was no law which authorized him to pay the claim. He also referred to a letter from the Governor of the State, dated September 17th, 1867, instructing him not to pay arrearages of salaries due and payable in 1864, and concluded his return as follows:

"And your respondent, further answering, saith: That all the funds now in the Treasury, came thereto by General Orders of General Canby, No. 139, dated Charleston, 3d December, 1867, known as the Tax Order. That, by Paragraph I of said Order, it is provided, 'to provide for the support of the Provisional Government of South Carolina, for the year commencing on the 1st day of October, 1867, and ending on the 30th day of September, 1868,' &c. That, in the Appropriation Order of same No. and date, by Paragraph XIV, it is provided, that 'the Treasurer of the State of South Carolina is hereby authorized to pay the appropriations herein made, and the salaries of public officers payable, by law, out of funds applicable thereto, which have fallen due since the 1st day of October, 1867, and which may hereafter fall due;' and, by Paragraph XVI, it is expressly provided, 'that the unexpended balance of appropriation made within the last two years, and undrawn, may be paid by the Treasurer, according to the laws of South Carolina,' &c., which amounts to an absolute prohibition upon your respondent against paying from

the Treasury any appropriation made more than two years anterior to the date of the said order, 3d December, 1867, and precludes him from paying any balance that might have remained to the credit of any person or object appropriated in 1864.

"Wherefore, this respondent did refuse to pay to the relator the sum of \$550, demanded at the Treasury, for arrears of his salary for the year 1864. All of which is respectfully submitted."

The judgment of his Honor upon the return to the rule was as follows:

Glover, J. In answer to a rule issued in this case, requiring the respondent, William Hood, State Treasurer, to show cause why

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*a mandamus should not issue, commanding and directing him to pay the sum of \$550 to the relator, now standing to his credit on the books of the Treasury, as Attorney General of the State, as arrears of his salary for the last six months of the year 1864, he has submitted a return, setting forth the several grounds on which he has declined to pay the said arrears of salary.

The first objection of the respondent is placed on the ground that, "in theory, undrawn appropriations of a preceding year are not chargeable upon the funds raised under Supply Acts of subsequent years," &c.; and that the funds raised by taxes in 1864 consisted of Confederate money, which, by the result of the war, ceased to be available as currency; and, therefore, that the balance due to the relator was no longer a demand upon the Treasury, unless aided by legislative action. It may be conceded that the Acts to raise supplies and make appropriations, being annual Acts, expire with the year, and that the former ceases to be operative; but it is not a legitimate consequence that where the appropriations of the year exceed the means provided to pay them, that the public creditor has "no longer a demand upon the Treasury." It would be strange in theory, and stranger in practice, if the Treasurer, with ample means for the purpose, should refuse to pay a claim established before the Legislature—a fortiori, a salary—because the demand was not made during the year. Neither in theory nor practice can such a refusal be justified. Means are provided every year to meet the public expenses, and the tax Acts can be enforced only during the year; and should the income be insufficient to meet all demands against the Treasury, then it is the duty of the Legislature the next year to make further provision to meet the deficiency. The appropriation Act, having directed the payment of the public creditor, is a compulsory order on the Treasurer to pay, when demanded; and such Acts do not require a re-enactment every year to give validity to their provisions. While funds are in the Treasury, the claims against the State should be paid without applying to the Legis-

lature for a further recognition of them, or additional authority to discharge them. I cannot understand why the State should refuse to pay undrawn appropriations because the taxes collected for that year were insufficient. As well might an individual excuse the non-payment of his debts because his means, realized during the year the debt was payable, were inadequate. I know that the means are adapted to the ways in estimating for the settlement of public dues, but a fail-

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ure of the former cannot operate as *a repudiation or discharge of the debts of State creditors. The only consequence is, that it devolves on the State to make further provision—not appropriation—for their payment; and whenever the ability to pay is within the power of the Treasurer, he should not wait further orders. The amount of the Attorney General's salary is not fixed by the appropriation Acts, but by the Act of 1828, (6 Stat., 358,) and subsequently increased by Act of 1837, (6 Stat., 577, Sec. V.) By the provisions of these Acts, a contract was made by the State with a public officer, in consideration of services to be rendered during his term of office, to pay him annually the sum stipulated. If, therefore, the State shall fail to provide and appropriate the funds necessary, she would violate her agreement. Nor can it be pretended that payment in a depreciated currency, or in worthless paper, is a fulfillment of the contract. On the contrary, an Act directing or enforcing such payment would impair the obligation binding the State to a fulfillment of her contract. If there be no funds in the Treasury, the validity of the objection to pay would be a sufficient answer to the creditor; but where the liability is established, the claim recognized, the means ample, and the amount actually appropriated, it is no justification that the demand of payment was not made during the year. Payments are generally ordered from funds not otherwise appropriated; and if there be such funds, payment should be promptly made.

2. The respondent also relies upon the Act of 1865, and he infers from the third Section, "saving claims for arrears previous to 1865 from prejudice," that the Legislature contemplated examination into all arrears, like other claims, and a determination on their merits by the Legislature, on petition, before they were discharged. I am unwilling to impute to the Legislature such an intention, nor can I infer it from the language of the Act. The Attorney General's salary is settled by a general Act, fixing the amount of all salaries, and an Act postponing or directing the officer charged with the Treasury to withhold the payment necessarily impairs the obligation of the contract entered into by the State and her officer, and would be unconstitutional. But why examine into the merits of a claim for a stipulated salary? The demand of the relator does not depend on a quantum meru-

it, where the amount and value of services to be rendered must be determined by evidence—nor is it pretended that the relator has failed in the performance of his official duties.

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*3. To the respondent's third objection, it is only necessary to say that no legislative re-affirmance is necessary to give validity to an appropriation, and my remarks on his second ground will apply to this.

4. I cannot perceive the necessity or propriety of submitting to the Legislature claims for arrearages of salaries due and provided for—or why some were admitted, in part, and some rejected—or what special circumstances induced such a proceeding. Nor is any reason alleged why the relator's claim was not acted upon by the Senate, after it had passed the House of Representatives. If I may be permitted to conjecture, I would suggest that the true reason was, that the Senate did not believe that a concurrence with the action of the House was necessary to enable a public officer to draw his salary—or, possibly, for want of time, it was not finally acted upon. There are cases where the payment of undrawn appropriations has been very properly refused by the Treasurer, unless they be submitted to the consideration and review of the Legislature. Such cases depend on special circumstances, creating doubt as to the identity of the person demanding payment—inducing the belief of fraud—or from the great lapse of time intervening since the appropriation was made. In these cases, it would be proper that an officer, in discharge of his duties, should consult the Legislature, and submit the case to their decision. The Luxemburg claim was of this class. In answer to the rule in this case, no such reason is urged.

The Governor's instructions, referred to by the respondent in his answer, only embody his conclusions, deduced from a consideration of the Acts of the Legislature, and are entitled to great respect; but an answer to the respondent's objections is an answer to the Governor's conclusions, drawn from a construction of the language used by the Legislature.

5. Another ground assumed by the respondent is, "that the funds now in the Treasury came there by Gen. Canby's order, dated December 3, 1867." This military order employs the language generally used in the Tax and Appropriation Acts annually passed. But I do not understand that the order which directs the payment of appropriations and salaries which have fallen due since October 1, 1867, and "that the unexpended balance of appropriations made within the last two years, and undrawn, may be paid by the Treasurer, according to the laws of South Carolina," amount to a prohibition, as respondent insists, against the payment of appropriations made two years anterior to the

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date of the order. An inference *may be drawn that the intention was to give a preference to such appropriations as were made two years before the date of the order, and if, after these preferred claims were satisfied, a balance still remained in the Treasury, there is no express prohibition; nor do I apprehend that it can be legitimately inferred from the language used against the payment of all public dues, merely on the ground of lapse of time. I do not, therefore, see, in any of the grounds taken by the respondent, a sufficient excuse or justification for his refusal to pay the amount standing to the relator's credit on the books of the Treasury; and

It is ordered, That a writ of mandamus do issue, directed to William Hood, Treasurer of South Carolina, directing and commanding him to pay to Isaac W. Hayne, Attorney General of South Carolina, \$550, his arrears of salary for the last six months of the year 1864.

The respondent appealed, and now moved this Court to reverse the order of his Honor, on the following grounds:

I. That the fund in the Treasury, provided and appropriated by law for the payment of the relator's salary, for the year 1864, being Confederate Treasury notes, which ceased to be of value as currency by the result of the war, the undrawn balance of said salary for the year aforesaid no longer constituted an enforceable demand upon the Treasury, without some subsequent provision or appropriation therefor by the Legislature; and none such having been made, the respondent was not authorized to pay the relator's demand.

II. That the Legislature, by its action taken on claims for arrears of salaries, clearly manifested the intention not to subject the Treasury to such claims, by virtue merely of the original Appropriation Acts providing for the same:

(1.) By providing, in the Tax Act of 1865, and by Joint Resolution at the same session, that the funds with which the Treasury was to be replenished, should be paid out by the Treasurer only in obedience to an Act of that or some future session.

(2.) By providing, in the Appropriation Act of 1865, for payment of arrears of certain salaries accrued in 1865, although these salaries had been already provided for in the Appropriation Act of 1864.

(3.) By saving from prejudice claims for

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arrears previous to 1st *January, 1865, which, it is submitted, could not have been deemed necessary if the Appropriation Acts of former years were considered operative proprio vigore.

(4.) By assuming jurisdiction of claims for arrears of salaries accrued previous to 1865, and providing for the payment of such as

were established, in the Appropriation Act of 1866.

And it is respectfully submitted, that the respondent was legally bound to take notice of, and respect, this action of the Legislature, by whose authority alone, according to the Constitution of the State, money may be drawn out of the public Treasury.

III. That, by a proper construction of the Military Orders of December 3, 1867, referred to in the return and in the opinion and order of his Honor, the respondent is restrained from paying to the relator his arrears of salary for 1864, the same having accrued due more than two years previous to the date of said Military Orders.

IV. That the said order of his Honor is, in other respects, contrary to law.

Maher, for appellant.

Hayne, contra.

Dec. 23, 1868. The opinion of the Court was delivered by

WILLARD, A. J. This is an appeal to the late Court of Appeals from a judgment rendered by Judge Glover, allowing a writ of peremptory mandamus, transferred to this Court by Act of the Legislature.

The respondent, I. W. Hayne, filed his suggestion before Judge Glover, alleging that there was to his credit in the Treasury the sum of \$550, due as salary as Attorney General for the last six months of the year 1864, and that the appellant, then State Treasurer, had refused to pay the same, and praying a writ of mandamus. A rule was issued, to which the appellant made return, among other things, as follows: "That all the funds now in the Treasury came thereto by General Orders of General Canby, No. 139; that, by Paragraph I of said order, it is provided, 'to provide for the support of the Provisional Government of South Carolina for the year commencing on the 1st day of October, 1867, and ending on the 30th day of September, 1868;' that, in the appropriation order of *same No. and date, by Paragraph XIV, it is provided that 'the Treasurer of the State of South Carolina is hereby authorized to pay the appropriations herein made, and the salaries of public officers, payable, by law, out of funds applicable thereto, which have fallen due since the 1st day of October, 1867, and which may hereafter fall due;' and, by Paragraph XVI, it is expressly provided, 'that the unexpended balance of appropriations made within the last two years, and undrawn, may be paid by the treasurer, according to the laws of South Carolina.'"

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tion order of *same No. and date, by Paragraph XIV, it is provided that 'the Treasurer of the State of South Carolina is hereby authorized to pay the appropriations herein made, and the salaries of public officers, payable, by law, out of funds applicable thereto, which have fallen due since the 1st day of October, 1867, and which may hereafter fall due;' and, by Paragraph XVI, it is expressly provided, 'that the unexpended balance of appropriations made within the last two years, and undrawn, may be paid by the treasurer, according to the laws of South Carolina.'"

The return contains other matters not important to be considered under the view taken of this case.

The return was not traversed, nor does it appear, from the record, that evidence was taken in the case. The case, therefore, stands before us as upon a demurrer to the return, and our only duty is to examine it, in point of law, as to whether it affords sufficient ground for the peremptory mandamus.

By the return it appears that all the funds in the Treasury at the date of issuing the rule to show cause, April 22d, 1868, were derived under a tax levy made by order of Major General Canby, then exercising military authority over the State, and were, by the same authority, appropriated to certain defined objects, not embracing the claim of the respondent. Authority was given to apply the unexpended balance of former appropriations, made within the two years previous thereto, "according to the laws of the State of South Carolina." It would appear from the return that no such unexpended balance remained in the Treasury April 22d, 1868, all the funds held at that time having been derived under the military tax levy.

The determination of the question before us must have exclusive relation to the state of facts existing at the time the proceeding was taken. It will not be necessary to notice the change in the situation of the parties, the contents of the Treasury, and the state of the funds in the same, which have occurred, as the propriety of the judgment appealed from can only be determined by the state of facts on which it was based.

The writ of mandamus can only issue to compel the performance of some act obligatory by law on the person or officer to whom it goes. He must have the ability to comply, as well as be under a clear duty in respect thereof. It is not necessary to make more than a general reference to the duty of the Treasurer in regard to the payment of the creditors of the Treasury, as these

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duties are well *understood. He can only pay out of funds in the Treasury, appropriated by law, and to the objects of such appropriations. He is under no general obligation to pay the creditors of the State. It is not sufficient, even, that there should be a legal appropriation; he must have funds applicable thereto, or, in other words, not otherwise appropriated.

The respondent failed to make out such a state of facts. As the onus probandi rests with the respondent, the application for the writ of peremptory mandamus ought to have been denied.

It is ordered and adjudged, that the order of the Judge, and the writ of peremptory mandamus thereby allowed, be, in all things, reversed and vacated.

HOGG, A. J., concurred.

I S. C. 24

CHARLES MADSDEN v. THE PHOENIX
FIRE INSURANCE COMPANY.

(Columbia. Nov. and Dec., 1868.)

[Insurance ⇨668.]

Action on a policy of insurance against fire. One objection to the recovery was, that the preliminary proof was irregular, informal and insufficient; but there being some evidence of waiver by the agent of the insurer: *Held*, that the question of waiver was, under all the circumstances in evidence, one of fact for the jury, and that the Judge below did not err in refusing a non-suit on the ground that the preliminary proof was insufficient.

[Ed. Note.—Cited in *Dial v. Valley Mut. Life Ass'n of Virginia*, 29 S. C. 579, 8 S. E. 27; *Madden & Co. v. Phoenix Ins. Co.*, 70 S. C. 302, 49 S. E. 855.

For other cases, see *Insurance*, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. ⇨668.]

[Insurance ⇨560.]

The insurer is bound fairly to apprise the assured of any defect in his preliminary proof on which he intends to insist, so that the assured may know what is essential to a due presentation of his claim, and waiver may be inferred where the objection to such proof is in general terms.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1394, 1402; Dec. Dig. ⇨560.]

[Trial ⇨255.]

Failure to charge the jury with certain propositions of law cannot be assigned for error, unless the Judge be requested so to charge.

[Ed. Note.—Cited in *Fox v. Railroad Co.*, 4 S. C. 544; *Ancrum v. Wehmann*, 15 S. C. 122; *Ellen v. Ellen*, 16 S. C. 139; *Ellen v. Ellen*, 18 S. C. 492; *Sawyer, Wallace & Co. v. Ma-caulay*, Id., 545.

For other cases, see *Trial*, Cent. Dig. § 627; Dec. Dig. ⇨255.]

[Insurance ⇨333.]

A covenant, contained in a policy of insurance against fire, that the insurer "will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stove, or brick chimney," does not require that a stove in which fires are used should be built into, and form part of, a brick chimney.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 843; Dec. Dig. ⇨333.]

[This case is also cited in *Hays v. Western Union Tel. Co.*, 70 S. C. 23, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731, as to the doctrine of waiver.]

Before Glover, J., at Charleston, June Term, 1868.

The report of his Honor the presiding Judge is as follows:

"The action was on a policy of insurance for the term of eleven months, dated November 2, 1866, to recover for a total loss by fire,

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*occurring February 14, 1867, at night, in the absence of the insured. His books were lost or destroyed, except a few leaves of a small memorandum book. There was a stove in a small room, with a pipe extending three feet to a wooden partition, in which fire had been seen by a witness, but none

had been kindled that day. C. Carpel was the last person in the store that night, and there was no fire when he closed the doors.

"Respecting the preliminary proofs and the conditions precedent required by the terms of the contract, the following evidence was offered:

"The plaintiff stated that he presented a certificate of his claim, which was produced, and Mr. Tupper, the agent of the company, retained it, and, after two months, informed plaintiff that he did not mind to pay \$500 or \$1,000, which was refused. Mr. Tupper, defendant's agent, stated that the papers submitted as proofs of loss, preliminary to payment, were handed to him about a week after the fire, and he asked the plaintiff to leave them for examination, who called a month after, when witness informed him that they had no idea of such a loss as plaintiff alleged. Said that the papers were not regular, informal, and insufficient; and he stated to the plaintiff if they could settle on a sum as compensation for actual loss, he would pay, and perhaps more. Afterwards, in January last, he informed plaintiff, in writing, that his proofs were insufficient and informal. He did not go into details as to the insufficiency of proof, and he proposed to assist the plaintiff. He required bills and invoices, and duplicates, but he did not tell plaintiff what was required. He would have been satisfied with the proofs which the conditions of the policy required.

"The evidence having closed, a motion was made for a non-suit, on the ground, that there was no proof that the plaintiff had furnished such evidence of the loss and claim as the conditions required, which I overruled, as there was evidence from which the jury might infer a waiver of the strict proof required by the policy, and which was proper for their consideration. Respecting the first ground of appeal for a new trial, the question submitted to the jury was, whether the defendant, in the negotiation for a settlement, had not dispensed with the preliminary proof, as no objection was urged, in the first interview, to a settlement, except as to the extent of the loss. The plaintiff could not furnish his books, etc., as they had been destroyed by the fire. I also submitted to the

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jury, *whether the fire occurred from the stove, or whether fire had been in the stove that day. There was much evidence as to the loss, whether total or partial, but as the grounds of appeal do not require it, I have not reported it.

"The verdict was for the plaintiff."

The defendant appealed, and now moved this Court for a non-suit, and, failing in that motion, then for a new trial, on the grounds:

For Non-suit.

First. That the conditions in the policy, as to the mode and form of stating a loss, and

the nature of the proof of the amount thereof, are conditions precedent on the part of the assured; and that, until the loss and claim is made, as directed in the said condition, there is no cause or right of action against the insurer. That, in this case, there was no sufficient proof of a waiver of the preliminary proof, or any part of it.

For New Trial.

Second. That the presiding Judge should have charged the jury, that the insurer was not required by law to specify his objections to this preliminary proof, item by item, and advise the assured of the special item objected to; but that a general objection of informality and incorrectness was a sufficient objection to the whole, and that no waiver could be inferred from such a mode of objection.

Third. That His Honor should have charged the jury that, under the twelfth Section of the policy, the insurance was void, as the assured had made fire in a stove, and not in a stone or brick chimney, as required by the conditions of the said policy, thereby increasing the risk; and that it was immaterial whether a fire was in the stove on the day of the accident or not; it was enough that the risk had been incurred thereby.

Fourth. Because the verdict was, in other respects, contrary to the law and evidence.

Whaley, for appellant.

Simonton, King & Runkle, contra.

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*Dec. 23, 1868. The opinion of the Court was delivered by

WILLARD, A. J. This is an appeal from a judgment rendered by the Charleston Common Pleas, originally taken to the Court of Appeals, and brought into this Court, by transfer, under the recent statute.

The judgment was for the plaintiff on a fire policy issued by the defendants on a stock of goods in the city of Charleston.

The first point of appeal alleges error in the refusal of the Circuit Judge to allow a non-suit. The second and third grounds are, the failure of the Judge to charge the jury as to certain propositions deemed by the defendants appropriate and material to the case. The fourth ground is, that the verdict is contrary to law and evidence.

The questions raised by the points of appeal are: First, Whether there was evidence of a waiver, on the part of the defendants, of a strict compliance with the requirements of the policy as to the preliminary proofs of loss; and, Second, Whether the plaintiff has incurred a forfeiture, under the policy, for a violation of the covenant implied in the following clause of the policy, viz: "This Company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stove or brick chimney."

The brief is defective in not furnishing to

the Court information as to the precise character of the alleged irregularity in the preliminary proofs. All that is said on this subject, in the report of the Circuit Judge, is to the following effect: "The plaintiff stated that he presented a certificate of his claim."

We are unable to ascertain whether the assumed defect is one of substance or of mere form.

Knowledge of the precise defect complained of would materially assist the examination of the present question.

The evidence bearing on the question of waiver, as reported, is contained in statements made by the plaintiff, and by an agent of the defendants.

The plaintiff's statement is, that he presented a certificate of his claim, and Mr. Tupper, the agent of the company, retained it, and, after two months, informed plaintiff that he did not mind to pay \$500 or \$1,000, which was refused. Mr. Tupper states that the papers submitted, as proof of loss, preliminary to payment, were handed to him about a week after the fire, and he asked the

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*plaintiff to leave them for examination, who called a month after, when witness informed him that they had no idea of such a loss as plaintiff alleged; said, "that the papers were not regular, informal and insufficient;" and he stated to the plaintiff, if they could settle on a sum as compensation for actual loss, he would pay, and perhaps more. Afterwards, in January last, he informed plaintiff, in writing, that his proofs were insufficient and informal. He did not go into details as to the insufficiency of proof, and he proposed to assist the plaintiff. He required bills, invoices and duplicates, but he did not tell plaintiff what was required. He would have been satisfied with the proof which the conditions of the policy required.

The doctrine that runs through the cases on this subject is, that the insurer is bound fairly to apprise the insured of any defect in his preliminary proofs on which he intends to insist, so that the insured may know what is essential to a due presentation of his claim. — *McMasters v. Insurance Company*, 25 Wen., (N. Y.) 379; *Clark v. Insurance Company*, 6 Cush., (Mass.) 342; *Bodle v. Insurance Company*, 2 Comst., (N. Y.) 53.

The sufficiency of the notice of defect is a question arising under the circumstances of the particular case, and, therefore, is one of fact for the jury.

When the defect complained of is of little substantial importance, and not readily discovered, except by one experienced in the business, greater precision will naturally be demanded in the statement of the objection than when it is patent and vital to the interests of the insurer.

In *Neve v. Charleston Insurance Company*, (2 McML, 237,) no objection, on the score of irregularity, was made by the insurer, yet

the Court held that the question of waiver was properly submitted to the jury, notwithstanding, as stated in the opinion, a majority of the Court thought that the proof was waived by the company.

If, in a case where the Court could go so far towards discovering the fact of waiver without the aid of a jury, a submission of the question was deemed proper, in the present case its propriety cannot be questioned, when the fact is to be made out upon evidence of what occurred between the parties, and which evidence, as far as we can make it out from the report of the Circuit Judge, was, to some extent at least, obscure and contradictory.

Without the "preliminary proof" before us, or any exact knowledge, from the record, of the precise points of objection made by the

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*insurer, it is impossible for us to say, as matter of law, that the objection made by the agent of the company was sufficient fairly to apprise the plaintiff of the defect they intended to insist upon.

This view disposes of the exception to the refusal to non-suit.

As to the second point of appeal, it does not appear that the Circuit Judge was requested to charge according to the terms of the exception, and, therefore, error cannot be assigned in respect thereof; but, independent of this objection, the proposition that a general objection of informality and incorrectness was a sufficient objection, and that no waiver could be inferred from such a mode of objection, cannot be maintained as stated. A case may arise when a general objection might be the most artful means of misleading the insured as to the real point of difficulty.

The correct rule on this subject has been stated in considering the first point of appeal.

The third ground of appeal is insufficient, so far as it is based upon the failure of the Judge to charge certain propositions therein set forth, for want of a request to charge, as was the case in reference to the second ground.

If counsel desire to bring any view of the law of a case to the attention of the jury, they must make such view the subject of a request to charge; and, failing in this, they cannot allege error. The maintenance of this rule is essential to a correct and careful administration of justice, when the Appellate Court is limited to a consideration of exceptions in points of law, and cannot look into the whole case to see that substantial justice has been done between the parties.

Looking, however, into the clause of the policy relating to the use of fires, above recited, we are of opinion that a breach of the condition, in this respect, cannot be establish-

ed without proof that the building in which the goods insured were, at the time of the loss, was without a good and substantial stove or brick chimney. No such proof was offered. It was contended, however, by the counsel for defendants, that the true construction of this condition required, that any fires that should be authorized by the assured should be confined to a fire-place built into, and forming part of, such chimney. That is not the language of the condition, nor could it, in view of the very general employment of stoves used in connection with such chimneys, (a practice tending to diminish rather than to increase the risk of the insurer,) be a reasonable inference from such language. There was, therefore, as the case

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stands before us, no ground for submitting the question, whether there had or had not been a fire in the stove, to the jury; nor can the defendants have been in any way prejudiced by such submission.

We see no ground for interfering with the verdict of the jury, as alleged in the first point of appeal; and if our right to set the verdict aside, on the ground of its being against evidence, was undoubted, we could find no sufficient ground for its exercise in the present case.

The appeal is dismissed.

HOGG, A. J., concurred.

I S. C. 30

THE STATE ex rel. GILBERT PILLSBURY
and Others v. THE ACTING BOARD
OF ALDERMEN OF THE CITY
OF CHARLESTON.

(Columbia. Nov. and Dec., 1868.)

[Elections ⇨298.]

The 5th Section of the Act to provide for the election of the officers of the incorporated cities and towns of the State, &c., ratified September 25th, 1868, providing that "the Managers of elections shall decide contested cases, subject to the ultimate decision of the Boards of Aldermen or Wardens, when organized, except when the election of a majority of the persons voted for is contested, or the Managers are charged with illegal conduct, in which case the returns, together with the ballots, shall be examined, and the case investigated, by the acting Board of Aldermen, who shall declare the election, and their decision shall be binding upon all parties," does not authorize the acting Board of Aldermen, in a case coming properly before it, to adjudge the election to be illegal and void. Its authority is limited to an examination of the returns, together with the ballots, and a declaration of the results of the election.

[Ed. Note.—Cited in *Ex parte Mackey*, 15 S. C. 334; *Blake v. Walker*, 23 S. C. 521.

For other cases, see *Elections*, Cent. Dig. § 305; Dec. Dig. ⇨298.]

[Elections ⇨270.]

The former election laws of the State, giving the Managers power to determine the validity of elections, do not enlarge the powers con-

ferred upon the acting Board of Aldermen by said Section.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 247; Dec. Dig. ⚡270.]

[Elections ⚡259.]

Powers granted by a statute cannot be enlarged by implication so as to include powers of an entirely different nature, as, for instance, judicial powers, where only ministerial are granted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 234; Dec. Dig. ⚡259.]

[Mandamus ⚡164.]

Where, upon an application to the Supreme Court for a peremptory writ of mandamus to compel the acting Board of Aldermen to declare an election under said Section, the return to the alternative writ does not show that no election was held, the Court has no power to determine as matter of fact the validity of the election.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344-360; Dec. Dig. ⚡164.]

[Mandamus ⚡160.]

An alternative writ of mandamus may be amended so as to preserve the symmetry of, or make it conform to, the proceedings.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. ⚡160.]

[Mandamus ⚡160.]

An alternative writ of mandamus commanded the respondents to "declare said election, and allow said petitioners to enter upon their several and respective offices," or to appear and show cause, &c. *Held*, That the writ might be amended by striking out the words "and allow said petitioners to enter upon their several and respective offices."

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 332; Dec. Dig. ⚡160.]

[This case is also cited in *State v. Chairman County Canvassers*, 4 S. C. 499, as to the right by mandamus to compel a declaration of the results of an election.]

This was an application to the Supreme Court for a writ of mandamus.

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*The petition for the writ is as follows:

"Your petitioners, Gilbert Pillsbury, W. R. H. Hampton, Malcolm Brown, E. W. M. Mackey, Thomas R. Small, James F. Green, Thomas J. Mackey, Philip M. Thorn, David Barrow, G. I. Cunningham and M. H. Collins, respectfully represent and state to the Court:

"That, pursuant to an Act entitled 'An Act to provide for the election of the officers of the incorporated cities and towns in the State of South Carolina,' passed the twenty-fifth day of September, A. D. 1868, an election was held in the incorporated city of Charleston, in said State, on the tenth day of November, A. D. 1868.

"That, on the day succeeding such election, within the corporate limits of said city of Charleston, the several Boards of Managers of Elections within and for said city met at ten o'clock A. M., and proceeded to count the votes, under oath, cast in said election, stating the whole number of votes

cast for each candidate or person voted for, and did transmit their several reports of the same, in sealed envelopes, to the acting Mayor of the said city; that said Mayor did open the reports of said Managers, and announce and publish the whole number of votes cast, and the whole number cast for each candidate, whereby it appeared that Gilbert Pillsbury, one of your petitioners, received the largest number of legal votes for the office of Mayor of said city, and that James F. Green, one of your petitioners, and J. D. Geddings, received the largest number of legal votes, respectively, for the offices of Aldermen for Ward One of said city; that E. W. M. Mackey, one of your petitioners, and William McKinlay, received the largest number of legal votes, respectively, for the offices of Aldermen for Ward Two of said city; that Thomas J. Mackey and David Barrow, of your petitioners, and Robert Howard, respectively, received the largest number of legal votes for the offices of Aldermen for Ward Three of said city; that G. I. Cunningham and W. R. H. Hampton, of your petitioners, and L. T. Potter, Charles Voigt and Richard Holloway, received the largest number of legal votes, respectively, for the offices of Aldermen for Ward Four of said city; that Philip M. Thorn, one of your petitioners, and L. F. Wall, received the largest number of legal votes, respectively, for the offices of Aldermen for Ward Five of said city; that M. H. Collins and Malcolm Brown, of your petitioners, received the largest number of legal votes, respectively, for the offices of Aldermen for Ward Six of

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said city; that E. P. Wall *received the largest number of legal votes for the office of Alderman for Ward Seven of said city; and that Thomas R. Small, one of your petitioners, received the largest number of legal votes for the office of Alderman for Ward Eight of said city; and each and all of said persons, as aforesaid, were duly elected to the several and respective offices aforesaid.

"Your petitioners further represent that the election of a majority of the persons voted for in said election was contested, whereupon the returns, together with the ballots, were examined, and the case investigated by the acting Board of Aldermen, who, thereupon, did declare as follows, to-wit: 'The said Board do declare that there has been no legal, valid election, and that no persons have been duly elected to the offices of Mayor and Aldermen of the city of Charleston at said election.'

"Your petitioners further represent that said acting Board of Aldermen had no authority in law, to declare that there had been 'no legal, valid election, and that no persons had been duly elected to the offices of Mayor and Aldermen of the city of Charleston,' as aforesaid, but should have

declared, upon the returns aforesaid, who had received the highest number of legal votes, and thereby were duly elected to the several offices.

"Your petitioners further represent that, on the 16th day of November, A. D. 1868, your petitioners made formal demand that their election be declared, according to law, and they be allowed to qualify and enter upon the duties of their said offices, as by law they were entitled to do; but your petitioners state that said acting Board of Aldermen, disregarding the just demand of your petitioners, afterwards, to-wit: on the sixteenth day of November, A. D. 1868, did utterly neglect and refuse, and still do neglect and refuse, to declare said election, and allow your petitioners to qualify and enter upon their said offices, as, by law, they ought to have done, and to do; and as, in fact and in law, they had and have power to do.

"And your petitioners further state that they are entirely without remedy in the premises, unless it be afforded by the interposition of this honorable Court by their writ of mandamus; and they therefore pray that a writ of mandamus may be issued against the said acting Board of Aldermen of the said city of Charleston, commanding them to declare said election, and allow your petitioners to enter upon their said several and respective offices; and that such other order may be had in the premises as justice may require."

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*The petition was verified by the oath of the petitioners, and, on the 4th December, 1868, an alternative writ of mandamus was issued, under the seal of the Supreme Court, and attested by the Clerk. This writ recited the statements of the petition, and commanded the acting Board of Aldermen of the city of Charleston "that you declare said election, and allow said petitioners to enter upon their said several and respective offices," &c., "or that you appear," &c., "to show cause," &c.

The return of the acting Board of Aldermen is as follows:

"The acting Mayor and acting Board of Aldermen of the city of Charleston, upon whom have been served copies of a writ of mandamus in this case, and whose names are subscribed hereto, to wit: George W. Clark, acting Mayor, and J. D. Geddings, L. T. Potter, Alexander Lindstrom, R. E. Dereef, Walter Cade, H. B. Olney, John H. Honour, William G. Whilden, C. Voigt, A. S. Marshall and H. Judge Moore, acting Aldermen of the city of Charleston, in answer to said writ, do hereby certify, and return unto the Supreme Court of the State of South Carolina, under whose seal said writ was issued:

"That, on the tenth day of November, A. D. 1868, polls were opened and votes were received in the city of Charleston, by the

Managers of Election, for Mayor and Aldermen of said city, under the orders of His Excellency Governor Scott, as directed by 'An Act to provide for the election of the officers of the incorporated cities and towns in the State of South Carolina,' passed the 25th day of September, 1868. That, on the day after the election, and from time to time subsequently, certain papers, purporting to be returns of Managers, were handed to the Mayor. That some were in sealed envelopes, and some were not; and that, on the day after the election, and before all the said papers, purporting to be returns of Managers, were handed in to the Mayor, a written paper, signed by numerous citizens, was served upon the Mayor, notifying him that the election of a majority of the persons voted for was contested, and that the Managers of Election were charged with illegal conduct; and praying that the returns, together with the ballots, be examined, and the case investigated by the acting Board of Aldermen, and that a time and place be appointed for the production of the proofs.

"And the respondents do further return and certify, that the Mayor did not open the

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reports of said Managers, and did not *announce and publish the whole number of votes cast, and the whole number cast for each candidate; but, on the contrary, the Mayor, upon the reception of the aforesaid paper, notifying him of a contest of the election of a majority of the persons voted for, and of the charge of illegal conduct against the Managers, did forthwith convene the acting Board of Aldermen of the city of Charleston, and did lay before them the papers purporting to be the returns of the Managers, and the boxes, together with the ballots, that had been placed in his charge. That the said acting Board of Aldermen did consist of the Mayor, George W. Clark, and of Aldermen Geddings, Potter, Cunningham, Lindstrom, Dereef, Wall, Cade, Olney, Honour, Whilden, Voigt, Howard, McKinlay, Marshall and Moore; that Alderman Parker had vacated his seat by accepting the disqualifying office of State Treasurer; that Alderman Adams had departed the State; and that Alderman Weston was non compos mentis. That the acting Board of Aldermen consisting of the Mayor and said Aldermen, duly organized themselves on the 14th day of November, A. D. 1868, adopted rules for their government in the conduct of the case, and proceeded, in accordance with the directions of the Act of Assembly aforesaid, to 'examine the returns, together with the ballots,' and to 'investigate the case,' by the examination of witnesses, the taking of testimony, and the hearing of argument from counsel for claimants and contestants.

"That the investigation and hearing were continued until the 28th day of November last, when the said acting Board of Alder-

men did decide, determine and adjudge, touching the said election, as follows:

"The election of a majority of the persons voted for at the municipal election of the city of Charleston, held on the second Tuesday of November instant, in pursuance of the Act of Assembly, entitled 'An Act to provide for the election of officers of the incorporated cities and towns in the State of South Carolina,' ratified on the 25th day of September, A. D. 1868, having been contested on the part of sundry citizens and electors, and the Managers of Elections having been charged with illegal conduct, and the acting Board of Aldermen having been duly convened, and having proceeded, in accordance with said Act, to examine the returns, together with the ballots, and to investigate the case, in

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order to declare the *said election, and to make a decision which shall be binding upon all parties:

"The said Board, having made such examination, and investigated the case by taking the testimony of witnesses, thereupon do find that the Managers of Election, in the registration of the voters, failed to require the oath to be taken and subscribed as required by law, and in their qualification and organization as Managers, in the holding and conduct of said election, and in the counting of the votes, and in making the return of said election, did not conform to the requirements of the law in such case made and provided, in essential particulars: that many other irregularities and illegalities occurred in the conduct of said election, in essential particulars; and that ballots, exceeding the majorities claimed for a majority of the persons voted for, have been destroyed and cannot be produced for examination:

"Wherefore the said Board do declare that there has been no legal and valid election, and that no persons have been duly elected to the offices of Mayor and Aldermen of the City of Charleston at said election.

"George W. Clark, Mayor: J. D. Geddings, Alderman Ward 1; L. T. Potter, Alderman Ward 4; Alex. Lindstrom, Alderman Ward 4; R. E. Dereef, Walter Cade, H. B. Olney, Aldermen Ward 6; John H. Honour, Alderman Ward 5; William G. Whilden, Alderman Ward 8; C. Voigt, Alderman Ward 4; A. S. Marshall, H. Judge Moore."

"And the acting Board of Aldermen do further return and certify, that they have examined the returns, together with the ballots, and have investigated the case, and have declared that no persons have been duly elected to the offices of Mayor and Aldermen of the city of Charleston at said election: that their authority in the premises is sole and exclusive, and that their decision is final and binding upon all parties.

"And the said acting Board of Aldermen do further return and certify, that persons, in large numbers, who presented themselves

for registration under the Act aforesaid, were not required by the Managers to take the oath prescribed, and had their names recorded without taking the said oath, and subsequently voted at the said election: that no person who so presented himself for registration, and whose name was recorded, and who afterwards voted at said election, did subscribe to the oath required by said Act:

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that *some of the Managers who were authorized and required to conduct said election were not duly sworn at the time of their original qualification, or at any other time: that the said Managers of Election never did organize as one Board, by the appointing of one of their number as Chairman of the Board, in the manner required by law: that the Managers of said election, as one Board or one body, did not meet at 10 A. M. on the day succeeding the election, at some place within the corporate limits, and did not then and there proceed to count the votes under oath, and did not state the whole number of votes cast for each candidate or person voted for, and did not transmit their report of the same in a sealed envelope to the acting Mayor; that no polling-place was held within the territorial limits of Ward No. 8, but the polling-place for Ward No. 8 was held within the territorial limits of Ward No. 6; that ballots, exceeding in number the majorities claimed for a majority of the persons voted for, were destroyed immediately after the counting thereof, and never did come into the possession of the acting Board of Aldermen, and could not be produced for examination: that some of the boxes, containing ballots in large numbers, were left for several days without any official custody, and were not produced until inquiry and search was made for them by the acting Board of Aldermen; that no poll-books were kept at several of the polling-precincts; that the Clerks of the Managers, in several Wards, were not duly sworn; that the examination of the returns and ballots showed discrepancies between the number of voters on the poll-lists, and the number of votes returned by the Managers, and the number of ballots produced; that, in Ward No. 1, there were more ballots in the box than persons who voted; and that, in some of the precincts, there were fewer ballots than persons who voted: and that there were many other irregularities and illegalities in the conduct of the said election, in divers essential particulars.

"And the said acting Board do further return and certify, that, after the examination of the Managers of Election and of the returns, together with the ballots, they did proceed to hear argument of counsel, and did decide that the election was illegal and void, and that no persons were duly elected to the offices of Mayor and Aldermen of the city of Charleston; and, having so decided, they

did not proceed to inquire and ascertain how many persons were allowed to vote who were not entitled to vote, and how many persons entitled to vote were excluded from voting,

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and how many *persons entitled to vote were prevented from voting by force and fraud, and by officious intermeddling.

"And the acting Board of Aldermen do further certify and return, that Gilbert Pillsbury was not, in fact, duly elected Mayor of the city of Charleston; and that W. R. H. Hampton, Malcolm Brown, E. W. M. Mackey, Thomas R. Small, James F. Green, Thomas J. Mackey, Philip M. Thorn, David Barrow, G. I. Cunningham and M. H. Collins, were not, in fact, duly elected Aldermen of the said city. For these reasons and causes the said respondents say that they cannot declare the persons aforesaid elected to the offices claimed by them respectively, and cannot allow the said persons to enter upon the several and respective offices claimed by them, as commanded in the said writ.

"And these respondents, having fully answered the said writ, and shown cause why they cannot do as commanded them in said writ, pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained."

Chamberlain, Attorney General, Corbin, for petitioners.

Porter & Conner, Miles, for respondents.

Jan. 7, 1869. The opinion of the Court was delivered by

WILLARD, A. J. The relators claim to have been elected to fill the respective offices of Mayor and Aldermen of the city of Charleston, at an election held on the 10th day of November last, under the Act "to provide for the election of the officers of the incorporated cities and towns of the State of South Carolina," ratified September 25th, 1868, (Special Session, 1868, p. 108). They allege that said election has been contested, as to a majority of the persons voted for; that thereupon the returns, together with the ballots, were examined, and the case investigated by the respondents, who thereupon did declare as follows: "The said Board do declare that there has been no legal and valid election, and that no persons have been duly elected to the offices of Mayor and Aldermen of the city of Charleston, at said election." Relators claim that, by law, respondents were bound to declare the results of the election, and had no authority to declare it void; that they have demanded of the respondents compliance with their legal duty, which has been refused. They pray a writ of mandamus to compel respondents to perform their legal duty in the premises.

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*An alternative writ issued accordingly, commanding the respondents to declare said

election and allow said relators to enter upon their several and respective offices, or that they appear and show cause for their refusal so to do.

Respondents have returned to said writ two grounds of non-compliance therewith. The first is, that, in virtue of authority vested in them by law, as Judges of Election, they have adjudged said election to be illegal and void, and that such decision is final and conclusive and binding on all parties. The second is, that illegalities and informalities were committed at such election, and in the returns thereof, and that fraudulent votes were cast in excess of the majorities appearing in behalf of the relators, and they contend that this Court, if not bound by the decision made by the respondents, must, from the facts, arrive at the same conclusion, namely, that the election is illegal and void.

As to the matters embraced in the first ground, the relators have demurred; and as to the second ground, have moved to strike out that portion of the return as immaterial and irrelevant.

The question for decision arises on the construction of the following clause of the 5th Section of the Act above named, viz.: "The Managers of Elections shall decide contested cases, subject to the ultimate decision of the Boards of Aldermen or Wardens, when organized, except when the election of a majority of the persons voted for is contested, or the Managers are charged with illegal conduct, in which case the returns, together with the ballots, shall be examined, and the case investigated by the acting Board of Aldermen, who shall declare the election, and their decision shall be binding upon all parties." It appears that the election of a majority of the persons voted for was contested, and also that illegal conduct was charged against the Managers.

The question is, whether the determination and decision of the acting Board is in conformity with, and in full discharge of, their duty in the premises.

Two acts are required of them: First, To examine the returns and investigate the case. Second, To declare the election. The first has been performed, and no question is made about it. The second is the subject of the present contest.

Examining the powers of the respondents by the terms under which they are delegated, and no difficulty, either of construction or interpretation, presents itself.

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*An election is the joint act of all legally qualified electors choosing to participate in it. It consists of the expression of a choice as to the matter voted upon, which is, in legal consideration, a secret act of the elector, and a declaration of the result of such choice in conformity with the law under which the election is held, which is the act of the officers conducting the election. The officers

performing this duty are here termed Managers.

According to the present law, their decisions may be reviewed, in some cases, by the new Board of Aldermen or Wardens; and, in others, before the old Board. In the present case the old Board acts. The declaration pre-supposes a scrutiny of the votes, and is completed by a return setting forth the whole number of votes given for each candidate, and, where there has been a choice, in conformity to law, by furnishing the prevailing candidate with suitable evidence of his election.

The foregoing is the general nature of the duty imposed upon the respondents by the terms of the statute, and, if it is to be regarded as the limit of their powers, it is evident that they have not acted in strict conformity therewith. On the contrary, while admitting the existence of an election, in fact, they refuse to declare the same, alleging, as the ground therefor, that it was illegal and void.

The respondents claim that, by a proper construction of the statute, in connection with the former election laws, it will appear that they have more enlarged powers, and are competent to adjudge the illegality of the election.

It is unquestionably true that, under the former election laws, the Managers of Elections possessed, by the express terms of the law, such powers as are here contended for, but it is not clear how that can assist the respondents, who act under a much more restricted grant of authority. The powers in question are the creatures of the statute, and we are not at liberty to cull from statutes passed at different periods, and under widely varying circumstances, in order to increase their efficiency and symmetry.

If the terms of the statute are to be enlarged, it must be in conformity with the principles governing legal construction, and because something is imported into those terms by a necessary, or, at the least, by a reasonable implication. That which is drawn after the statute by a necessary implication is as much a part of it as that which is expressed in terms. Where a subject-matter is named, all things directly appertaining to it are included by necessary

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implication. Where an act is required to be performed, whatever constitutes a necessary or ordinary means to its performance is, in like manner, included. The question in all these cases is, not whether the matter of implication will add to the value and efficiency of what is conferred in terms, but whether, without it, the statute will be wholly or in part inoperative. Applying these tests to the case in hand, and we have no difficulty in discovering that the powers granted, and those sought to be added by way of implication, are in their nature different, and no

ways connected or dependent, and cannot be united on any principle of necessary implication.

One is administrative and the other judicial, and, therefore, entirely separate and distinct in themselves. Nor does the nature of the duty to be performed demand their conjoint exercise. Whether the election ought or ought not to be held void, there is equal propriety in making its results officially known; nor can it be perceived how the right to pass judicially upon the question of the legality of the election can furnish any facilities for arriving at an official statement of its results. There is no ground for enlarging the terms of the statute so as to embrace the powers claimed by the respondents, on any idea of a necessary implication, as strenuously contended for on their behalf.

But if not a necessary, may it not be a reasonable implication? This question opens a wide range of consideration, and enables us to determine whether the enlarged powers contended for are within the spirit and intent of the statute, if not in its terms. It is an obvious rule of construction, that that which is unreasonable in itself cannot become the subject of a reasonable implication. Nothing is more unreasonable than that the acting Board of Aldermen, having an interest in this question, as they retain their seats, in the event the election is held void, should be invested with the power of judicially deciding the case. But it is said that the office of Alderman is one of honor, and not of emolument. A desire for honors may have as corrupting an influence on the judicial mind as that for emoluments. We cannot do violence to the very principle of judicial purity, in order to enlarge the powers of the respondents, or ascribe any such intent to the Legislature.

The powers of the respondents are limited to a legal declaration of the election, and so much of their return as is covered by the demurrer is insufficient as an answer to that part of the mandate of the writ that requires a declaration of the election.

The only view in which the relevancy of

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the residue of the re*turn can be supported is, that this Court can, in the present form of proceeding, determine, as matter of fact, the validity of the election. We are satisfied that this question is not properly before us.

If the return had undertaken to show that no election had, in fact, taken place, that would have raised an issue on which their duty to declare the election depended; but the return only goes to the extent of denying the legal validity of the election—a fact altogether unimportant, so far as their duty is concerned.

The respondents may have supposed, from the concluding clause of the command of the alternative writ, which directs the respondents to allow the relators to take possession

of the offices to which they make claim, that the entire question of the right of the relators to the offices in question was at issue on this record, and that, therefore, it was necessary to put in issue the validity of the election; but a careful examination of the frame of the writ shows that such issues are not pertinent. The theory of the writ is, that something is lacking to enable the relators to prosecute any claim they may have acquired by the election to the offices, namely, a declaration of the results thereof. Hence the necessity for applying for a mandate to compel the performance of that official act, without which the right to the office is inchoate. That portion of the mandate that relates to the declaration of the election must be regarded as fixing the character of the proceeding, and the issues triable under it, and the residue must be regarded merely as intended to enlarge the scope of the relief, on the contingency of the declaration of the election favorable to the claims of the relators. In this respect the mandate is objectionable, as it seeks to carry the remedial aid of the Court beyond the case made by the pleading.

It is clear that if the case is in a position to enable the Court to ascertain finally the right of the contestants in respect to the offices, then it would be idle to require a declaration of the election, for nothing would be left dependent on such declaration. But the theory of the writ contradicts such an assumption, and shows that a declaration is necessary, as a condition precedent, to any contest involving the question of right to fill the offices.

That portion of the return covered by the motion to strike out is, therefore, irrelevant to the true issues of the case, and may be disregarded.

It has been argued, in behalf of the respondents, that the peremptory writ must issue in the terms of the alternative or not at all, and that, as it cannot so issue, the pro-

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ceeding must be quashed. It is true that the peremptory writ cannot issue in the exact terms of the alternative, as we have already seen. Can it, then, issue at all?

It was held in the *King v. St. Pancreas*, (3 Ad. & Ellis, 535,) and in *Regina v. Tithe Commissioners*, (14 Adol. & El. N. S., 459,) that the peremptory writ must conform exactly to the alternative, and that the Court could not mould the writ, though it may the rule to show cause. This strictness resulted from the notion that this proceeding did not partake of the characteristics of the formal remedies afforded at common law, but was a resort to kingly prerogative because of a failure of justice. This notion has never been received in this country, but the writ of mandamus has been treated as forming no exception to the rules governing ordinary remedies.

In the *People v. Thorpe*, (12 Wen., 189,) a

peremptory mandamus was allowed on a return to a rule to show cause, without waiting to issue an alternative, and the relator was permitted to complete the record by the introduction of an alternative writ pro forma.

This is certainly allowing greater latitude than that of an amendment limiting the sphere of the mandate. The liberality with which amendments are allowed is well stated by Judge Earle, in *Bank of Pennsylvania v. Condy*, (1 Hill, 209.) The learned Judge says: "The ancient rigor on the subject of amendments has been greatly abated, as well by the liberal and enlightened practice of the Courts in modern times as by statute. It is the constant practice here to amend proceedings in any period of their progress, to preserve the symmetry, and to make them conformable, if anything appear by which the amendment can be framed. Writs, declarations, judgments and executions are every day amended up to the time of final satisfaction, and there can be no reason why a verdict should not be also." This reasonable practice is applicable to mandamus. The objection of the respondents relates to "symmetry" and "conformity" alone, and concerns no substantial right. We find in this case a return and a demurrer, giving a definite mould to the proceeding, and forming ample ground to amend by, and we do not feel at liberty to disregard the just and humane doctrines of amendment now generally prevalent, in order to ingraft upon the practice in this very important department of remedial justice the rigidity practiced in earlier times.

The relators will be permitted to amend their alternative writ in conformity with the foregoing, and, upon such amendment, a per-

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emptory mandamus will issue, commanding the respondents to declare the election.

HOGG, A. J., concurred.

Jan. 7, 1869. Separate opinion of

MOSES, C. J. While I concur in the result of the opinion pronounced by the learned Associate, I do not desire to be understood as committed to all which it contains, as leading to the conclusion to which the Court has arrived.

If I regarded the statute conferring on the Board of Aldermen the power "to examine the returns and the ballots, and investigate the case," as imposing the authority "to hear and determine," I would not feel warranted in granting the mandamus merely because they had failed to declare the election.

The obligation to "hear and determine" involves the right to consider and dispose of by judgment. The determination consequent on the hearing is to be carried out by judgment, which implies decision.

In the *King v. Loxdale et al.*, 1 Burr., 447, Lord Mansfield said: "It is a rule, in the construction of statutes, that all which re-

late to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken to be one system, and construed consistently."

The learned counsel for the respondents recognized the force of this rule when he remarked, "that the question is to be decided by the law and custom of South Carolina."

Are the powers, however, of the Board of Aldermen, under the Act of 1868, as general and extensive as those of the Managers of Elections under the Acts of 1808, 1815, 1839 and 1846, so that this rule becomes imperative as a guide? If, on the contrary, they are more restricted, then, following the reason on which it is founded, may we not conclude that the Legislature proposed and intended a different and more limited grant than they had theretofore extended to Boards of the like character?

The Acts of 1808 and 1815 authorize the Managers "to hear and determine." Those of 1839 and 1846, "to hear and determine the validity of the election; and their decision shall be final."

With a knowledge of these Acts, the Legislature, in 1868, providing a uniform system for the election of officers of incorporated towns, invested with authority the acting

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Board of Aldermen, "where the election of a majority of the persons voted for is contested, or the Managers are charged with illegal conduct, to examine the ballots and returns, investigate the case, declare the election; and their decision was to be binding on all parties.

Does this confer upon them such judicial power as puts them beyond the reach of the process of mandamus?

This proposition is plainly and distinctly announced by the return, and it is due to the respondents that it should be considered.

The received idea at one time was, that the writ would only lie to command the performance of a ministerial duty, but later cases have gone further, and it is now the constant practice to grant the writ to command the performance of any public duty for which there is no specific remedy.—Tappan, 12, 176.

More especially does this apply in matters enjoined by statute; and thus, where the Ordinary (an Ecclesiastical Judge) refused a grant of administration or probate of a will, the King's Bench, a temporal Court, ordered the writ.—Anonymous, 1 Strange, 552; King v. Doctor Hay, 1 Blk. Rep., 648; Bacon Abr., Mandamus, D., 434.

And the ruling was followed in *Sikes v. Ransom*, 6 Johns., 279; *State v. Watson*, 2 Speers, 97.

To what extent the Court, by this prerogative writ, would attempt to interfere with an inferior jurisdiction, where a judicial power was to be exercised, it is not necessary now to decide.

In the case of *Lynah v. Commissioners of the Poor*, 2 McC., 170, the Court said they

would interpose, if there had been an abuse of discretion; and this was in regard to a body clothed with judicial authority in the matter in which they had acted.

Judge Brevard, in the case of *Bruce*, 1 Tr. Con. Repl., 180, referred to in the argument, said: "But the authority of Managers is not purely judicial. Their discretion is limited by legal restraints, and, being inferior Magistrates of a mixed character, even though they should confine themselves within the bounds of their jurisdiction, yet they must be subject to the visitatorial jurisdiction of the Court of General Sessions, to regulate and correct them in the exercise of their discretionary power;" and he refers to 10 East, 403, and 7 East, 92.

The mere power to investigate and declare an election is not of such a judicial character as precludes supervision by the writ of mandamus.

The Legislature appears to have had in

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view all the Acts heretofore passed in relation to Managers of Election, so far as their powers were concerned, and to limit the Board of Aldermen, in the contingencies provided for, to the mere investigation of the contested case and the declaration of the election. This permitted scrutiny, and all that was necessary for the proper execution of the power thus confided. What that declaration should be, depended on the facts elicited in the inquiry; but it is required by the Act, for, otherwise, a party interested could not be placed in the position, which the law concedes to him, to assert, through the Courts, his right to an office.

The declaration may, in the end, be of no value to him; but still, if the Act extends the privilege, it was not competent for the Board to deprive him of it by neglect or refusal to carry out its provisions.

It is made a substantive duty on the part of the Managers: the words were intended to denote something: the language is plain, and has a significance and meaning which the Court is not at liberty to overlook or disregard.

It is said, however, that the writ will not be granted where it must be fruitless, vain, or useless, and that the Court has full discretion in the matter.

It is true that if the writ could have no result, as in *The Queen v. Trustees of Norwich Savings Bank*, 3 A. and E., 729, or where the act to be performed would fail to carry out the purpose of a relator, because it could not be accomplished in time to render it available, the Court would stay its hand. It has not been made to appear that any such obstructions or difficulties prevail in the case before us.

Of all the powers which a Court is called on to exercise, it approaches none of them with more caution and distrust than those which are alleged to be within its mere dis-

cretion. Where the law affords fixed principles for guidance, there is less danger of a "false judgment."

Where nothing is to be followed but the suggestions of "legal will," there is a consciousness of a want of safety, because there is then no reliance but on the dictation of mere reason, which would induce a fluctuation and vacillation, inconsistent with public security, and which might entail on the community all the evils which a regulated system of law was intended to prevent.

Where discretion is to be exercised, it must be governed by some admitted and prefixed standard of right. It is true that, where the

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*end sought is only a private one, or granting the writ would be attended with manifest hardship, there it will be withheld.—*Van Ranssaeler v. Sheriff of Albany*, 1 Cowen, 512.

How, in a matter of public concern affecting a large city, can we undertake to say that the relators are not entitled to the remedy which the law provides, to place them in a position in which they may assert their claim to an office?

The wrong and hardship would be in precluding them from the opportunity of establishing, if they can, a right, from the possession of which they aver they are prevented by the non-performance by the Board of Aldermen of a duty which the law enjoined.

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THE STATE ex rel. THE SOUTH CAROLINA RAILROAD COMPANY v. THE COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(Columbia. Nov. and Dec., 1868.)

[*Courts* ⚡207.]

Under Section 4 of Article IV of the Constitution, vesting the Supreme Court with power to issue "original and remedial writs," that Court may issue writs of prohibition.

[Ed. Note.—Cited in *State ex rel. Townsend v. McIver*, 2 S. C. 41; *Ex parte Carson*, 5 S. C. 120.

For other cases, see *Courts*, Cent. Dig. § 736; Dec. Dig. ⚡207.]

[*Property* ⚡5.]

Where a railroad corporation, claiming a right of way over the lands of another, applies by petition to the Circuit Judge, under the Act (No. 43) of September, 1868, for the empanneling of a jury to assess the amount of compensation to be paid for such right of way, and the answer to the petition denies the right of the petitioner to take the lands claimed, and the Circuit Judge is proceeding to have the question of compensation determined, without first determining the question of right, prohibition will not lie from the Supreme Court to restrain him from acting.

[Ed. Note.—For other cases, see *Property*, Cent. Dig. §§ 7, 8; Dec. Dig. ⚡5.]

[*Property* ⚡5.]

The powers of the Circuit Judge, under the Act, are judicial, and not ministerial; and, in

the execution of his duties, he may exercise common law powers.

[Ed. Note.—For other cases, see *Property*, Cent. Dig. §§ 7, 8; Dec. Dig. ⚡5.]

[*Prohibition* ⚡3.]

Where an inferior Court has jurisdiction of the subject-matter of the proceeding, prohibition, on the ground of error in the proceeding, does not lie to restrain it from acting.

[Ed. Note.—Cited in *Holladay v. Hodge*, 84 S. C. 95, 65 S. E. 952.

For other cases, see *Prohibition*, Cent. Dig. § 7; Dec. Dig. ⚡3.]

[*Action* ⚡30.]

It is important that the distinctions between legal remedies should be observed, and that a party, in pursuit of his rights, should be required to adopt the remedy which the law provides for his case, or fail in his application to the Court.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 216-255; Dec. Dig. ⚡30.]

[This case is also cited in *Ex parte Bacot*, 36 S. C. 132, 15 S. E. 204, 16 L. R. A. 586, without specific application.]

This was a suggestion to this Court, praying for a writ of prohibition to restrain the Columbia and Augusta Railroad Company, the respondents, and the Hon. Z. Platt, Judge of the Second Judicial Circuit of the State, and the Clerk of the Court for Edgefield County, from proceeding, under an order by His Honor Judge Platt, to condemn and appropriate to the use of respondents certain lands and right of way of the relators, until the necessity and propriety of such condemnation, and the legal right of the re-

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spondents so to *condemn, shall be first heard and decided, on preliminary trial, by the competent judicial tribunals of the State.

The facts necessary to a full understanding of the case, and the grounds upon which the relators claimed that the writ should be issued, are stated in the judgment of the Court delivered by the Chief Justice, but it may not be amiss to state here, in a condensed form, the principal facts and grounds upon which the relators relied.

On the 16th November, 1868, the respondents presented a petition to Hon. Z. Platt, Judge of the Second Judicial Circuit, setting forth that, in the construction of their railroad, the respondents require to pass over certain lands of the relators in Edgefield County (describing them); that notice had been given and consent refused; and praying that a jury of twelve be empaneled to assess the compensation which the respondents should pay to the relators for the lands the use of which they so required.

The relators filed a written answer to the petition, and therein denied the right of the respondents to enter upon and take the lands mentioned in the petition, setting forth the grounds upon which they rested their denial, and also submitting, under Section 8th of the Act (No. 43) of September, 1868, that the

construction of the respondents' road upon the lands aforesaid would operate as a hindrance to the use and enjoyment by the relators of their own right of way.

The petition was heard on the 11th December, 1868, and His Honor Judge Platt expressly, and in terms declining to adjudicate the question of legal right to enter upon and take the lands of the relators, nevertheless made an order directing the Clerk of the Court of Edgefield County to empanel a jury to assess the amount of compensation to be paid for the lands.

A jury was accordingly empaneled, and they made a return in the form of an inquisition, stating the amounts they had assessed, &c.

This suggestion was then filed, alleging that the proceedings before Judge Platt were irregular, illegal and void, for the following, among other reasons: (1.) That the Act of 1868 (No. 43) only declares the "manner" by which lands, or the right of way over lands, may be taken, and does not confer the right to take said lands or right of way. (2.) That the right of way sought to be condemned in this case is a right of way granted by the State to the relators, and the lands sought to be condemned are lands purchased by the relators under their charter for the purposes of their road. (3.) That the legal

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*right of the respondents to enter upon and take said right of way and lands was traversed and put in issue in the answer of the relators to the petition of the respondents; and that no legal condemnation of said lands and right of way, and no order to empanel a jury under said Act, could be made until the question of right had been determined by the competent judicial tribunals of the State; and, (4.) That the proceedings of the Clerk and of the jury empaneled by him were illegal and oppressive, and tend to the injury of the relators.

Comer, Magrath, for relators.

Memminger, Carroll, contra.

March 8, 1869. The opinion of the Court was delivered by

MOSES, C. J. The Court does not entertain any doubt as to its power to issue writs of prohibition in proper cases made.

It is granted, in unequivocal terms, by the 4th Section of the 4th Article of the Constitution. If it is an original and remedial writ, (and of this there can be no doubt,) it is covered by the right conferred in terms as full and complete as if directly expressed.

It was contended, on the argument, that the 15th Section of the same Article vested "exclusive original jurisdiction" in the Circuit Court, "in all civil cases and actions ex delicto" not cognizable before Justices of the Peace: and, therefore, that this Court had no original cognizance of the writ.

That Section was only intended to confer on the Circuit Court exclusive original jurisdiction in all actions, as well ex delicto as ex contractu, and to deprive (except as in said clause excepted) all other Courts of any control over the class of cases comprised in it.

The same Section confers on the Circuit Courts the power to issue writs of mandamus, prohibition, scire facias, &c., which clearly shows that they were not to be included among the writs as to which the "exclusive jurisdiction" was granted.

Neither does the Act of 20th August, 1868, (No. 9, 14 Stat., 12,) "to regulate appeals and writs of error to the Supreme Court," attempt in any way to restrict the power. If it did, it would be void and of no effect, for the authority under the Constitution could not be defeated by the act of the Legislature.

It was not an uncommon or extraordinary power to vest in the Supreme Court. The same jurisdiction attaches to the like Courts

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*in various of the States, and to the Supreme Court of the United States, in certain specified cases, by Act of Congress.

In the judgment we are about to pronounce, we do not propose, in anticipation, to pass on the many and important issues pending between these respective parties, and brought into discussion in the learned argument. The Court will avoid all intimation of opinion on every point, save that which it regards necessary and essential to be adjudicated in the matter before it.

The relators, (the South Carolina Railroad Company,) some time prior to 20th November, 1868, filed a bill on the Equity side of the Circuit Court for Richland County, among other things alleging that the defendants, (the Columbia and Augusta Railroad Company,) chartered under the laws of this State, had entered upon their right of way and franchises secured to them by charter, and, under pretense of constructing their railroad, were, without lawful authority, exercising acts of ownership therein, whereby great and irreparable damage was apprehended by the complainants to their proprietary rights, and asked a preliminary injunction.

The injunction was granted on November 20, 1868, by Associate Justice Willard, on the ground that whatever rights the defendants might have, they had not pursued the course necessary for the appropriation which they sought, and which was required by the Act (No. 43, 14 Stat., 89) passed by the Legislature on the 22d September, 1868. Liberty was reserved to the defendants to move for its dissolution, at any time before the hearing of the case, on proof that they have duly acquired a right to enter, for the purposes of construction, upon the premises claimed

by the complainants, as set forth in the said bill.

The suggestion now before the Court substantially avers that, on the 16th October, 1868, the Columbia and Augusta Railroad Company gave notice to the relators, that in the construction of their railway between Graniteville Depot and Hamburg, they would require the right of way in, along and over the right of way and lands claimed by the relators between the said points; that the relators refused their assent to such entry on their lands and right of way, and such condemnation thereof; and, in their return, directed and addressed to the Hon. Z. Platt, (the Judge for the Second Circuit,) before whom the application of the Columbia and Augusta Railroad Company was to be made, denied that the said Company had any right or authority in law to enter upon or condemn the lands or right of way of the relators; and that the Judge, before whom the

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application was made for a *jury to assess the compensation thus claimed, could not grant an order to empanel a jury until the question of legal right put in issue had been first adjudged by the competent judicial tribunals of the State.

That, on the 4th day of December, 1868, His Honor Judge Platt made an order that the petition of the Columbia and Augusta Railroad Company had been presented in due form of law; but, if it be alleged in the answer of relators, that the taking of the lands and right of way, as prayed for, will be a hindrance to the use and enjoyment of their highway, within the intent and meaning of the said Act, (No. 43,) and if such ground of objection be made to appear by clear and sufficient evidence produced, then the prayer of the petitioners must be denied, as provided in and by Section 8 of the Act aforesaid.

That, on the 11th day of December, 1868, the parties appeared before His Honor; testimony was taken solely on the question of hindrance, counsel were heard, and, as the suggestion submits, His Honor, declining to adjudicate the question of legal right, on the 17th of said month, pronounced an opinion on the matter before him, and, making it part and parcel of his order, did direct and order a jury to be empaneled, in conformity with the provisions of said Act, to assess the compensation to be paid by the petitioners to the South Carolina Railroad Company, for a way over their land and right of way, at three points named and specified. That the jury was accordingly drawn, and a time appointed for their meeting, not only inconvenient to the relators, as they allege, but rendering it almost impossible for the President and Superintendent of the Company, and their counsel, (who resided in Charleston,) to attend. Objections were also averred to the competency of some of the

jurors, to the oath administered to them, to the absence of testimony, and to their whole conduct in passing on the matter submitted. The relators object, and claim a writ of prohibition against the said Columbia and Augusta Railroad Company, the Hon. Z. Platt, and the Clerk of the Court for Edgefield County, restraining them from proceeding under the said order to condemn and appropriate to the Columbia and Augusta Railroad Company, until the necessity and propriety of such condemnation, and the legal right of the Columbia and Augusta Railroad Company so to condemn—all of which are traversed, and put in issue by the return and answer of the South Carolina Railroad Company—shall be first heard and decided on preliminary trial, by the competent judi-

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cial tribunals of the State; and various grounds of prohibition are suggested.

That the whole aspect of the case may be presented, it is proper to remark, here, that, although forming no part of the record, it was stated and conceded by counsel, that about the time of the commencement of this proceeding, the injunction granted by Justice Willard, above referred to, was, on motion of the respondents, (parties defendant to the equity case,) dissolved by Judge Boozer, Judge of the Fifth Circuit.

If the causes for which the relators claim a prohibition were before us, in a form of proceeding in which we could consider them, it would not only be proper, but interesting, to discuss at length the points which they raise. A solution and determination of them must, in fact, be made before the rights of these respective companies can be adjusted and quieted.

That they must be passed upon before a conclusive settlement of the issues between them can be had, no one who heard the able discussion can for a moment doubt.

The view, however, which the Court takes of the case before it, will render it unnecessary to review them now, for, in its judgment, in the proceeding here we are confined to a single question. We do not consider that we deviate from the limits which we have thus prescribed for ourselves when we say, that before the relators can be divested of any of the property, rights or franchises which they claim they hold under their charter, they of common right, are entitled to an adjudication by some Court having the power to hear and determine their extent—the tenure by which they are held—the power of the Legislature over them, and how far that power may be exercised to deprive the company of them—and confer them on some other power or corporation.

These questions, however, must be determined by a tribunal not only competent for their decision, but they must be brought before it in a form and manner recognized by the principles and practice of our Courts.

It is as important that the proper difference between the various remedies through which rights are secured should be observed, as that Courts should be confined to the jurisdiction which the legislative authority has prescribed. A departure from the one, though possibly in itself of little detriment to the public good, would only serve as a precedent, through the force of which it might finally be regarded as a general rule,

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that, although the legal end and *right might be attained, the form through which they are reached is of minor import.

This would at once destroy all distinctions between forms of remedy, and the Courts, by a quiet submission to such departure, would at last administer justice with no regard to the medium through which it should be reached.

A court might possess the power of a general jurisdiction, with no superior tribunal to correct its errors or control its proceedings, and yet it would be false to its high trusts if it merely attempted to dispense what, in its conception, it regarded right, without respect to the forms which have been provided for its action.

The question before us—and which alone we decide—is, whether this is a proper case for prohibition.

It is necessary, therefore, to inquire if the Circuit Judge had jurisdiction of the subject-matter in which he granted the order.

The Act (No. 43) provides a mode of procedure by which the lands, or the right of way over the lands, of persons or corporations may be taken for the construction and uses of railways and other works of internal improvement.

In case of refusal of consent without compensation, application is to be made, by petition, to the Circuit Judge of the County wherein the lands are situated, for the empanneling of a jury to ascertain the amount to be paid as just compensation.

The Judge is then to order the Clerk to empanel a jury, who are to examine the said lands, and assess the compensation for the right of way over the same. An appeal is reserved to either party to a jury in open Court, whose verdict shall be final and conclusive, unless, on writ of error, a new trial is awarded by the Supreme Court.

The 8th Section declares that no lands or right of way heretofore or hereafter procured for the construction or use of a highway shall be considered exempt from liability to condemnation, provided that, in the construction of such other highway, there be no hindrance to the use and enjoyment of the highway for which such right or lands were previously procured.

It is thus apparent that the Circuit Judge had power, under the Act, to entertain the petition and consider the prayer of it. To test this, let us ask if, by any proceeding of

the character now sought, he could have been prohibited from hearing it? The Act confers the power in express terms. In his judicial capacity he was at liberty to pass upon the right which the petitioners claim-

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ed *by their proceeding, and to have abstained from acting, if he concluded it against them. In fact, if he had not expressly made his "decision and opinion part and parcel of the order," it might have required much argument on the part of these relators to have satisfied the Court that he had not decided the question of right, as well as that of hindrance; and, in such event, they might have been subjected to the necessity of seeking a reversal of his judgment on that point, instead of asking, as they do, to prohibit further action under his order, because, without deciding the question of right, he granted the order of condemnation.

It is said that he erred, and violated the purpose of the Act, which the relators contend only declares the manner by which lands may be taken, and does not confer the right to take the lands or right of way.

The powers of the Circuit Judge under the Act are judicial. He is not confined to the mere ministerial duty of granting the order for inquiry as to the compensation. He may require the party claiming the exercise of such high prerogative, first to satisfy him that he has the right, and, as this, if denied, would involve the title to land, he could, in his Court, order an issue to try and decide whether the right thus demanded was with the petitioners.

Assuming that he erred in granting the order before the right was determined, is prohibition the remedy to which these relators are entitled for the correction of the error?

It must be remembered that he is a Judge of a Superior Court, clothed with all the common law authority which attaches to that jurisdiction. In giving construction to a statute, and carrying out, according to his view, the ends which it contemplated, he acted as a Judge in no way deprived of his general powers.

To make this case analogous to that of Thompson and Ingram, (4 A. & E.) 68 E. C. L. 709, to which the counsel for the relators referred, the jurisdiction of the Circuit Judge must have ceased when he found the right of the petitioners (the C. & A. R. Co.) contested. Did that circumstance divest him of all power of further procedure under the Act? He was the Judge of a Court having the right to try the question of title, and it was for him to decide whether he was thereby deprived of jurisdiction.

The point here is not whether the Judge should have required the right to have been established by the mode proper in his Court before he granted the order, but whether,

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not having done so, he, *and those acting

by virtue of his order, can be prohibited from the enforcement of it.

Mr. Justice Blackstone, 3 Comm., 112, says: "Prohibition is a writ issuing properly out of the Court of King's Bench, being the King's prerogative writ. * * * directed to the Judges and parties to a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court."

The high authority for this definition will commend it to respect and acceptance. Let us apply its terms to the case under consideration: By the Act, the cause must have its origin before the Circuit Judge, and, in fact, no other Court could take cognizance of it. If the question of right, on the part of the petitioners, is to be regarded only as a collateral point, and not, as the relators claim, of direct, immediate and essential connection, what Court possessed the power to try and determine it but the Circuit Court? What Court but it can try the title or claim to land? Where the subject-matter is within the jurisdiction of the Court, and it errs in its decision, the remedy is not by prohibition.—*Grant v. Gould*, 2 Hy. B., 100; *State v. Wakely*, 2 N. and McC., 412.

In the *People ex rel. Kerr v. Seward*, 7 Wendell, 518, it is declared to be, not prohibition, but certiorari.

In *Taft v. Ryner*, (Man. G. & S.) 57 E. C. L., 162, it was held that a writ of prohibition to the Judge of a County Court, in a matter within his jurisdiction, could not issue, although the Act creating the Court had taken away the writ of error. Maule, J., said, "this might have been error, if the writ had not been taken away in these cases; and this shows that it is no ground for prohibition."

Buller, J., in *Ld. Camden et al. v. Home*, 4 T. R., 382, said, "whatever may have passed in the several cases on the subject in the last century, the grounds of granting and refusing prohibitions are now clearly and accurately defined. If the Court below have jurisdiction over the subject, though they may mistake in their judgment, that is no ground for a prohibition, but only matter of appeal."

An examination of the cases in this State, referred to by the counsel for the relators, will show that there is no contrariety or repugnance between them and the principles

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we have affirmed here. *They were, to some extent, reviewed in the *State v. Nathan*, 4 Rich., 514, and the conclusion of the Court in this case is in conformity with the results there announced.

Where Spiritual Courts, or Courts of Admiralty, or other Courts, whose proceedings

differ from the common law, exceed their jurisdiction, or determine any matter of common law cognizance, such as the construction of an Act of Parliament, or apply a rule of evidence otherwise than the common law requires, prohibition lies.—Bacon, Abr. Prohibition, Letter K; and on that principle was the decision in the case of *Gould v. Tupper*, 5 East., 344.

The distinction proceeds upon the ground that, not having common law powers, if they attempt to administer their functions by the rules of common law, they must not construe or distinguish them according to their own notion, but must act in the premises with strict regard to it.

The cases founded on that principle, and cited as authority in the argument, have no application, because the Circuit Court has, and can exercise, common law powers.

The motion for the writ of prohibition is refused.

WILLARD, A. J., and HOGE, A. J., concurred.

I S. C. 55

W. H. GARVIN v. J. WHEELER GARVIN and R. KIRKLAND GARVIN.

JAMES PATTERSON, Adm'r of J. WHEELER GARVIN, v. W. H. GARVIN and R. KIRKLAND GARVIN.

J. W. RILEY and Others v. W. H. GARVIN. (Columbia. Nov. and Dec., 1868.)

[Judgment ⇨ 793.]

Where, in a suit for partition, land is sold for distribution of the proceeds between the tenants in common, the liens of judgments against one of the tenants are transferred from his share of the land to his share of the proceeds of the sale, and the legal priorities of the liens are not affected by the sale.

[Ed. Note.—Cited in *Clinkscales v. Pendleton Mfg. Co.*, 9 S. C. 323; *Riley v. Gaines*, 14 S. C. 457; *Ex parte Crawford & Sons*, 27 S. C. 162, 3 S. E. 75.

For other cases, see *Judgment*, Cent. Dig. § 1383; Dec. Dig. ⇨ 793.]

[Partnership ⇨ 49.]

In such cases the judgment creditors may intervene by petition or rule.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 67-74; Dec. Dig. ⇨ 49.]

[Appeal and Error ⇨ 79.]

The decree below examined and held not to be final, and, therefore, not to be appealable, except in its relation to one only of the three causes in which it was entitled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 484-493; Dec. Dig. ⇨ 79.]

[This case is also cited in *Regenstein v. Pearlstein*, 30 S. C. 206, 8 S. E. 850, without specific application.]

Before Lesesne, Ch., at Barnwell, February, 1868.

The decree of His Honor the Chancellor, (filed October 19, 1868,) is as follows:

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*Lesesne, Ch. The three causes above entitled were heard together. The first of them was a bill for partition of the estate of W. W. Garvin, deceased, by whom the same had been devised to his three sons, namely, the plaintiff and defendants in that cause. A sale had been made of the real estate, and the cause came up on the Commissioner's report of sales. By this it appears that the net sales amounted to six thousand six hundred and fifty-seven dollars and thirty-seven cents, and that the purchaser, William P. Dunbar, had accounted to the defendant, R. K. Garvin, for one-third part of that sum.

J. Wheeler Garvin died after the sale, considerably indebted, and leaving no property, except his interest in the real estate of his father. And the second cause is a bill by his administrator, praying that his share of the sales of said real estate may be paid to the plaintiff, to be disposed of in a due course of administration. And the third cause is a bill by judgment creditors of W. H. Garvin, praying that his share of the sales aforesaid be applied to the payment of their demands. An order was submitted to confirm the sale made in the first cause, and give the purchaser (Dunbar) credit on his bond for the amount paid by him to R. K. Garvin, and to grant the relief prayed for in the two other causes.

But at the hearing it was brought to the attention of the Court, by the solicitor of R. K. Garvin, that he had filed a bill, not yet on the docket, against W. H. Garvin and the administrator of J. Wheeler Garvin. This bill alleges that W. H. Garvin, who was the sole qualified executor of W. W. Garvin, had used and wasted all the personal estate and effects of the testator, and asks for an account of plaintiff's share, or third part of the same, and that the amount to which he may thereupon be found to be entitled, as against the executor, W. H. Garvin, be paid out of the said W. H. Garvin's share of the sales of the real estate before mentioned.

Thus the question is raised whether such a claim is entitled to be paid out of the said fund in preference to the claim of judgment creditors. And that question was fully discussed by the counsel of the said R. K. Garvin, and of the judgment creditors, respectively.

It is undeniable that the judgment creditors of W. H. Garvin have no lien on his share of the fund in Court. Whatever lien they may have had on his undivided share of the land was displaced by its sale for partition. The fund in question is still liable for their demands, but it is equitable assets,

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and liable for all *the debts of W. H. Garvin, without preferences.—*Carlton v. Felder*, 6 Rich. Eq., 60; *Heath v. Bishop*, 4 Rich. Eq., 46-58 [55 Am. Dec. 654].

The claim of R. K. Garvin, too, must stand

on the same footing with the others. There is not, I think, any principle of law that entitles him to the preference which is claimed by him.

It appears that in the case of *R. K. Garvin v. W. H. Garvin*, the Commissioner (under an order of reference by himself) has made a report finding the amount due by the defendant, but, without the consent of the defendant, I am not at liberty to consider that report in this connection.

It appears, moreover, that certain persons, claiming to be creditors of W. H. Garvin, as executor, and to be entitled to payment out of his testator's estate, have filed petitions to be paid out of the fund in this Court. These claims must be considered before any decree can be made to dispose of the fund. Mr. Dunbar, the purchaser of the land, having settled with R. K. Garvin, is entitled to a credit on his bond for whatever may be ascertained to be the amount of R. K. Garvin's share of the sales of the land. In ascertaining that, claims of creditors that are properly chargeable against the testator's estate must be first deducted from the amount of sales. The Court will also order the share of J. Wheeler Garvin, deceased, when ascertained, to be paid to his administrator, on his giving security for the due administration of the same.

It is ordered and decreed, that the Commissioner inquire and report whether there are any creditors who claim payment of their demands out of the estate of the testator, and the amount of said demands; also, the claims of the judgment creditors of W. H. Garvin, and of all other creditors of the said W. H. Garvin, especially that of R. K. Garvin, hereinbefore referred to; and, to that end, that he call on all the creditors of the said W. H. Garvin, by advertisement in a newspaper, to establish their demands before him by the first day of December next; and that he give due notice of any reference or references held under this decree to the solicitor of R. K. Garvin, and of the petitioners hereinbefore mentioned.

And it is further ordered, that the parties, or any of them, have leave, on due notice, to apply at the foot of this decree, at Chambers, for any further order or orders that may be necessary or proper in the premises.

The complainants, J. W. Riley, N. G. W.

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Walker and Charles *Peckman, appealed, and now moved this Court to reverse or modify so much of the decree in these causes as holds William H. Garvin's share of the fund in Court to be equitable assets, and, as such, distributable, *pari passu*, among all his creditors, on the ground:

That the fund in question is legal assets, and that the lien of said complainants' judgment upon William H. Garvin's undivided interest in the land having been displaced by the action of the Court, the legal priority

of the judgment should be preserved in the disposition of the proceeds of the sale.

Maher, for appellants.

Davant, contra.

April 2, 1868. The opinion of the Court was delivered by

WILLARD, A. J. J. W. Riley, N. G. W. Walker and Charles Peckman, complainants, in the suit of Riley v. Garvin, appeal from so much of the decree entitled in the three causes above named as adjudged that appellants were not entitled to priority of payment over other creditors out of a fund arising from the sale of real estate under a decree of partition in the suit first above named. Priority is claimed under a judgment confessed by Wm. H. Garvin, one of the distributees of the land partitioned, and complainant in the partition suit, subsequent to the decree of sale for the purpose of such partition, and before sale actually made. Wm. H. Garvin was sole defendant to appellants' bill, and suffered the same to be taken pro confesso; and accordingly, as between appellants and that defendant, the right of appellants to the distributive share of the latter in the proceeds of the sale of the lands under partition, to the extent necessary to satisfy their debt, is fully established.

The singularity of this case is, that the persons who contest the appellants' claim to priority were not before the Court in that character in either of the suits in which the decree was rendered. We learn, from the decree of the Chancellor, that R. K. Garvin, another of the distributees, and certain petitioning creditors of W. H. Garvin, executor, are the true contestants of the appellants' claim. Whether there are still other creditors, not yet before the Court, and, if any, whether they claim as judgment or simple contract creditors, is not yet ascertained, the decree having made provision for the as-

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certainment of such claims; but it is not yet, in that respect, as far as we can know, carried into effect.

The portion of the decree appealed from is as follows: "It is undeniable that the judgment creditors of Wm. H. Garvin have no lien on his share of the fund in Court. Whatever lien they may have had on his undivided share of the land was displaced by its sale for partition. The fund in question is still liable for their demands; but it is equitable assets, and liable for all the debts of Wm. H. Garvin, without preferences."

If this Court had no other concern with the record before us than simply to examine the soundness, in point of law, of such propositions as we find embodied in the decree, irrespective of their bearing upon the rights of the parties under the case stated in the pleadings, there would be no embarrassment in proceeding at once to the examination of the doctrine laid down by the Chancellor.

But such is not the case. The Legislature, in order to give solidity to proceedings in equity, and to prevent the inconvenience, delay and expense of frequent and vexatious appeals, resulting from a piecemeal consideration of the questions arising, have declared, in fixing the appellate jurisdiction of this Court, final decrees and judgments in equity to be the proper subjects of the consideration of this Court on appeal, (Stat. Special Session, 1868, p. 12, Sec. 1.) It therefore becomes necessary for us, in giving effect to this salutary enactment, to ascertain the bearing of the decision of the Chancellor, brought up by the appeal, and whether it can be regarded as finally disposing of the whole or any distinct and substantive part of the matters in controversy.

In reference to the suits in which the decree was rendered, there are two views that may be taken of that portion of the decree appealed from. The first is in its application and bearing on the partition suit of W. H. Garvin v. J. W. Garvin and R. K. Garvin. The second, in its relation to the case of Riley et al. v. W. H. Garvin.

Assuming, for the purpose of a more exact understanding, that the decree had been rendered in the partition suit alone, and what would be its proper bearing? After the accomplishment of the direct object of the partition suit, to the extent of the decree of sale and a sale thereunder, there remained in the hands of the Court a fund, arising from the proceeds of the sale, to be disposed of. If no new parties interposed as claimants to the fund, either as creditors or otherwise, the fund would pass under the terms of the

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*decree of sale, which must be assumed to have disposed finally of all questions arising among the parties to the bill touching their respective interests in the proceeds of sale.

Where there is a claim, by judgment or other record creditors, to the fund, brought in either on petition or by rule, a question is made which may be brought before this Court, provided the decree in relation thereto is in its nature final as to the matters embraced in it.

That this is the usual and proper mode of bringing forward the demands of such creditors, having a right to come into equity for satisfaction out of the fund, is well settled. In *Simmons v. Simmons*, (Harp. Eq., 256.) a rule was moved, in a partition suit, by a judgment creditor of one of the distributees, for payment out of the proceeds of sale.

Although in that case the creditor did not intervene in time—the share of the distributee, bound by the judgment, having been paid over to him before demand made by his creditors—still no question was made as to the propriety of the mode of his intervention; indeed, the order made by the Court of Appeals in the case shows that, as to le-

gal liens—in which may be included such as arise by judgment and mortgage—protection should be afforded to the creditor by the terms of the decree and order of distribution, even when the creditor has not intervened in any form whatever.

The Court say: "We think the decree of the Circuit Court was correct. The Commissioner, having obeyed the order of the Court, ought to be protected. It is proper that he should respect the legal liens. It is, therefore, ordered and adjudged, that the decree of the Circuit Court be affirmed, and that the Commissioner pay over the moneys according to the order of the Court, first satisfying the legal liens."

This order was practically a modification of the Circuit order of distribution as to any portion of the fund still remaining in the hands of the Court, distinctly recognizing the right of the creditor to intervene on the footing of the order of distribution itself. The other method of intervening, viz, by petition, was adopted by certain creditors in the present case, as appears by the statements of the decree; and the direction to the Commissioner to inquire and report as to creditors illustrates the general mode of procedure in such cases. This practice was sanctioned by Chancellor Kent, delivering the opinion of the Court of Errors, of New

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York, in *Codwise v. Gelston*, 10 Johns. R., 507, so far as applicable to the claims of creditors by matter of record.

He says, however: "As the appellant applies by petition only, and does not, by bill, bring in the other judgment creditors, the Master must determine the priority of the liens by the record, and he cannot resort to proof aliunde, unless it be the voluntary confession of any prior judgment creditor that his debt is satisfied."

Following this practice, the appellants, as judgment creditors of one of the distributees, had a right, independently of their bill, to intervene by rule or petition, or upon the intervention of other creditors, and a reference to the Commissioner, to go before him and make proof of their demand, and to assert any priority that might appear by matter of record. Had they intervened by rule or petition, and had the present decree been made on such rule, denying their alleged priority, it might be a question whether, in that stage of the proceedings, the decree could be regarded as in an appealable form. While it might be regarded as final in respect to one aspect of the appellants' claim, namely, as creditors claiming a preference, yet it leaves unsettled the question whether they will be allowed to reach the fund to any extent whatever, and the appellants, should they fail to establish before us a right to priority, might be again before us on the question, whether they have any right to the fund in common with other creditors. So, on the

other hand, should we hold that appellants are entitled to a priority on the case made by the proceedings and decree, it might turn out that other judgment creditors had still older claims on the fund.

If that portion of the decree appealed from is to be regarded as intended as an order in the partition suit, it could be considered in no other light than as an instruction to the Commissioner ruling an abstract proposition which was to govern him as to all claims to priority of payment out of the fund, whether made by parties who had had an opportunity to be heard in opposition to the point ruled, or by those who had had no such opportunity. We cannot adopt this view of the ruling without assuming an unusual and irregular course of proceeding, and we must, therefore, conclude that the portion of the decree appealed from has exclusive relation to the bill filed by the appellants against W. H. Garvin.

The next question that arises is, whether, regarding the portion of the decree appealed from as a disposition of the bill filed by the appellants against W. H. Garvin, it can be

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regarded as finally disposing of the matter of that bill, so as to stand for a final decree, and, as such, to be appealable to this Court.

Appellants' bill was a judgment creditors' bill against Garvin, and sought satisfaction out of the particular fund. As this fund was subject to the claims of creditors having legal or equitable liens upon it, and could be reached only by a proceeding to determine the respective priorities affecting it, and as the judgment creditors, if any, were not made parties to the bill, so as to be bound by a decree, the bill must be regarded as contemplating the subrogation of the appellants to the rights of W. H. Garvin in respect to the fund. Whether there was any necessity for such a subrogation, in view of the fact that the appellants, as judgment creditors, already possessed a sufficient ground in equity to prefer their claims, is not a question here, as W. H. Garvin suffered the bill to be taken as confessed, and does not appear to raise any question as to the form of the decree. The proper decree in the appellants' suit was in accordance with the foregoing principles. The Chancellor, instead of pronouncing the decree called for by the case, substantially refused it, by making a decree foreign to the purpose of the bill, and covering questions not yet reached, arising between the appellants and the other creditors, in which Garvin, the sole defendant, had no direct interest. It follows, therefore, that, even if the doctrine laid down by the Chancellor was in itself free from objection, it was not called for by the state of the case before him, and formed no sufficient basis for disposing of the appellants' bill.

But we cannot yield our assent to the ruling in question, standing, as it does, in di-

rect antagonism to the entire current of decisions and authorities. The sale of the real estate merely transferred the legal liens affecting it, and did not change their relative priorities. In equity, the fund arising from the sale stands in lieu of the land itself, and all liens on the land attach to the fund and are enforced with due regard to all the legal priorities.—Story Eq., Sec. 553; 2 Fonb. Eq., 403, 404; see remarks of O'Neill, J., on *Rabb v. Aiken* [2 McC. Eq. 118], in *Johnson v. Payne*, 1 Hill, 111. This was expressly held in *Codwise v. Gelston*, above cited.

The authorities cited by the Chancellor do not sustain the propositions based upon them. This is so obvious a conclusion that it will not be necessary to enter into a detailed consideration of the points ruled in those cases.

That portion of the decree appealed from is erroneous and is reversed.

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*It is adjudged and decreed, that so much of the decree of the Chancellor as is contained in the following language, viz—"It is undeniable that the judgment creditors of W. H. Garvin have no lien on his share of the fund in Court; whatever lien they may have had on his undivided share of the land was displaced by its sale for partition; the fund in question is still liable for their demands, but it is equitable assets, and liable for all the debts of W. H. Garvin, without preferences"—be, and the same is, in all things, reversed and set aside.

It is further adjudged and decreed, that so much of the decree aforesaid as is not hereby reversed stand for a decree in the case of *James W. Riley et al. v. William H. Garvin*, and that the appellants be admitted before the Commissioner, or person who shall or may carry out the instructions of said decree, to allege and maintain any matter or thing that of right may be alleged or maintained by or on the behalf of W. H. Garvin.

HOGUE, A. J., concurred.

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THE STATE ex rel. THE ATTORNEY GENERAL, Plaintiff in Error, v. THE PRESIDENT AND DIRECTORS OF THE BANK OF THE STATE OF SOUTH CAROLINA, Defendants in Error.

(Columbia, Nov. and Dec., 1868.)

[*Banks and Banking* ⇨76; *Constitutional Law* ⇨129, 154.]

So much of the Act "to close the operations of the Bank of the State of South Carolina," passed September 15, 1868, as authorizes and requires the Governor, "for and on behalf of the State, to take possession of all the real and personal estate, assets, choses in action and books of account of" the Bank of the State of South Carolina, and sell the same, at public auction, "upon such terms as he shall deem most advantageous to the State," and deposit the proceeds in the Treasury, subject to his or-

der, is void, because within the inhibition of the Constitution of the United States, that "no State shall pass any law impairing the obligation of contracts."

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 158; Dec. Dig. ⇨76; *Constitutional Law*, Cent. Dig. §§ 391, 472; Dec. Dig. ⇨129, 154.]

[*Banks and Banking* ⇨80.]

Though the capital of the Bank of the State of South Carolina was furnished by the State, and its profits enured to the benefit of the State, and the faith of the State was pledged to its support, yet it was a distinct corporation, having the ordinary powers and rights, and subject to the ordinary obligations, of banking corporations, with liability to suits by its creditors, and holding its property subject to their claims in preference to the claims of the State as its only stockholder.

[Ed. Note.—Cited in *Dabney, Morgan & Co. v. Bank of State of South Carolina*, 3 S. C. 158, 166; *Clinkseales v. Pendleton Mfg. Co.*, 9 S. C. 324; *State of South Carolina ex rel. J. Fraser Lyon, Attorney General, v. State Dispensary Commission*, 79 S. C. 337, 60 S. E. 928.

For other cases, see *Banks and Banking*, Cent. Dig. § 187; Dec. Dig. ⇨80.]

[*Principal and Surety* ⇨147.]

A creditor has the right to be subrogated to all the rights of the surety or guarantor of his principal debtor, in securities taken by the surety, or guarantor, for his own indemnity or protection—semble.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 402–412; Dec. Dig. ⇨147.]

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[*Constitutional Law* ⇨180.]

*An Act so changing existing remedies as materially to impair the rights and interests of creditors, is within the inhibition of the Constitution of the United States in reference to laws "impairing the obligation of contracts."

[Ed. Note.—Cited in *State ex rel. McKinlay v. Cardozo*, 8 S. C. 81, 28 Am. Rep. 275.

For other cases, see *Constitutional Law*, Cent. Dig. § 498; Dec. Dig. ⇨180.]

[*Constitutional Law* ⇨169.]

An Act withdrawing the property of a debtor from the operation of all legal process by his creditors, leaving to them the barren right to sue, virtually destroys the remedy of a creditor, and impairs the obligation of his contract.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 474, 476, 478–481, 502, 511–514, 522; Dec. Dig. ⇨169.]

[*Banks and Banking* ⇨77.]

[Cited in *Dabney, Morgan & Co. v. Bank of State of South Carolina*, 3 S. C. 153, to the point that the assets of an insolvent bank are no longer such to which the term "capital" may apply.]

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165–176½; Dec. Dig. ⇨77.]

[*States* ⇨191.]

[Cited in *Dabney, Morgan & Co. v. Bank of State of South Carolina*, 3 S. C. 167, to the point that the state is not subject to suit.]

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 179–184; Dec. Dig. ⇨191.]

Before Willard, A. J., at Chambers, Charleston, Oct., 1868.

This was an information by the Attorney General, praying that a rule do issue, to be served upon the President and Directors of

the Bank of the State of South Carolina, the respondents, requiring them to shew cause why a mandamus should not be awarded, commanding them to deliver to His Excellency the Governor of the State all the real and personal estate, assets, choses in action and books of account of the corporation known as the President and Directors of the Bank of the State of South Carolina, as required by the Act passed September 15, 1868, entitled "An Act to close the operations of the Bank of the State of South Carolina."

A rule was accordingly issued and served on the respondents, who made a return thereto, setting forth various grounds as causes why a mandamus should not issue against them. One of the grounds was, that the Act aforesaid is in violation of Article 1, Section 10, Par. 1, of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts."

His Honor, Mr. Associate Justice Willard, discharged the rule, and filed his reasons therefor, as follows:

Willard, A. J. The Attorney General has, in behalf of the State, filed a suggestion, praying that a writ of mandamus do issue to the respondents, commanding them to deliver to the Governor the assets of the Bank of the State, in accordance with the provisions of the Act of the Legislature entitled "An Act to close the operations of the Bank of the State of South Carolina," passed September 15th, 1868. A rule to show cause has been granted, upon the return of which the respondents now appear to show cause for the discharge of the rule.

The first objection of the respondents is to the sufficiency of suggestion to warrant the issuing of the writ. Respondents contend that they stand before the Court as private

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citizens, and not as public officers, and that, for that reason, they are not amenable to the writ. They also contend that the subject-matter of the controversy is one to which the writ is inapplicable.

The writ presupposes a duty to be performed in which the public are concerned: the respondent must, therefore, be a person capable of performing such a duty. Though commonly issued to public officers, it equally extends to any person, official or otherwise, who may owe a public duty, and, in respect thereof, stands in the relation of a public servant. Chief Justice Marshall says, in *Marbury v. Madison*, 1 Cranch, 170 [2 L. Ed. 60]: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

Blackstone (3 Bl. Com., 110) enumerates, among those to whom it issues, "persons." It is not the design of the writ to draw to the Court the official powers of the respondent, so that the Court can perform what he

has neglected, but it acts personally upon him, compelling, by personal pains and penalties, the performance of a neglected duty. It is as much a remedy against the person as an indictment and action at law for official misfeasance.

It is unnecessary to consider whether the President and Directors are, in a technical sense, public servants, although one branch of the Legislature so considered them, holding them to be officers "contemplated by the Constitution as vacating the seat of any such member of the Legislature."—Resolution of House of Representatives, September 15, 1813, Bank Compilation, p. 73.

The true question is, whether the act required to be performed is one that may be compelled by mandamus.

To establish a claim to the writ, the State must establish, *prima facie*, a clear right to demand the performance of some act, and a corresponding specific duty, on the part of the respondent, to perform the same, imposed by law, (*Marbury v. Madison*, 1 Cranch, 170 [2 L. Ed. 60].) in its nature ministerial, and not depending on the discretion of the respondent, (*Kendall v. United States*, 12 Pet. 524 [9 L. Ed. 1181].) and that the public are, in some degree, directly concerned in the performance of such duty; also, that performance has been demanded and refused, and that no specific remedy exists for the enforcement thereof.—*King v. Barker*, 3 Burr., 1265.

Section 1 of the Act of September 15, set forth by the suggestion, declares that "the Governor of the State is hereby authorized

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*and required, for and on behalf of the State, to take possession of all the real and personal estate, assets, choses in action, and books of accounts of the corporation known as the President and Directors of the Bank of the State of South Carolina, in whose hands soever found." It alleges a demand on the part of the Governor, and a refusal of compliance on the part of respondents. It is conceded by the return that there is property, of the description specified in the law, in the hands of the respondents as officers of the bank. The requirements of the statute cannot be complied with, unless such property is delivered to the Governor; and hence it is contended by the Attorney General, that there results, by necessary implication of law, a duty on the part of the respondents to perform such act, of the same obligation as if commanded in express terms. Assuming that the respondents have no personal interest in the required act, but are to be regarded as standing in the relation of public servants to the property claimed, such implication is not only reasonable, but necessary to the attainment of the object of the statute. If the Governor has a clear, legal right to take the property, the withholding it is a wrong, the essence of which, in the case of a public servant, is the failure of official duty.

Nor is it of importance that the respondents are not named in the statute as the holders of the property—the language of the Act, “in whose soever hands found,” being sufficiently descriptive to denote the persons who ought to comply with its requirements.

It remains, therefore, to inquire whether the respondents are amenable to the law, in the character of public servants.

The Bank of the State was created in 1812, as a corporation and body politic, to continue until 1835, and has been continued under subsequent statutes until the present time. It was established “in the name and in behalf of the State.” Its capital was a fund created from the resources of the State, guaranteed against deficiency by a pledge of the faith of the State. It was made a bank of loan, discount, issue and deposit. It could incur obligations, and had the largest powers to deal with property usually conferred upon banking companies. It could sue and be sued, have a corporate seal, make by-laws, “and, generally, to do and execute all and singular such matters and things which to them it should appertain to do.” The President and Directors were chosen by the Legislature. The State, from time to time, increased the resources of the bank by deposit subject to its draft, but upon which it was authorized to bank. In addition to this, all public officers

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holding *public moneys were required to employ the bank as their place of safe-keeping. The unexpended balance remaining in the Treasury of the State at the end of any fiscal year was placed to the credit of the capital of the bank. The profits were, in 1821, created a fund for the redemption of the State six per cent. stocks.

The Legislature, from time to time, passed laws controlling the institution, clearly expressive of a relation more intimate than that which usually subsists between the State and banking corporations.

It is obvious that the bank was created for the use of the State—a purely public purpose—and that the State intended to retain, and did, in fact, retain over the institution the fullest control capable of being exercised over a corporate institution—a power that necessarily resulted from the reservation to the State of all elements of public authority, and those appertaining to the ownership of the stock of such an institution. To the extent of the entire limit of the constitutional authority of the Legislature, the officers of the bank were bound to execute the commands and carry out the will of the legislative authority. Thus, as to both its objects and uses, and the means by which they were to be attained, the State, having entire control of the institution, it is characterized as a public servant, its officers standing in the same relation.—*Opinion of Story, J., [Dartmouth College v. Woodward]* 4 Wheat., 669 [4 L. Ed. 629].

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The fact that it could bind itself and its resources by its contract, and become amenable to the judicial authority, does not alter this view of the case, for many public officers possess the same degree of competency without changing their relations to the public authority.

The respondents being public servants, as between the State and themselves, the Act of September 15 created a duty to deliver to the Governor the fund in question, to the extent of the control they might have over it, and failing to do so, the State was entitled to a remedy to enforce the performance of such a duty.

That the act required was ministerial, and left nothing to the discretion of the respondents, results from the absolute character of the command, as well as from the nature of the act itself.

The act required is clearly and distinctly commanded as a specific duty, in which the State is alone concerned, so far as can be gathered from the statute.

The next question that arises is, whether any other specific remedy than that by mandamus has been provided. The statute in question provides no remedy, and, therefore,

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the question is *to be governed by general principles of law; for a case like the present mandamus is a specific remedy, devised for the very purpose of meeting the want of a general remedy by action. It meets the very case where a specific act ought to be performed and is withheld, and where compensation in some other form would not equally serve the public interest.

I must, therefore, conclude that the remedy has been well chosen, and proceed to the consideration of the grounds that have been urged as a bar to the present form of proceeding.

The respondents set up the pending of a suit in equity in the Court of Chancery of this State, in which Dabney, Morgan & Co. are complainants, and respondents and others are defendants, in which the complainants claim as bill-holders of the bank, and seek equitable remedies against the assets of the bank—also certain orders made in such suit—and contend that, by reason thereof, jurisdiction in this case is ousted, both as it regards the fund in controversy and the respondents who have its custody.

It is necessary to examine the grounds on which this claim rests.

Dabney, Morgan & Co. filed their bill in equity in October, 1867, alleging that they are holders of bills issued by the bank; that the bank is insolvent. They seek a discovery and account of the assets of the bank, and a decree annulling, as unconstitutional, an Act of the Legislature passed in 1865, so far as the same assumes control over such assets, and to create certain preferences in regard to the same, prejudicial to complainants;

and also to be paid out of the assets of the bank, according to the rights and priorities adjudged to the respective creditors having claims, legal or equitable, thereon. They also ask an injunction and receiver of the fund.

The President and Directors of the Bank are made parties defendant to the original bill. The Attorney General was afterwards, with his consent, made a party in behalf of the State, for the purpose of validating the Act of 1865, and certain other creditors of the bank were likewise made parties defendant.

Answers were interposed by the several defendants—that of the bank, admitting its insolvency, and upholding the preferences created by the Act of 1865. The Attorney General answered in behalf of the State, enforcing the validity of the Act of 1865.

An order was made by consent, March 3, 1868, which, by anticipation, directed that, upon the coming in of the answers, or the bill being taken pro confesso, for want of an answer, the cause should stand referred to a Master to take proofs. Directions were given

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*for the Master to advertise for the appearance of the creditors of the bank. The President and Directors were also ordered to account before the Master for the "capital, property and assets" in their hands or under their control. The creditors of the bank were enjoined from prosecuting at law or in equity, except as parties to such suit, and Messrs. Furman and Waring, the President and Cashier, were enjoined from paying the assets to the creditors until the hearing. Instructions were given as to current expense, and as to changing the form of securities, and all parties were allowed leave to apply for additional orders.

The case has not yet proceeded to a hearing. Does the pending of this suit oust the jurisdiction asserted in the present case?

The general rule of law on this subject is well stated in Conkling's Treatise, page 273, as follows:

"The rule is this, that between Courts of concurrent jurisdiction, the Court that first attains possession of the controversy, or of the property in dispute, must be allowed to dispose of it finally, without interference or interruption from the co-ordinate Court. This well settled rule is equally applicable between Courts of Equity and Courts of Common Law, and between different Courts of Common Law; and it has repeatedly been asserted and enforced by the Supreme Court between the National and State Courts."

The decisions of the Supreme Court of the United States are entitled to the greatest weight, as bearing on this subject, even where not possessing conclusive authority, from the fact that the possession of Federal authority would naturally incline them to decide this rule within the narrowest limits, with a view to secure the largest efficiency

within the necessarily limited sphere of original Federal jurisdiction.

Taylor v. Carryl (20 Howard, 583 [15 L. Ed. 1028],) is a striking illustration of this rule, arising out of a conflict between the United States District Court in Admiralty and a State Court, acting under process of foreign attachment. The claim in Admiralty was for seamen's wages—in the State Court that of a general creditor having no lien upon the vessel, the subject of controversy, except that obtained through the foreign attachment. It was strenuously contended that the case of a libel for seamen's wages in Admiralty formed an exception to the general doctrine embraced in the rule above stated. The Court, however, was of opinion that the

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general *rule, as to co-ordinate jurisdictions, was applicable to the case, and sustained the authority of the State Court, which had first gained possession of the subject of the controversy. The cases in the Supreme Court, depending on this principle, were carefully considered in this case, and the rule vindicated, substantially, as laid down in Conkling's Treatise, above cited. Campbell, J., delivering the opinion of the Court, cites, approvingly, the authority of 3 Hare, 472, to the proposition that the "Court of Chancery does not allow the possession of its receiver, sequestrator, committee or custodee to be disturbed by a party, whether claiming by title paramount, or under the right which they were appointed to protect." He contends that the possession of the agent of the Court is the possession of the Court.

In Wiswall v. Sampson, (14 Howard, 52 [14 L. Ed. 322],) a judgment creditor endeavored to validate a sale of real estate, made by the United States Marshal, under a judgment of the United States Circuit Court, while the property was in the hands of a receiver of the Court of Chancery. The Court applied the rule in question to the case, holding that the sale made by the Marshal was absolutely void. Nelson, J., held that the possession of the receiver was the possession of the Court, and points out the method by which one claiming by superior title must intervene in Chancery in such a case.

So, in Peale v. Phipps, (14 Howard, 368 [14 L. Ed. 459],) it was held that an action could not be brought in the United States Circuit Court against trustees appointed by a State Court to wind up the affairs of an insolvent corporation, they being amenable to the Court that appointed them, which had authority to apply the assets to the payment of claims against the corporation.

The application of this rule to the present case involves the following considerations: First, Whether the Court of Chancery has obtained the possession of the subject-matter of this controversy, or of the controversy itself; and, Second, Whether the rule is applicable to a case in which the public authority

seeks to compel, by mandamus, the performance of a strictly public act.

In a strictly technical sense, the subject-matter of this controversy is an act of a public character, performance of which is claimed of a public servant who withholds the same; but as the doing this act involves a certain control over a specified fund, it becomes necessary to know whether, consistently with the rules of law, the act can be compelled in the manner that is proposed.

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*What is, then, the situation of the fund? Had it been placed in the hands of a receiver, no question could arise as to its being in the hands of the Court that appointed him. Is it any the less so, in the present instance? The Court has assumed not only the control of the fund, but has actually entered upon its administration. It has protected it from waste by injunction. It has already, by anticipation, devoted it to certain uses. It has tied up every hand that could intermeddle with it, and opened the door of controversy to all making claims against it. The assets of the bank are no longer either capital or profits, but a fund in equity, as completely and actually as if in the hands of a receiver. The President and Directors, if not receivers, have their responsibilities, and, in the language above cited, are at least "custodees." As it regards the fund, they are but the hands of the Court of Chancery.

But it is equally clear that the Court of Chancery has possession of the controversy, both as it regards the questions at issue and the parties. The State has intervened, in the person of its Attorney General, and submitted its right to that Court by answer. If that demand is too narrow, it can be made larger. The Court is bound to respect and maintain whatever claim the State may rightfully make upon the fund. The rights of the State, as they exist under the Act of 1868, are the same that existed at the time it interposed its answer. It has acquired no new title or grant of authority in relation to the fund. It could have claimed, by its answer, unlimited control over the assets, if it can do so now. It advances no claim that could not be considered by that Court, and it is to be presumed that Court, deriving its powers from the Constitution, will give due effect to all rights, public and private. A plainer case could not be conceived for holding that, so far as the question of co-ordinate jurisdiction is involved, the right to proceed in judicature, had private rights been alone concerned, rests with the Court of Chancery.

But, can this rule be extended to a contest where the State claims, by the extraordinary remedy of mandamus, the performance of an act of a public nature, imposed by statute authority?

The writ of mandamus is a remedy appertaining to the general exercise of judicial power, and, as such, is subject to all the rules

that govern procedure in the Courts. If sued out by a citizen, for the purpose of claiming a purely private right, depending on the action of a public officer, it could not be contended, with any propriety, that, as a peculiar remedy, it was exempt from the opera-

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*tion of a rule intended to bind together all jurisdictions and remedies into a harmonious whole. It certainly would not be allowed to oust the Court of Chancery of its appropriate jurisdiction over a specified fund in controversy.

In the present case, however, the State is a real, and not a nominal party; and this is claimed as placing the case in a peculiar attitude to the rule in question. The State can neither be sued nor compelled to appear in its own Courts or elsewhere. Where it enters the Courts, it does so voluntarily, and, it is to be presumed, for the reason that some important object cannot be attained except through the aid of the judicial arm of the Government. But no proposition is more clear than that when the State places itself in the attitude of a suitor in its Courts, it subjects itself to all the rules that bind the jurisdiction from which it seeks relief. When it enters the Court of Chancery, it conforms to every requirement that binds the humblest citizen. When it claims the aid of the writ of mandamus, it takes it subject to all the rules that control its employment. It follows, therefore, that the same rule must be applied in the present case that would govern in a case of private rights, and, accordingly, that, regarding the State as a claimant to the fund in question, an insuperable objection exists to the exercise of the jurisdiction claimed in these proceedings.

It has been hitherto assumed that the demand of the State is to the absolute control of the fund in its own right, and for such uses as it may see fit to declare. Another view of the Act of 1868 has been presented, which demands consideration. It is contended that the Act merely contemplates a change in the custodian of the fund, without necessarily diverting it from any uses to which it may have become appropriated by law. It is said that the Legislature may rightfully designate the proper persons to have the custody of funds in suits pending in the Courts, and that, in the present instance, they have fairly exercised that power; that, in such a case, the Courts have no more right to complain than they would if the writ of mandamus was sought to compel a Master in Equity to surrender to the Clerk of Common Pleas funds in his possession, on the legal transfer of the duties of his office to the last named officer; that, in such event, the fund still remains subject to the order of the Court, though actually held in different hands.

On this supposition, the statute of 1868 would have to be regarded as remedial, rath-

er than as an assertion of a right to control the dedication of the fund.

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*This question is one of delicacy and importance, and, as such, has received full and serious consideration. Time allows only a statement of the conclusions arrived at.

A careful examination of the statute, both as to its terms and general scope, allowing, in favor of the legislative action, every reasonable intendment, affords no sufficient ground for holding it to be intended as a remedial statute. The Governor could find in it no authority to make any other disposition of the fund than such as might be prescribed by appropriations made by the Legislature. The designation of the Governor, in his name of office, as the custodian—an officer who cannot, in his official character, as Executive of the State, be reached by the process of the Courts—seems to exclude the idea that it was not the intention of the Act to remove the fund from the control of the Court.—*Governor Georgia v. Madrazo*, 1 Pet., 110 [7 L. Ed. 73]. The direction to sell at public auction, with direct reference to the interests of the State, is inconsistent with the principles governing the disposition of equitable funds. Viewing the provision made in the statute for funding a portion of the bills of the bank, in connection with the clauses empowering the Governor to seize the fund, and the inevitable inference is, that the Legislature fairly concluded that such provision satisfied all legal and moral claims upon the fund, and left it at liberty to employ it as a means of satisfying the general indebtedness of the State, part of which arises from the issue of bonds to satisfy the demands of the billholders of the bank. In this view, the statute can only be regarded as an assertion of a proprietary claim to the fund, and, as such, we have seen that the appropriate tribunal before whom that claim should be asserted is the Court of Chancery that has possession of the fund.

The respondents have urged various other matters in bar of the proceedings, which, under the view taken of this case, are not important to be considered. Among the objections urged is, that the Act of 1868 is invalid, under the Constitution of the United States, as impairing the obligations of the contracts of the bank and the State with the creditors of the bank. As I may be called upon, at some future time, as a member of the Supreme Court, to pass upon the question, it is manifestly appropriate that no expression of views on that subject should be made when not imperatively demanded by the case before me.

The rule to show cause will be discharged.

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*The case was then removed into this Court by writ of error, where it was now heard.

Chamberlain, Attorney General, and Corbin, for plaintiff in error.

Campbell, Hayne, for defendants in error.

March 9, 1869. PER CURIAM. This cause came on to be heard on the transcript of the record from Associate Justice Willard, sitting in Chambers, at Charleston, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the rule for the mandamus be dismissed, because so much of the Act (No. 17) entitled "An Act to close the operations of the Bank of the State of South Carolina," as authorizes and requires the Governor, "for and on behalf of the State, to take possession of all the real and personal estate, assets, choses in action and books of account of the corporation known as the President and Directors of the Bank of the State of South Carolina, in whose hands soever found, and sell at public auction, at such times and upon such terms as he shall deem most advantageous to the State, all the real and personal estate, stocks, bonds of the corporation, and other assets of said corporation, and the personal bonds, notes and bills of exchange owned by said corporation," is in conflict with Article 1, Section 10, Par. 1, of the Constitution of the United States, which provides that "no State shall pass any law impairing the obligation of contracts."

The opinion of the Court will be filed hereafter.

April 8, 1869. The opinion of the Court was now delivered by

MOSES, C. J. The information before us was filed by the Attorney General of the State, on behalf of the State, praying a rule against the respondents to show cause why a writ of mandamus should not be awarded, commanding them to deliver to His Excellency the Governor of the State all the real and personal estate, assets, choses in action, and books of account of the corporation known as "The President and Directors of the Bank of the State of South Carolina," required by the Act entitled "An Act to close the operations of the Bank of the State of South Carolina," passed by the General Assembly on the 15th day of September, 1868.

The respondents submitted cause, and the

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matter came for hearing before Associate Justice Willard, at Chambers, who, after full argument, discharged the rule, and, by writ of error, it is brought to this Court.

Among the grounds urged by the respondents against the rule, it is averred that so much of the said Act as authorizes and requires the Governor, for and in behalf of the State, to take possession of all the assets, real and personal estate, choses in action, and books of account of the corporation known as the Bank of the State of South

Carolina, and sell, &c., and directs that the proceeds of sale and all collections shall be deposited in the Treasury of the State, subject to the order of the Governor, is in violation of Article I, Section 10, Paragraph 1, of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts."

As this objection is sustained by this Court, it is not necessary to review the ground on which the Associate Justice rested his decision, or the other points submitted by the respondents.

In 1812, the General Assembly, by Act, (S Stat. at Large, 24.) established "a bank in the name and on behalf of the State of South Carolina." It was "made a corporation and body politic, by the name and style of the President and Directors of the Bank of the State of South Carolina." Under the charter, extended from time to time, it was, as such, to continue until the first day of January, 1871.—Act of 1833, S Stat. at Large, 67; Act of 1852, 12 Stat. at Large, 149. It was made able and capable, in law, to have, purchase, receive and possess real and personal estate, and the same to sell, demise, grant, or dispose of, to sue and to be sued, to ordain and establish by-laws, ordinances and regulations for its government, and, generally, to do and execute all and singular such acts, matters and things which to them it shall or may appertain to do, subject to the rules, regulations, restrictions, limitations and provisions prescribed in the Act.

The whole capital was furnished by the State, consisting of all the stocks, bonds and notes belonging to the State, and the unexpended money in the Treasury; and all taxes hereafter to be collected on account of the State were to be therein deposited, to aid and facilitate its operations, subject to drafts on the part of the State, authorized by legal appropriations; and "the faith of the State was pledged for the support of the said bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency."

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*It was invested, by its charter, with all the rights and powers generally used, exercised and enjoyed by banking companies.

In December, 1865, the General Assembly, by Act, authorized the President and Directors to close the branches and agencies of the said institution, and required that the principal bank in Charleston should cease to be one of issue, but should continue to act as a bank of deposit until further action of the Legislature.

The bank was a distinct corporation. Although its capital was furnished by the State, its profits to inure to the benefit of the State, and "the faith of the State was pledged for its support, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency,"

still, though brought into existence by the State, the legitimate administration of its affairs, within the limits of its charter, created business relations and associations, founded upon the credit of its capital, property and profits. In all its transactions, these were looked to and accepted as the basis of its credit and responsibility.

While it continued solvent, it was a matter of little consequence to a creditor how far, or to what extent, the Legislature interfered by its control.

When, however, the fact of its insolvency is apparent, whether the State is the sole stockholder or a co-stockholder with individuals, the fund which it supplied as capital no longer remains, and to allow it to claim and hold the assets of the Company would be depriving the creditors of their right, and, in fact, using the assets as the means of reimbursing the stockholder, to their utter wrong and injury.

The assets of the bank are all that is left to meet the debts of the corporation, and, if they are taken by the State from the hands of those who hold the title for the purposes designed by the charter, and who are amenable to suit, where is the remedy which the creditor held in his right of action?

It does not at all change the nature of the relation of the bank to its creditors, that the State was the sole owner of the capital. The State, in its sovereign capacity, is distinct and separate from the bank. When it established a trading corporation, did it invest it with any of its sovereign power? or, because the State was the sole stockholder, did the charter which it conferred acquire any higher power by reason of the status of the stockholder, or were the judicial tribunals of the

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State to construe it by any other rule *than that by which they would be guided if the corporation consisted alone of private persons?

On the contrary, when a State invests its funds, either alone or with others, in a banking or other company, it does not carry into it any of the elements of its sovereign powers, but occupies the bare position of any other stockholder.—The Bank of the United States v. The Planters' Bank of Georgia, 9 Wheat., 907 [6 L. Ed. 244]; Bank of Commonwealth of Kentucky v. Wister, 2 Pet., 318 [7 L. Ed. 437.]

In the case last referred to, Mr. Justice Johnson, delivering the opinion of the Court, remarks, "that the case of the Bank of Georgia was much stronger for the defendant, for there the State of Georgia was not only a proprietor, but a corporator." Here, as in the Kentucky case, the State was only proprietor, for, by the Act, the President and Directors were the real corporators.

It was conceded, in the learned argument for the relator, "that where a common bank becomes insolvent, its assets should be dis-

tributed to its creditors, but that this proposition is not applicable to the present case: 1st, Because the capital of the bank was, and is, the property of the State, furnished and deposited by the State, consisting of specific funds, the annual accumulations thereof, and the unexpended money of the State derived from taxes; and, 2d, Because the faith and credit of the State was, and is, pledged to the support of the bank."

The authorities above referred to, and many others which may be cited from the reported decisions of the Supreme Court of the United States, abundantly shew that the fact of the capital having been furnished by the State does in no way vary or affect the responsibilities of the corporation to its creditors, and the rights of those creditors, as against a corporation with which they dealt, looking to the grants in the charter as the security for their debts.

Then, is this conceded proposition (by the counsel of the relator) as to private banks, affected by the consideration of the pledge of the faith of the State to the support of this bank?

We desire to be understood as not committing ourselves to any expression of opinion as to the extent (if any) the State may be regarded as bound for the liabilities of the bank under the language of its charter. To give, however, full effect to the point made by the relators' counsel in this regard, we will, for the purpose of the argument, adopt their language, in the sense they desire it understood.

This view of the counsel presents the case as if the bank was the debtor, and the State the surety or guarantor.

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*If that be the relation, and the State holds the assets of the bank for its protection as surety, has not the creditor the right to claim the benefit of them, and that they shall be specifically bound for application to his debt? Has he not the right to demand all the securities which the guarantor holds for his protection?—*Maure v. Harrison*, 1 Eq. Cases. Abr., 93; *Yonge v. Reynell*, 9 Hare, 809; *Moses v. Murgatroyd*, 1 Johns. Ch., 129; *Phillips v. Thomson*, 2 Johns. Ch., 418-422; *McCollum v. Hinckley*, et al., 9 Vermont, 143-149.

Although this doctrine of subrogation, or substitution, is a creature of the Court of Equity, yet it attaches, in all its force, whenever the relation of debtor, creditor and surety exists, and extends its protection, not as part or parcel of the contract, but as an incident attaching to the remedy, by which the various rights of these several parties are guarded and protected.

If the State, at its own option, can, then, transfer the assets of the bank from the hands in which they were placed by the charter, the creditor at least loses the indemnity which they constitute; and, even assuming that the State is bound, he is cut

off from one of the sources through which his debt may be made available.

"The obligation of a contract, in the sense in which those words are used in the Constitution, is the duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same." This is the language of Mr. Justice Curtis, while in the Supreme Court.

The learned and chaste opinion of Chief Justice Dunkin, in the *State v. Carew*, 13 Rich., 498 [91 Am. Dec. 245], reviews, with so much care and ability, the various authorities to which we have been referred as giving the just and proper construction to the clause of the Constitution now in question, that it would be a fruitless work to enter on a field where he has left nothing untouched.

His examination adopts, as a principle consequent to the said clause of the Constitution, the language of Mr. Justice Washington, in *Green v. Biddle*, 8 Wheat., 1 [5 L. Ed. 547], (followed by various decisions, both Federal and State,) that "if the Acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

If the property of the debtor is withdrawn

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from the operation of *all legal process, the remedy is virtually lost. It can not be urged that, because the right of action is left, the remedy is untouched. When that which renders the right of action alone valuable—because, through it, satisfaction of the debt may be obtained—is entirely destroyed, is it not as virtually affected as if prohibited by law? The right to sue remains, but with the certain knowledge that the judgment will be a barren one. What does this Section of the Act propose? To take from the custody of the bank—a separate and distinct corporation—all its real and personal property, place it in the hands of the Governor, who shall sell the same, and the proceeds, with the collections that may be made of its choses in action, shall be deposited in the Treasury, to be held subject to his order. Not only are the funds of the bank to be abstracted from the custody where, by the charter, they are committed, and, without even a direction that they shall be held as a trust for the benefit of its creditors, they are to be in a position where they may be appropriated by the Legislature to any purpose, with no guide but its will.

The case of *Curran v. The State of Arkansas*, 15 Howard, 304 [14 L. Ed. 705], is so analogous to this, that it is difficult for a mind ingeniously bent on discovering a difference to find it. In fact, the case before us is weaker in one particular than that of *Curran*.

The Bank of the State of Arkansas was incorporated by that State in 1836, with the usual banking powers.

The capital was raised by the sale of bonds of the State, with other certain sums paid by the State. In January, 1843, the bank being insolvent, the Legislature passed an Act to liquidate and settle its affairs, but continued its operation, and subjected its management to a financial receiver and attorney, who were to collect its assets and apply them to the redemption of the outstanding circulation of the bank. At the same time, bonds of the State, held by the bank for money borrowed by the State, were required to be given up and cancelled, and their amount to be credited to the bank, against a part of the capital stock it furnished. From time to time Acts were passed withdrawing specie and other funds from the bank, and all its real and personal property was declared to be vested in the State. Curran, who was a billholder, instituted suit, recovered judgment, the executions on which were returned unsatisfied. He then filed a bill in equity against the State, the bank, the receiver and attorney, following the assets

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of the bank, and requiring that they should be subjected to the payment of his debt. The Supreme Court of the United States, disaffirming the order of the Supreme Court of the State of Arkansas, dismissing the bill, granted the relief sought, on the ground that a law which deprives a creditor of all legal remedy against the property of his debtor impairs the obligation of the contract, and is invalid.

The case before us is, in fact, more obnoxious to the prohibition of the Constitution, for the State of Arkansas, by its Constitution and laws, may be made a party in Court by suit.

Here the creditor is remediless, for there is no legal liability on the part of the State. It cannot be held to answer before the judicial tribunals of the country; and when a contract was entered into with a corporation created by it, the party contracting looked not to the faith of the State, which was intangible and beyond its reach, but to the property of the corporation, which, by due course of legal procedure, could be subjected to the satisfaction of his debt.

There are other sections of the bill not depending on or connected with the first, and distinct and separate from it. We are not to be understood as passing upon them.

The order dismissing the rule in this case has been already filed.

CARPENTER, J., sitting in place of WIL-
LARD, A. J., concurred.

HOGG, A. J., not present to sign opinion,
also concurred.

1 S. C. 80

DANIEL GOGGANS, Administrator, v. J. O.
TURNIPSEED and Another, Ex'ors.

(Columbia. Nov. and Dec., 1868.)

[*Constitutional Law* ⇨170.]

So much of the Act passed December 21, 1861, and other later Acts, known as the Stay Law, as provided that "debts due on open accounts and other demands not heretofore bearing interest by law, shall bear interest," &c., is unconstitutional and void, so far as it related to debts contracted before the passage of the first Act.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 503; Dec. Dig. ⇨170.]

[*Constitutional Law* ⇨156.]

Moses, C. J., holding that an Act allowing interest upon existing contracts not bearing interest, is interdicted by Section 10 of Article 1 of the Constitution of the United States, declaring that "no State shall pass any law impairing the obligation of contracts."

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 429-436; Dec. Dig. ⇨156.]

[*Constitutional Law* ⇨170.]

Willard, A. J., holding the provision in relation to interest not to be an independent enactment, but to be merely a feature of the general plan of the Act to grant a suspension of legal remedies—to be inseparable from that general plan—and, therefore, to be affected by, and void under, the decision in *State v. Carew*, 13 Rich., 498 [91 Am. Dec. 245].

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 503-510; Dec. Dig. ⇨170.]

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*Before Dawkins, J., at Newberry, Spring Term, 1867.

Sum. pro. on a merchant's open book account for goods sold in the year 1861, previous to the 21st December. His Honor gave a decree for the plaintiff for \$33.67, the amount of the account, and for interest thereon.

The defendants appealed, on the ground that the Act of December 21, 1861, under which the interest was allowed, was unconstitutional and void, so far as it affected contracts then existing.

Fair, for appellants.

Baxter, contra.

Opinion of

MOSES, C. J. This is a process on (what in the report is called) "a merchant's account for the year 1861." We understand, by the admission of the counsel, that it was an open running account with a storekeeper for goods supplied during the year 1861.

In this State it has always been held that interest was not recoverable on an open or book account.—*Skirving v. Ex'rs of Stobo*, 2 Bay., 233; *Adm'rs of Conyers v. Magrath*, 4 McC., 392; *Johnson ads. Bennett*, 1 Speers, 209. And Judge Nott, delivering the opinion of the Court in *Bulow v. Goddard*, 1 N. & McC., 57 [9 Am. Dec. 663], remarks: "I should be willing to carry the doctrine fur-

ther, and allow interest in all cases on open accounts where payment is to be made at a certain time. But I think the contrary has been so well established by the uniform current of decisions in this State that it would now be a dangerous and unauthorized innovation."

So far have our Courts gone on this question that, in *Bishop v. Ross*, Rice, 21, it was held that interest could not be recovered on a letter of guaranty given for an open account, although the sum be fixed in writing.

The General Assembly, in the exercise of its legislative powers, may prescribe interest on demands of any character, if, in doing so, it does not violate any of the provisions of the Federal or State Constitution.

It is objected that the Act under which interest was here decreed does violate the 10th Section of 1st Article of the Constitution of the United States, which forbids the passage by the State "of any law impairing the obligation of contracts."

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*On the 21st of December, 1861, the General Assembly passed an Act, entitled "An Act to extend relief to debtors, and to prevent the sacrifice of property at public sales."—13 Stat., 18.

The first Section makes unlawful the service of mesne or final process of any of the Courts of this State for the collection of money until after the expiration of the first session of the next General Assembly of the State, except in the cases therein specifically provided. It was renewed in February and December, 1864, and continued in force, in December, 1865, until the adjournment of the next regular session.

The 9th Section is in the words following: "That, while this Act remains in force, debts due on open accounts, and other demands not heretofore bearing interest by law, shall bear interest at the rate of 7 per cent."

It is under this that the claim to interest is made. The cause of action, therefore, arose before the passage of the Act, and the only question is, whether the right to interest, which the Section provides, can attach to it?

It is an admitted principle, that one clause or part of an Act may be without any constitutional prohibition, and yet another not subject to such exception.—*Ogden v. Saunders*, 12 Wheat., 213 [6 L. Ed. 606]; *Barry v. Iseman*, 14 Rich., 129 [91 Am. Dec. 262]. Under this very statute, the Court of Appeals held, in the *State v. Carew*, 13 Rich., 498 [91 Am. Dec. 245], the first Section unconstitutional as to antecedent contracts, and, in *Barry v. Iseman*, valid as to contracts entered into after its passage; and, in *Wardlaw and Simkins, administrator and administratrix of Simkins v. Buzzard*, 15 Rich., 158 [94 Am. Dec. 148], that the 5th Section, which suspended the operation of the statute of limitations "during the period in which the Act was of force," "so far as applicable to

causes of action coming within the meaning of the Act, was not in violation of the Constitution of the United States."

The obligation which the Constitution refers to is the legal, and not the moral attribute of the contract. "It is the law which binds the party to perform his undertaking." It subsists in the law applicable to the agreement. "Anything which enlarges, abridges, or, in any manner, changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it."—*Ogden v. Saunders*, 12 Wheat., 213 [6 L. Ed. 606]. This principle is recognized in all the cases where this constitutional inhibition has been discussed; among which are: *Sturges v. Crowninshield*, 4 Wheat., 197 [4 L. Ed. 529]; *Green v. Biddle*, 8 Wheat., 1 [5 L. Ed.

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547]; *Bronson v. Kinzie*, 1 Howard, *311 [11 L. Ed. 143]; *Planters' Bank v. Sharp*, 6 Howard, 301 [12 L. Ed. 447]; *Curran v. State of Arkansas*, 15 Howard, 319 [14 L. Ed. 705].

The obligation of the contract, therefore, is the tie which fastens the parties to the observance of it. They have assumed some act, of sufficient consideration, in reference to existing laws, which, in fact, import themselves into the contract. It is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe.

It is not in the power of either, independent of the consent of the other, to increase or abridge any of the responsibilities which attached to the contract at its inception. Nor has the State, in the face of the Constitution, any more power to enlarge or diminish them.

In the case before us, the plaintiff's intestate contracted, by parol, with the defendant's testator, for the purchase of goods, wares and merchandise, from time to time, during the year 1861, at certain fixed prices. Contracts of that character did not then bear interest by law. When the General Assembly (on December 20, 1861,) required by the Act "that, while it remains of force, debts due on open accounts, and other demands not heretofore bearing interest by law, shall bear interest at the rate of 7 per centum per annum," did it not enlarge the terms of the agreement between the parties, to the benefit of the one and the prejudice of the other? If it had the right to declare that interest should run upon such contracts, when, at the time they were entered into, it was not a legal consequence, might it not, with equal propriety, prescribe that a penalty should attach on, or damages follow, the delay of payment?

The extent of the proposed change in the law does not affect the principle. The imposition of any condition, "however apparently immaterial its effect on the contract, or any part of it," or any deviation from its

terms, in addition to, or diminution of, those which, by law existed, when it was made, impairs the obligation.

In this view, we hold the sixth Section of the Act void, because in violation of the said Article of the Constitution.

The motion for a new trial is granted, unless, by the 1st day of June next, a remittitur is entered by the plaintiff for the amount of the interest included in the decree.

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*April 27, 1869. Opinion of

WILLARD, A. J. I concur in the result arrived at by the Chief Justice, but do not find it necessary to consider the validity of the sixth Section of the Act under examination, as a distinct and independent enactment. It can only be considered as part and parcel of the measure of relief set forth in both the title and body of the Act.

As the Act sought to confer on the debtor a great favor, at the cost of the creditor, it naturally occurred to the Legislature to afford the creditor that which should approach the nearest to an equivalent for the temporary loss of a remedy to enforce his claim.

The allowance of interest upon demands which, independently of the statute, did not carry interest, was an obvious expedient to attain this end. This Section was, in terms, to continue in operation only during the life of a temporary Act; or, in other words, during the temporary suspension of remedies contemplated by it.

This circumstance shows that, as a measure of legislation, it was accessory merely to the more general object of the Act, and rested upon the same foundation of policy that dictated the suspension of legal remedies. It would be doing injustice to the intention of the Legislature to hold that this Section was intended to change the law of interest, without regard to the other objects sought to be secured by the Act.

It possessed neither permanence nor definiteness sufficient to warrant such an assumption.

Regarding this Section, then, as a feature merely of the intended plan of suspending legal remedies, and it is affected by the decision of the Court of Errors in *State v. Carrew*, 13 Rich., 498 [91 Am. Dec. 245], and is inoperative under that decision, as affecting antecedent contracts.

I do not feel called upon to express any opinion as to the validity of acts of legislation, fixing interest on demands, as affecting antecedent contracts.

I S. C. *85

*THE STATE v. JOHN SHUMPERT.

(Columbia. Nov. and Dec., 1868.)

[*Indictment and Information* ¶2.]

The provision in the 5th amendment to the Constitution of the United States, that "no per-

son shall be held to answer for a capital or other infamous crime, unless on presentment of a Grand Jury," does not apply to prosecutions in State Courts.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 5; Dec. Dig. ¶2.]

[*Criminal Law* ¶84.]

New tribunals may be established by the Legislature for the trial of offences previously committed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 120; Dec. Dig. ¶84.]

[*Bastards* ¶35.]

The District Court had jurisdiction of a case of bastardy where the offence was committed before the Court was organized, but the prosecution was commenced afterwards.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 80-90; Dec. Dig. ¶35.]

[*Bastards* ¶1.]

The child of a married woman may be a bastard.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 1-3; Dec. Dig. ¶1.]

[*Bastards* ¶70.]

No rule of law declares that a child is a bastard if the husband of its mother be absent during the nine months preceding its birth—what was the actual period of gestation in any particular case being a question of fact for the jury.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 185; Dec. Dig. ¶70.]

[*Bastards* ¶3.]

The fact that a child was born of a married woman is, generally, only prima facie evidence of its legitimacy. It may be rebutted by proof of such non-access, or other fact, as shows that the husband was not its father.

[Ed. Note.—Cited in *Shuler v. Bull*, 15 S. C. 428; *Wilson v. Babb*, 18 S. C. 69, 72.

For other cases, see *Bastards*, Cent. Dig. § 5; Dec. Dig. ¶3.]

Before the District Judge, at Lexington, February Term, 1867.

This was a prosecution for bastardy, commenced by warrant to arrest, dated October 27, 1866. Anna M. Craps, wife of Henry Craps, was the prosecutrix, and the charge was, that she was the mother of a bastard child, born January 17, 1864, and that defendant was the father. It was in evidence that Henry Craps, the husband, was absent from the State from some time in the spring of 1863 until about three months after the child was born. The prosecutrix testified that defendant was the father of the child, and that it was begotten in April, 1863; that she saw her husband in January, 1863, and did not see him again until March or April, 1864. The jury found the defendant guilty, and he appealed.

The points made in the grounds of appeal sufficiently appear in the opinion delivered in the Supreme Court.

Fort, for appellant.

Fair, Solicitor, contra.

April 29, 1869. The opinion of the Court was delivered by

MOSES, C. J. The defendant was indicted for bastardy, and tried and convicted at the February Term, 1867, of the District Court of Lexington.

The warrant under which he was arrested, issued October 27, 1866, founded on an affidavit made the same day.

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*He seeks a new trial, by reason of alleged misdirection of the Judge, and, indeed, several other grounds, which, to be of benefit to him, should have been presented on a motion in arrest of judgment.

They will, however, all be considered, as if brought before us in due form.

The first is, that, as the said Court has no grand jury, and he was put on trial without a presentment by one, the proceeding is void, by reason of the prohibition in the fifth amendment of the Constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment of a grand jury."

It has been so often decided that the said clause, with many of the limitations contained in the amendments of the Constitution, were only intended as restrictions on the powers of the General Government, and related exclusively to it, that a reference to some of the authorities will suffice to shew that the party, on this ground, can take nothing by his motion.—*Barron v. City Council of Baltimore*, 7 Pet., 243 [8 L. Ed. 672]; *Livingston v. Moore*, 7 Pet., 531 [8 L. Ed. 751]; *Jackson v. Wood*, 2 Cowen, 818; *Murphy v. People*, 2 Cowen, 815; *Barker v. People*, 3 Cowen, 686; *Livingston v. Mayor of New York*, 8 Wend., 85; *Matter of Smith*, 10 Wend., 449; *Lee v. Tilman*, 24 Wend., 337.

It is next alleged, that the offense is charged to have been committed (child born) January, 1864, before the organization of the District Court, and, therefore, it could not take cognizance of it.

It cannot be doubted that it is in the competency of the General Assembly to establish new tribunals for the trial of offences already committed—in fact, to establish two or more with concurrent powers.

The 4th Section of the Act of September, 1866, to amend an Act entitled "An Act to establish District Courts," (13 Stat. at Large, 388,) conferred "exclusive jurisdiction, (subject to the right of appeal) in all cases of larceny and misdemeanor, in all cases of vagrancy, and in all cases of bastardy, arising within the limits of the election district in which they are established."

This Section was amended by the 11th Section of the Act of December, 1866, (13 Stat. at Large, 494,) by giving the Superior Courts of law "concurrent jurisdiction with the District Courts, of all cases in law, of which, by the Constitution, the District Courts have jurisdiction."

The decision of the Appeal Court in The

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State v. Moore, (15 *Rich., 57,) held that "a case" did not arise until there was some action, suit, proceeding, or accusation; and, as the warrant issued after the establishment of the District Court, it had cognizance of the matter, although the offense was committed before.

That was also a case of bastardy.

Here the offence was committed in January, 1864, but no proceeding was taken until the issuing of the warrant, on October 27, 1866. The case of *The State v. Moore* is conclusive on the point made.

The position assumed by the defendant's counsel as law, to wit: that the child of a married woman, born during coverture, could not be a bastard, is not well taken.—*Pendrell v. Pendrell*, 2 Stra., 925; 1 Stra., 51; *Rex v. Bedell*, 2 Stra., 1076; *Rex v. Luffe*, 8 East., 193; *Goodright v. Saul*, 4 T. R., 356.

One of the grounds of appeal is, that the Judge charged the jury, that nine months' absence of husband is sufficient to make issue bastards. In thus prescribing what he considered as a rule of law, he committed error.

In regard to the period of gestation, no precise time is referred to as a rule of law, though a certain time is recognized (forty weeks) as the usual period. But the birth of a child being liable to be accelerated, or delayed, by circumstances, the question is a matter of fact, to be decided upon all the evidence, both physical and moral, in the particular case.—2 Green. Ev., 160.

The consideration of the jury was, therefore, limited by the charge to a specific time, when it should have been directed to the principles expressed in the rule above referred to.

We have, therefore, concluded to give the defendant the benefit of another trial, that the law may be fully presented to the jury.

A child born during coverture is presumed to be legitimate. Proof of non-access, or anything else which plainly shows that, in the course of nature, the husband could not be the father of the child, removes the force of the presumption. If the husband and wife had opportunity of intercourse, this merely strengthens the presumption of legitimacy.—2 Green. Ev., 125.

The rule is stated in clear terms in the answer of the Lord Chief Justice, in the celebrated *Banbury-Peerage* case, (1 Simons and Stuart, 153,) "That the fact of the birth of a child from a woman united to a man by lawful wedlock, is, generally, by the law of England, prima facie evidence that such child is legitimate; that such prima facie evidence

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of legitimacy may always be lawfully *rebutted by satisfactory evidence that such access did not take place between the husband and the wife as, by the laws of nature, is neces-

sary, in order for the man to be, in fact, the father of the child."

The motion for a new trial is granted.

WILLARD, A. J., concurred.

I S. C. 88

WARREN P. BELCHER and Another v. A. P. CONNER.

(Columbia. Nov. and Dec., 1868.)

[*Appeal and Error* ⚡66.]

An appeal, taken before the passage of the Act of August 30, 1868, regulating appeals and writs of error, is not subject to the objection of want of finality in the decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 329; Dec. Dig. ⚡66.]

[*Witnesses* ⚡362.]

Where the credibility of a witness is assailed on the score of character, and he is discredited, his depositions are not to be disregarded altogether as those of an incompetent witness, but should have such weight as, under the circumstances, is due to them as discredited testimony.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1176; Dec. Dig. ⚡362.]

[*Partnership* ⚡19.]

Where two were in copartnership in the business of buying and selling slaves, the liability of one to account to the other is not founded upon a contract, the consideration of which was the purchase of slaves, within the sense of those terms, as used in Article 4, Section 34, of the Constitution.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 5; Dec. Dig. ⚡19.]

The plaintiffs are administrators of William W. Belcher, late of Abbeville District, who died intestate in November, 1859. The bill filed in 1860 alleged that a partnership had existed between the intestate and the defendant, in the purchase and sale of slaves, and it prayed that an account be taken of the partnership dealings and transactions, and that a decree be rendered against the defendant, for the balance found to be due by him, at the foot of the account.

Two Circuit decrees were made in the case by His Honor Chancellor Inglis—one in 1862, and the other in 1864. The case was then taken by appeal to the Court of Appeals, by which Court, at May Term, 1866, the principles of a final decree were settled, and the case remanded to the Circuit Court. The brief furnished the Reporter does not contain the proceedings after the appeal decree, and he is compelled, therefore, to refer to the judgment of the Supreme Court, delivered by Mr. Associate Justice Willard, for any

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*further statement of the case. He believes, however, that that judgment contains everything necessary to a full understanding of the questions raised on the appeal made to this Court.

—, for appellant.

Burt, contra.

April 29, 1869. The opinion of the Court was delivered by

WILLARD, A. J. This is an appeal from a decree on a bill for the taking of a partnership account as between the testator of the plaintiffs and the defendant. The principles of a final decree were settled by the late Court of Appeals, in May Term, 1866. The case subsequently came before the Commissioner in Equity, to carry out the instructions of the appellate Court, and testimony was taken.

The defendant offered himself, and was examined as a witness in his own behalf, and notice was given by the plaintiffs that they intended to produce before the Chancellor, in open Court, proof that defendant was unworthy of credit as a witness.

The commissioner reported, recommending the terms of a decree based in part upon the testimony given by the defendant. Witnesses were examined before the Chancellor, both impugning and sustaining the credibility of the defendant upon the general ground of character. The Chancellor held that the proof was sufficient to impeach the credibility of the witness, and set aside the Commissioner's report, and returned the case for a further report, with the instruction that "no regard be had to the depositions of the said Conner." The effect of this decision was to open the case before the Commissioner for further testimony.

The defendant filed his notice of appeal from this decision on the 8th day of November, 1867.

Had the present appeal been taken since the passage of the Act regulating appeals and writs of error to the Supreme Court, ratified August 30, 1868, it would have been subject to the objection that the decree appealed from was not "final;" but, having been previously taken, it comes to us under Section 5 of the Act to organize the Supreme Court, ratified September 10, 1868, based upon Section 9, Article XIV, of the Constitution of 1868, and is not subject to the objection of want of finality.

We can see no ground to interfere with the disposition of the case made by the Chancellor on the question of the credibility of

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*the defendant. That question was properly before the Court, and its decision adversely to the defendant is open to no objection that would warrant an appellate Court in disturbing it.

The instruction to wholly disregard the testimony of the defendant goes too far. The objection to testimony, on the score of credibility, affects its weight, and not its competency, and it is impossible to say, in the present stage of the case, that it will be entitled to no weight whatever in the final adjudication, although, under the effect of the discred-

iting testimony, it is entitled to no weight in the present aspect of the case.

The point of objection taken by the defendant in his last ground of appeal, that this is a case that should be dismissed, as arising upon a contract, the consideration of which was the purchase of slaves, is inapplicable to the case. The contract sought to be enforced here is one of partnership. The business contemplated by it was the purchase and sale of slaves; but the proper consideration of that contract was the mutual covenants and promises of the copartners, and the acts they respectively engaged to perform, bearing on the objects contemplated. It cannot, in any just sense, be said that a contract of this nature was one of which the consideration was the purchase of slaves.

It is adjudged and decreed, that so much of the decree as directs that, on the further hearing of the case, no regard be had to the depositions of the defendant, Conner, be modified as follows: "That, on the further hearing of the case, the depositions of the defendant, Conner, be regarded as discredited, and, that, as to all other matters, the appeal be dismissed, and the case be remitted, for further proceedings, to the Circuit Court."

MOSES, C. J., concurred.

I S. C. *91

*ELIZA RAGSDALE and Others v. MOSES L. HOLMES and Others.

(Columbia. Nov. and Dec., 1868.)

[Equity ⚡148.]

A creditors' bill against the executors of the executrix of the debtor and legatees of the executrix, alleging a devastavit by the executrix, insufficiency of assets of the debtor's estate, that assets of both estates were in the hands of the executors, that the executrix had assumed to bequeath to the legatees, parties defendant, part of the estate of the debtor, charging the executors with waste, insolvency, and an intent to leave the State, and praying an account of the assets of both estates, appointment of a receiver and payment of debts, with other prayers, is not demurrable by H., a party defendant, on the ground of multifariousness, because it also alleges the fraudulent conveyance, by the executrix, of a portion of the debtor's real estate to H., and prays that the conveyance be set aside.

[Ed. Note.—Cited in *Melton v. Withers*, 2 S. C. 568; *Suber v. Allen*, 13 S. C. 326; *Sheppard v. Green*, 48 S. C. 174, 26 S. E. 224.

For other cases, see *Equity*, Cent. Dig. § 356; Dec. Dig. ⚡148.]

[*Executors and Administrators* ⚡421.]

It is not necessary that specialty and simple contract creditors of a decedent should exhaust their remedies at law before exhibiting a creditors' bill in equity against the executors of the decedent for an account of assets, payment of debts, &c.

[Ed. Note.—Cited in *Welsh v. Davis*, 3 S. C. 216; *Warren v. Raymond*, 12 S. C. 21; *Brooks v. Brooks*, Id., 461; *Barrett v. Watts*, 13 S. C. 451; *Werts v. Spearman*, 22 S. C. 217; Na-

tional Bank of Newberry v. Kinard, 28 S. C. 113, 5 S. E. 464; *Lawton v. Perry*, 40 S. C. 260, 18 S. E. 861; *Sheppard v. Green*, 48 S. C. 175, 26 S. E. 224.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1663; Dec. Dig. ⚡421.]

Before Carroll, Ch., at Chester.

The bill in this case was exhibited by Eliza Ragsdale, William Glaze and others, naming them, "suing for themselves and such other creditors of Lewis A. Beckham as shall come in," &c. It alleged that Lewis A. Beckham, having made his will, and thereby appointed T. H. Beckham executrix thereof, departed this life in March, 1860; that the executrix qualified and took the estate into her hands and filed an inventory thereof; that she received assets to the amount of \$50,000 and upwards, and sold part thereof; that the testator was possessed of a large amount of real estate, which plaintiffs believe was sold by his executrix, shortly after his death; that, in June, 1866, the executrix made a fraudulent confession of judgment to the defendant, Moses L. Holmes, which has been marked satisfied; "that the said executrix and Moses L. Holmes, fraudulently confederating and conspiring together, further to defeat the just rights of your orators and other creditors, had a conveyance made from the said executrix unto the said Moses L. Holmes, for a valuable plantation belonging to her testator," &c.; that the said executrix died shortly after said conveyance was made, leaving a will, whereby she appointed Thomas C. Beckham and Lewis A. Beckham executors thereof; that the said executrix was possessed, at the time of her death, of household and kitchen furniture, silver plate, a library, carriages, wagons, &c., which belonged to the estate of her testator, which she bequeathed, with the whole estate owned by herself, to her children, the defendants,

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Harriet Pride, *Lewis A. Beckham, Hyder D. Beckham, and Thomas C. Beckham; that the said executors have no property of their own, and are residing on the plantation sold to Moses L. Holmes; that they are in possession of all the visible property of the said testator and testatrix come to their hands; and that, as plaintiffs are informed and believe, they intend soon to remove from the State.

The bill then set forth the indebtedness of the testator to some of the plaintiffs, and charged that the said confession of judgment and conveyance were fraudulent, and made with intent to defeat the just rights of the plaintiffs and other creditors of the testator, and that the said executors were wasting the assets which had come to their hands, and were irresponsible and insolvent.

The prayers of the bill were, that the executors may be required to file an inventory of the property of both estates; that they may

be compelled to give security for the same; or, failing to do so, that a receiver be appointed, and they be required to turn over the assets to such receiver; that they be required to account; that the assets of the testator be marshalled; that the creditors of the testator be enjoined from proceeding at law, and be required to establish their claims in this Court; that the said confession of judgment and conveyance may be declared fraudulent and be set aside; and that the lands conveyed, as aforesaid, and other real estate of the testator, be sold. &c. Subpoena was prayed against the parties hereinbefore named as defendants.

Moses L. Holmes demurred on three grounds: (1.) On the ground of multifariousness. (2.) Because it doth not appear by the bill that the plaintiffs, or any of them, have obtained judgments at law, either against the testator in his lifetime, or against the executors since his death; and, (3.) Because three of the plaintiffs (naming them) have shown no claim, right, title or interest whatever in the matters and things complained of by the bill.

The decree of His Honor the Chancellor is as follows:

Carroll, Ch. The demurrer of the defendant, Moses L. Holmes, rests upon three grounds.

It is objected that the plaintiffs claiming to be creditors of the testator, Lewis A. Beckham, have not alleged in their bill that they, respectively, had recovered judgments either against him or his personal representatives. The bill here exhibited is a creditors' bill. The doctrine recognized in *Brinkerhoff v. Brown*, 4 John. C. R., 676, and *Screven v. Bostick*, 2 McC. Ch., 416 [16 Am.

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Dec. 664], seems to be inapplicable to suits of this description. If none but creditors who have exhausted their legal remedies are competent to institute such a proceeding, then, upon the same principle, none other can derive any benefit from the decree. But this would be contrary to the familiar course and practice of the Court. One of the ordinary orders in such a cause is, to enjoin the creditors from proceedings at law; and one of its leading purposes, to prevent multiplicity of suits, with its consequent accumulation of costs and expenses. In *Whitmire v. Oxborough*, 2 Y. & C., 17, it was held that such a bill might be filed by a creditor whose debt is not payable in present, but payable in futuro. "The doctrine," says Judge Story, "equally applies, whether the suing creditors are creditors whose debts are then absolutely due, or payable in future."—Story's Eq. Plead., 99.

It is further objected that, as against the defendant, Holmes, the bill is multifarious, seeking, as it does, the calling in of creditors, a general account of the testator's estate and

its administration, the marshalling of his assets and the payment of his debts, all of them being matters in which this defendant, as he contends, is in no wise concerned. It is undoubtedly true that, ordinarily, the debtors of a testator, or the persons who have possessed themselves of his property, cannot be made parties to the bill against the executors at the suit of a creditor. But there are recognized exceptions to the rule. The bill alleges large waste of the testator's estate by his executrix, T. H. Beckham, and that she, knowing that the assets unwasted by her were insufficient to pay his debts, and "fraudulently confederating and conspiring with the defendant, Holmes, to defeat the just rights of the plaintiffs and the other creditors, conveyed to said Holmes a valuable plantation belonging to her testator, containing about 1,200 acres, on the Catawba River, in consideration of the sum of \$8,500." These statements might have been more definite and distinct. But they have not been objected to upon that ground, and they certainly import a direct and express charge of fraud and collusion between Holmes and the executrix.

It is further alleged in the bill that Thomas C. and Lewis A. Beckham, Jr., executors of the executrix, T. H. Beckham, "and, therefore, the executors of her testator, are wasting the assets which have come into their hands, are wholly irresponsible and insolvent, and, as the plaintiffs are informed and believe, soon intend to leave the State." If there are persons who have possessed themselves of the estate of the deceased, or are

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his debtors, *and there is collusion with the representatives of the deceased, or are the debtors, and there is collusion between them and the personal representatives, or the latter are insolvent, a creditor may make such third persons parties to a bill against such personal representatives.—Story's Eq. Plead., 178. "The rule," says the Lord Chancellor, "is to stop short at the personal representatives, unless there is insolvency; or where other parties stand in such relation to the deceased, or his estate, or his representatives, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his representatives, after his decease, in withdrawing his estate from his creditors, or to have undertaken more directly a quasi representation of him." "The second case," he continues, "that of collusion with the executor, may be likened to that of an executor de son tort—a representation fixed upon those who intermeddle with the estate as the penalty of their interference."—*Holland v. Prior*, 1 M. & C., 240.

"Is a party," asks Lord Cottenham, "entitled to raise this objection, who has made himself, by uniting with the trustee in a breach of trust, part and parcel of the transaction? The object of the rule against multifariousness is to protect a defendant from

unnecessary expense; but it would be a great perversion of that rule if it were to impose upon the plaintiffs the expense of two suits instead of one."—Attorney General v. Craddock, 3 My. & Cr., 94.

The demurrer is considered not sustainable upon either of the grounds suggested.

As to the third ground upon which the demurrer is placed, but little need be said.

The omission in the bill to set forth the demands of the plaintiffs, Glaze, Estes and Wylie Moffat & Co., seems to have been simply the result of inadvertence. Indeed, it was not necessary to make those persons parties to the record at all. The usual course of the Court in such cases is to withhold its judgment and allow an amendment.

It is ordered and adjudged that the plaintiffs have leave to amend their bill as they may be advised.

The defendant, Moses L. Holmes, appealed upon the following grounds:

1. Because the bill is multifarious.

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*2. Because complainants have not pursued their remedies at law, and have not prosecuted their claims to judgment and execution.

Hamilton, for appellants. ✓

McAlliley & Brawley, contra.

April 2, 1869. The opinion of the Court was delivered by

WILLARD, A. J. This is a creditors' bill against the executors of a sole executrix upon specialty and simple contract debts of the first testator, alleging a devastavit by the executrix and insufficiency of assets of the first testator's estate to pay his debts; also alleging assets of the first estate, as well as of the executrix's estate, in the hands of the executors, defendants to the bill, and charging the executors of the executrix with waste of assets, insolvency, and an intent to leave the State. The bill further alleges, specially, the fraudulent conveyance, by the executrix, of a portion of the real estate of the testator to the appellant, a party defendant. It also alleges that the executrix, by her last will, assumed to bequeath to her children, parties defendant part of the estate of her testator remaining as assets in her hands. The bill seeks, in behalf of the complainants and other creditors coming in, an account of the assets of the estates of the first testator and of the executrix, protection of the assets, by means of security on the part of the executors, or the appointment of a receiver, marshalling of assets, and payment of the debts of the first testator.

The appellant, Holmes, demurred to the bill on the grounds: First, That the bill is multifarious. Second, That the complainants have not recovered judgments on their de-

mands at law; and, Third, That certain of the complainants have not sufficiently set forth a title to put the defendants to their answer.

The Chancellor overruled the demurrer, and the defendant, Holmes, appealed therefrom, alleging the following grounds: First, Because the bill is multifarious. Second, Because complainants have not pursued their remedies at law, and have not prosecuted their claims to judgment and execution.

The relief sought against the appellant is clearly within the scope of the general objects of the bill. The bill charges that he has fraudulently mixed himself up with the testator's estate, so that a complete account

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cannot be taken without making him a party; and these allegations being admitted by the demurrer, sufficient ground appears for making him a party. His implication with the assets depends upon an admitted fraudulent dealing with the executrix, and did not originate in the structure of the bill of complaint. The bill is not open to the charge of uniting distinct and independent claims, nor of bringing in parties defendant who are strangers to the general matters set forth and charged.—Adams' Equity, 309, and cases there cited. The first ground of appeal is insufficient.

The second ground of appeal assumes the erroneous proposition that only a judgment creditor who has exhausted his remedies at law can seek the protection and application of assets in the hands of an executor, through the medium of a bill in Equity.—*Eno v. Calder*, 14 Rich. Eq., 154. Inter vivos that rule is applicable, for the reason that the estate of the living debtor does not become assets for the payment of his debts until the exhaustion of the legal remedies is complete. The estate of a deceased debtor, or so much thereof as may be requisite for the payment of his debts, becomes assets from his decease. The primary mode of making them available is by an action at law, and recourse cannot be had to a creditors' bill where there is an adequate legal remedy.—*Eno v. Calder*, supra., *Wattington v. Hawley*, 1 Eq. Rep., 167. But where there is a devastavit, or threatened waste and insolvency of the estate, and want of responsibility of the executors, as in the present case, unquestioned ground exists for the interference of equity.—*Middleton v. Dodswell*, 13 Ves., 266; 1 Story's Eq., Sections 533 and 543. The grounds of appeal are insufficient, and the appeal must be dismissed.

It is adjudged and decreed, that the appeal of the defendant, Holmes, be dismissed, and the decree of the Chancellor, overruling the demurrer to the bill of complaint, affirmed.

HOGUE, A. J., concurred.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

AT COLUMBIA—APRIL TERM, 1869.

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

I S. C. *97

*V. D. V. AUSTIN v. WARREN KINSMAN.

(Columbia. April Term, 1869.)

[*Appeal and Error* ¶1194.]

Where a decree of the Court of Appeals disposes of all matters of defence that had been made in the cause, and refers it to the Commissioner to ascertain a certain fact—as, for instance, the amount of a mortgage debt—upon the coming in of the report new questions cannot be raised, by exception, which should have been taken before the appeal decree was made. The defendant is concluded by the appeal decree from a ground of defence that does not necessarily and legitimately arise under it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4651; Dec. Dig. ¶1194.]

[*Appeal and Error* ¶1022.]

Conclusions of the Commissioner, upon questions of fact, which the Chancellor has sustained, will not be disturbed by the appellate Court, unless it be very clear, from the evidence, that other results should have been attained.

[Ed. Note.—Cited in *Blackwell v. Searles*, 1 S. C. 117; *Arnold v. House*, 12 S. C. 608; *York County v. Watson*, 15 S. C. 10, 40 Am. Rep. 675.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015–4018; Dec. Dig. ¶1022.]

Before Lesesne, Ch., at Orangeburg, April, 1868.

By the decree made in this case, 28th February, 1867, which was sustained on appeal, (13 Rich. Eq. 259,) it was decided "that the defendant can claim nothing more than to reduce the balance due on the unpaid note, under the provisions of the Ordinance of the Convention;" and the Commissioner was ordered "to ascertain and report the amount really due on the said note, and that, in so

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doing, *he do regard the provisions of the

said Ordinance." Under this order, the Commissioner took and reported testimony, introduced by complainant.

On the 26th February, 1868, the matter was recommitted, "in order that further testimony be taken, under the decree," and the Commissioner submitted the following report:

"That he has taken additional testimony, which, with that originally taken, is submitted:

"As to some of the items, there is a good deal of difference in the opinions of the witnesses, and the Commissioner has had to adopt the plan of striking a medium between them; and he is satisfied that the result is a close approximation of the true value, as it fixes the whole amount of the property at very nearly the same figures which were reached on the estimate made by John Jordan, a witness on whose judgment and experience in such matters the Commissioner places great confidence, and who was present when the property was sold, and who drew up the papers for the parties.

"I have in this way fixed the whole value of the property, which was sold in 1862 for \$7,720, at the sum of \$4,980. Applying the principle fixed by the decree, it reduces the balance of principal on the unpaid note from \$1,850 to \$1,193.50. The interest on this, from its date, 2d October, 1862, to day of payment, 2d October, 1864, is \$167.08, making the amount then due, \$1,360.58. The interest on that makes the amount due. 2d April, 1868, \$1,788.91.

"The Commissioner further reports, that no interest has been paid since 29th April, 1865, and that the interest accruing on the present principal, \$1,360.58, will be, on 29th April, 1868, \$285.69."

The defendant submitted the following exceptions to the report of the Commissioner:

First. Because two thousand four hundred and seventy-five dollars, (\$2,475), of the whole sum of four thousand nine hundred and eighty dollars and fifty cents. (\$4,980.50), reported by the Commissioner as the true value of the consideration of the contract, was for slaves, and should, therefore, have been stricken from the estimate.

Second. Because, in any view, the Commissioner, in estimating the value of the slaves, should have taken into consideration the general emancipation which had been proclaimed, and was in process of being enforced, by the United States Government, and

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*which was, in fact, shortly after carried into effect; and, taking this into consideration, he should have fixed their true value at the price of the hire of the slaves, from the time they went into possession of defendant until the occupation of the State by the Federal troops.

Third. Because the complainant received Confederate money without question, and all sums so received by him should be credited upon the amount found as the value of the contract; and, if this be done, the defendant will be found to have owed nothing to the complainant.

Fourth. Because interest should not be charged, except from the day the last note became due.

The exceptions were overruled by the Commissioner, and were then heard by His Honor the Chancellor, who made a decree as follows:

Lesesne, Ch. On hearing the report of the Commissioner in this case, and the defendant's exceptions thereto, it is, on motion of Messrs. Hutson & Legare, for the complainant,

Ordered, That the exceptions be overruled, and the report be confirmed as the order of this Court.

And it is further ordered, That the defendant do pay to the complainant the sum of seventeen hundred and eighty-eight dollars and ninety-one cents, with interest from the 2d April, 1868, and the costs of this case.

And it is further ordered, That unless the said Warren Kinsman shall, on or before the first day of August next, pay to the complainant the whole amount of interest which has accrued on the principal of the said debt, (namely, on \$1,360.58,) since 29th April, 1865, and the costs of this case, the Commissioner shall sell, on the first Monday of August, at Orangeburg, having duly advertised the same twenty-one days before, all the property, real and personal, described in Exhibit A of the complainant's bill, (except the provisions,) the personal property for cash, and the real estate for one-half cash, the balance on a credit of six months, secured by bond, with interest from date, and a mortgage of the

premises, containing a covenant for resale, after due notice, upon a breach of the condition of the bond, purchasers paying for papers and stamps. But if the defendant shall, before the day of sale, pay the complainant, or his order, the interest which has accrued

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up to that *time and since 29th April, 1865, and the costs, then the execution of this decree shall be stayed until the further order of this Court, which the complainant may apply for at any time at Chambers.

In estimating the true value of the consideration of the contract, the Commissioner has put the negroes on the same footing with the other property, just as if their emancipation had not afterwards taken place, and (the Court thinks) rightly.

If the entire nominal amount of the debt had been paid in Confederate currency, the contract would have been executed, and the debt extinguished. So, too, the partial payments made in that currency reduced the said nominal amount to that extent, and it is the balance remaining unpaid that is liable to be scaled, according to the provisions of the Ordinance of 1865.

The interest made payable at the maturity of the note, being unpaid, became principal, and bears interest.

The defendant appealed, on the same grounds taken in his exceptions to the Commissioner's report.

Simonton & Glover, for appellant.

Hutson & Legare, contra.

April 29, 1869. The opinion of the Court was delivered by

MOSES, C. J. The Court of Appeals, in its opinion in this case, (13 Rich., Eq., 268,) indicated the proper mode of applying the relief intended by the Ordinance of September, 1865, to the particular circumstances involved in it.

It also held that the Circuit decree, which it confirmed, conformed exactly to such mode.

The Commissioner proceeded to take the testimony, and submitted his report, to which four exceptions were filed. These were overruled by the Chancellor, and are here made grounds of appeal from his decretal order. Of these, at the hearing in this Court, the first, third and fourth were abandoned. The second is in the words following: "Because, in any view, the Commissioner, in estimating the value of the slaves, should have taken into consideration the general emancipation which had been proclaimed, and was in process of being enforced by the United States Government, and which was, in fact, shortly after carried into effect; and, taking this into consideration, he should have fixed their

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true value at the price of *the hire of the slaves from the time they went into posses-

sion of defendant, until the occupation of the State by the Federal troops."

This exception, in fact, presents a new question—one not taken in the answer, neither submitted at the hearing, nor made a ground of appeal against the decree. The judgment of the Court of Appeals regarded the negroes, which made a part of the contract, as property, and their true value, as such, in currency, was to be ascertained. To change the relation in which they were accepted by both parties, and to ask now that only the hire should be estimated, by reason of the new condition they assumed long subsequent to the sale, is to seek a position which the appellant, from the course of the proceedings, cannot occupy.

He is concluded, by the appeal decree, from any ground of defence that does not necessarily and legitimately arise under it.

The appeal decree left nothing to the Commissioner to ascertain but the sum, in lawful money, which, under the particular circumstances of the case, would be a just representative of the value, falsely expressed by the exaggerated price named in the contract.

The exception, then, can only be viewed as an objection to the value which the Commissioner, under the order, fixed on the negroes, regarding them (at the time of the contract) as property.

His whole duty was, to ascertain the facts and report the conclusion of his judgment on them. If, in doing this, he has carried out the principles of the decree, his report cannot be impugned.

It has been the uniform rule of the appellate tribunals—whose jurisdiction this Court now administers—that, unless clear mistake is shown, to sustain the Commissioner in all conclusions of fact, where his judgment is approved by the Chancellor on Circuit.—*Lyles v. Lyles*, 1 Hill Eq., 76; *Clarke v. Jenkins*, 3 Rich. Eq., 318. If they concur, proof of a very overbearing character is required to disturb the result which they reach. Here, no such sufficient error has been made to appear.

The appeal is dismissed, and the case remanded to the Circuit Court, that the plaintiff may there move for such orders as may be necessary to give proper effect to the decree.

WILLARD, A. J., concurred.

1 S. C. *102

*CHARLES T. LOWNDES, Executor, for A. S. Izard v. THE EXECUTORS OF M. KING.

(Columbia, April Term. 1869.)

[Bonds \hookrightarrow 122.]

The assignee of a money bond may bring suit thereon in the name of the obligee, or, if

he be dead, in the name of his executor or administrator.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 97; Dec. Dig. \hookrightarrow 122.]

[Evidence \hookrightarrow 450.]

Bond given by H., as principal, and M., as surety, to L. L. was the executor of L. H. endorsed on the bond as follows: "I hereby assign the annexed bond to L., he having loaned me the funds to pay the same to estate L." In an action on the bond by L. for the use of another, against the executors of M.; *Held*, That this endorsement might be explained by oral evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2077; Dec. Dig. \hookrightarrow 450.]

[Trial \hookrightarrow 139.]

It is error in the Judge to take from the jury a question of fact, depending upon oral evidence, decide it himself, and instruct them how to find.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. \hookrightarrow 139.]

[Bonds \hookrightarrow 122.]

It is not a ground of objection to plaintiff's recovery, in an action of debt on bond, brought in the name of the executor of the obligee, that, after oyer, the plaintiff added a date to an assignment previously endorsed on the bond.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 97; Dec. Dig. \hookrightarrow 122.]

Before Glover, J., at Charleston, June Term, 1868.

The report of His Honor, the presiding Judge, is as follows:

"The action was debt against the executors of the late Mitchell King, who was the surety of A. M. Huger on a bond in favor of the plaintiff, C. T. Lowndes, executor of the late Jacob Bond l'On, and the following is a narrative of the facts of the case, shown by the evidence:

"A. M. Huger, wishing to raise money, applied to the plaintiff, who advanced it from the assets of the estate of Bond l'On, in his hands as executor; and, to secure the payment, took A. M. Huger's bond, with the late Mitchell King as surety. C. T. Lowndes afterwards, desiring to close his administration of the estate of Bond l'On, and to settle with the legatees, demanded payment of the bond from A. M. Huger, who made efforts to do so, and proposed to sell his Savannah River plantation for that purpose; and, failing to raise the money, C. T. Lowndes suggested to him that Allan S. Izard, trustee of Mrs. Sabina E. Lowndes, was in possession of funds, and that he might procure from said trustee an amount sufficient to satisfy the bond, on the assignment of it to said trustee. February 10, 1860, the negotiation was entered into between the trustee and A. M. Huger, C. T. Lowndes receiving the amount due on the bond, with which he debited himself, as executor of Bond l'On, in the Ordinary's office, and settled with the legatees. No formal assignment of the bond, in writing, was made by C. T. Lowndes to Allan S. Izard, trustee, at the time that he received the money, nor did he do so until 1865. The

reason assigned for this by C. T. Lowndes

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*was, that the papers of the estate of Bond I'On, and with them this bond, were left in the custody of Herckenwrath, Wragg & Co., who generally acted for him, and that all the receipts on the bond were entered by them, except the two last: that his papers, including this bond, never came into his hands until after the end of the war, in 1865, when he assigned it to Allan S. Izard, trustee, dating the assignment in February, 1860, according to the understanding of the parties.

"From this state of facts, it is manifest that the obligors on this bond have never satisfied it, except by funds advanced by Allan S. Izard, trustee, on condition that it should be assigned, and that said trustee is the owner, and entitled to payment. If the assignment had been regularly made before the commencement of this action, according to the provisions of the Act of 1798, (5 Stat., 330,) and the action had been brought in the name of the trustee, as assignee, I presume that no ground of defence, now relied upon, would have been pretended; and, in the absence of such assignment, the legal owner or holder could, before the Act of 1798, and might now, bring the action in the name of the obligee, for his use and benefit, and that was done in this case. I held and instructed the jury that the plaintiff was entitled to their verdict, who found accordingly.

"The defendants have appealed, on the several grounds relied upon in the defence, for a new trial, which will be considered seriatim:

"1. The endorsement referred to in this ground is as follows: 'Charleston, 10th February, 1860. I hereby assign the annexed bond to Mr. C. T. Lowndes, he having loaned me the funds to pay the same to estate Col. J. B. I'On.' (Signed,) 'A. M. Huger.' C. T. Lowndes stated that this endorsement was made by A. M. Huger, while the bond was in the safekeeping of Herckenwrath, Wragg & Co., and that he never saw it until after the close of the war, in 1865, and he presumed that A. M. Huger, (who acknowledged that the bond was the property of the trust estate), made the endorsement in this form, supposing it proper and necessary. The proof was, that C. T. Lowndes informed A. M. Huger that he could borrow the money of the trust estate of Mrs. Sabina E. Lowndes, on the assignment of the bond to the trustee—not to C. T. Lowndes. The plaintiff, as executor of Bond I'On, did receive the money, but it was advanced by the trustee of Mrs. Sabina E. Lowndes, according to the negotiation between the parties, and was rather a purchase by the trustee than a payment by the obligor.

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"*2. This ground and the first submit the same question, and the remarks made respecting the latter apply to the former. The several endorsements made on the bond were

explained by C. T. Lowndes, and the true history of the transaction was given by him.

"3. I do not understand that the plaintiff claims under a written endorsement, or that the suit is brought by an assignee; but that the obligee's name is used for the benefit of Allan S. Izard, trustee, who owns the bond; and I have no doubt that parol evidence was admissible, to explain the endorsements and the circumstances under which they were made.

"4. As was stated, in considering the last ground, Allan S. Izard, trustee, does not claim through C. T. Lowndes, under a written assignment, which would enable him to sue as assignee; but C. T. Lowndes sues to his use.

"5. The endorsement made by A. M. Huger, and copied above, does state that the funds were loaned by C. T. Lowndes; but C. T. Lowndes proved that this was a misapprehension of A. M. Huger, and that the funds were advanced by the trustee of Mrs. Sabina E. Lowndes, to purchase the bond, and to accommodate A. M. Huger; and I apprehend that if this endorsement, which (with no purpose to do so) misstated the fact, had not been made on the bond, there would have been very slight foundation for the objections urged in the several grounds of appeal.

"6. In reference to this ground the evidence was, that the bond did not come into the possession of C. T. Lowndes until after the war, in 1865, and that he did, as soon after as he could conveniently do so, assign it, in writing, dating the assignment at the time that the trustee advanced the money to purchase the bond. If the action had been brought in the name of Allan S. Izard, trustee, as assignee, the objection, that the date was added to the assignment after over craved, might have availed.

"7. There was no evidence showing such an extension of time or indulgence as, in my opinion, discharged the surety. Mere indulgence, without some proof of fraud or fraudulent collusion, will not operate to discharge a surety.—*Cornwell v. Holly*, 5 Rich., 47. Nor was the contract so varied as to operate a discharge. With the explanations offered, it appeared to me that the circumstances present the ordinary case of a transfer of an obligee's interest in a bond to a third person, for a valuable consideration."

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*The defendants appealed, and now moved this Court for a new trial, on the grounds:

1. Because the endorsement upon the bond, by Arthur M. Huger, is set up by the plaintiff himself as evidence, and proves that the obligation to the estate of Col. Jacob Bond I'On was discharged by payment.

2. Because the plaintiff claims, for the use of Allan S. Izard, trustee, and the very evidence produced to show the interest of the real plaintiff in interest establishes the fact that the old obligation, upon which Mitchell

King was surety, was discharged, and a new obligation entered into between the principal, Arthur M. Huger, and Charles T. Lowndes, individually, with which new contract Mitchell King had no privity.

3. Because the plaintiff claims under a written endorsement, and should not be allowed to explain it away by verbal testimony.

4. Because the assignee, Allan S. Izard, claims title through Charles T. Lowndes, who could only have acquired title by assignment of the executor of Jacob Bond l'On, of which there is no written evidence.

5. Because the only evidence of the termination of the interest of the executor of l'On in the bond, is evidence of payment by Arthur M. Huger, the principal, with funds loaned him for that purpose by Charles T. Lowndes.

6. Because a date was added by the plaintiff to the assignment to Allan S. Izard, trustee, after oyer craved and the instrument produced.

7. Because time was given by the creditor to the principal debtor, and the terms of the original contract otherwise varied, without the knowledge or consent of the surety, whereby he is discharged.

8. Because His Honor, the presiding Judge, erred in not charging the jury in conformity with the principles above set forth.

DeSaussure, King, for appellants.

———, contra.

April 29, 1869. The opinion of the Court was delivered by

MOSES, C. J. There are certain errors of fact in the report of the presiding Judge, made manifest by his statement of the testimony, which it is better now to note.

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*The bond sued on was made payable to Jacob Bond l'On, and not the executor, plaintiff here.

The assignment referred to in the report was endorsed on the bond in 1865, and dated February 10th, 1860.

As this case must be sent to the Court below for another trial, we shall refrain from all intimation of opinion as to the testimony already heard.

The grounds of appeal, however, must be considered, although a solution of the principles which they involve would not, in itself, be conclusive of the issues made by the pleadings: yet the points raised under them are considered by the appellants as bearing on the main position on which a new trial is claimed.

It is alleged in the third ground that the plaintiff seeks a recovery under a written endorsement, and should not be allowed to explain it away by verbal testimony. This appears to be a clear misapprehension. The only endorsement which could convey a legal title to the bond would be by assignment. On the death of the obligee this vested in his

executor, and the transfer of it by the executor to himself, in his individual character, while it would be a most anomalous act, would not change his status as to the right to sue.

He, however, makes no claim by virtue of any assignment. The action is in his name, for the benefit of another. If he had transferred it to a third person, by a writing therefor sufficient, still such assignee could waive the right which he would have, under the Act of 1798, (5 Stat. at Large, 330.) to bring action as assignee, and could maintain suit in the name of the obligee, or, if dead, his legal representative.—*Cunningham v. Miller*, MS., Dec., 1820.

We do not feel ourselves at liberty to consider, in this connection, the effect of the endorsement of A. M. Huger, of date February 10th, 1860, but we must determine whether it could be explained by parol testimony. This constitutes the third ground, and our remarks will have the like application to the first, second and fifth grounds.

Did the endorsement constitute a contract, or an agreement, which could, in a Court of law, of itself, have any efficacy? He was the principal obligor in a joint and several bond, which it is to be supposed, on the day stated, in some way came into his possession. He had no legal title to it, so far as it was an instrument conferring rights on him against others. He, (the obligor,) if he undertook anything by the act, assumed some relation

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to the instrument *which, in his conception, authorized him to assign it to the executor of the obligee, adding, that "he, the said C. T. Lowndes, had loaned him the funds to pay the same (the bond) to estate of Col. l'On." If standing alone, unexplained, could any legal consequence be drawn from it? If so, then the question would have been reduced to a bare inference of law, on which it would have been the province of the Judge to pass. This would produce a result entirely destructive of the claim on which we regard the defendants entitled to a new trial.

Conceding, for the sake of argument, that it was a contract, was it one so free from doubt, ambiguity or equivocal expression as to preclude the introduction of parol testimony for the purpose of explaining its true intent and meaning?

It is claimed, however, as a receipt. The rule, as to the admissibility of verbal testimony to explain a writing, admits of a much wider latitude, in regard to receipts, than it does to any other instruments.

So far as a receipt goes only to acknowledge payment, or delivery, it is merely prima facie evidence of the fact, and not conclusive; therefore, the fact which it recites may be contradicted by oral testimony.—1 Green. Ev., § 305, and the authorities there referred to.

As was said by Justice Williams, in *Fuller v. Crittenden*, 9 Conn., 406: "The true view

of the subject seems to be, that such circumstances as would lead a Court of Equity to set aside a contract, such as fraud, mistake or surprise, may be shown at law, to destroy the effect of a receipt."

Our own Courts have proceeded on this recognized principle. *Hogg v. Brown*, 2 Brev., 223; *McDowell & Black v. Ex'rs of Vanderberg*, 2 McC., 320; *Dobbin v. Perry*, 1 Rich., 33; *Lewis v. Bell*, 3 Strobl., 260.

The sixth ground alleges that a date was added by the plaintiff to the assignment after oyer craved and the instrument produced.

It is not necessary to inquire what effect, in the state of the pleadings, the addition of a date to the assignment might have had, if the action were brought in the name of Izard, trustee, as assignee.

The purpose of prayer of oyer after profert of an instrument is to have it produced, and thereby made a part of the record, that the party, by proper pleading, may avail himself of any discrepancy or dissimilitude between the paper set out in the declaration and that exhibited, or claim judgment of non pros. If the true effect and meaning of the deed is

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misstated in the declaration, the *variance is cured, and becomes immaterial if the deed be set out on the plea of oyer and non est factum pleaded.—1 Chit. Pl., 433.

Here the allegation is not that the bond is different in any way from that described in the declaration, either on its face or endorsements, but that, after it was so set out and oyer claimed, a date was added to the assignment. This would involve a principle of a very different kind from that embraced in questions, arising under the law, applicable to the practice in regard to profert on oyer.

It would open for inquiry, not necessary here, the effect of the change of the writing, either by alteration or addition.

In any view, however, the defendant can derive no benefit from the exception taken in the said ground, because the plaintiff does not rest his rights to a recovery on the assignment.

It does not follow, because force and effect may not be given to the various grounds as presenting obstacle to a recovery, that, when taken together, they may not establish a sufficient right to the motion.

In our conception, the presiding Judge appears to have regarded the issues submitted as those of law for his judgment. If the verdict had been a special one, ascertaining facts, and leaving nothing to follow but his decision on the law, then he would have been

in a position in which he could have ordered the postea to be delivered to the party in whose favor he pronounced judgment.

Presumptuous, from evidence, of the existence of particular facts, are, in most, if not in all cases, mixed questions of law and fact.

Here the Judge left nothing for the jury to pass upon. In this, we think, he erred. True, the credibility of the witness was not involved; but yet the defendant had a right to the judgment of the jury on the effect of the facts, in writing, on the one side, and his explanation on the other; and who was to decide on the weight as tending to or producing conviction?

It is not to be denied that when it is clear, beyond dispute, that the facts proved can lead but to one conclusion, the Judge may state their legal effect to the jury, for then a deduction of law is to follow, and that is exclusively for him. We do not think that the consequence here.

Are the facts which may rebut the prima facie evidence of payment to be decided by the Judge, or is their force to be considered and passed on by the jury? As here, the endorsement by Mr. Huger, on the 10th February, 1860, shows that the bond was then in his possession, raising the presumption of

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payment.—2 Green. *Ex., 577. Who was to decide whether the oral evidence offered to rebut it was sufficient? The Judge or the jury?

If His Honor had charged on the conclusions of law to be applied to the case, as arising out of the testimony, viewed in the different aspects insisted on by the plaintiff and defendants, and instructed the jury to apply the law, as they might be, the one way or the other, impressed by the evidence, we would not have felt bound to disturb a verdict thus found. We fear, however, that the right of the defendants to a full consideration of the facts was abridged, and, therefore, regard them entitled to a new trial.

The views which we have expressed render unnecessary any comment on the fourth ground. We have purposely avoided all remark on the seventh ground. Whatever benefit the defendants can derive, representing a surety, from the acts of the principal and obligee, must arise out of, and be determined by, the circumstances proved on the trial ordered.

The motion is granted.

WILLARD, A. J., concurred.

1 S. C. 109

A. J. HAMMOND and Another v. D. J. WALKER and THOMAS B. REESE.

(Columbia. April Term, 1869.)

[*Dismissal and Nonsuit* ⇨56.]

That the action is against two out of three joint contractors, is no ground for non-suit.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. § 127; Dec. Dig. ⇨56.]

Before Glover, J., at Edgefield, March Term, 1868.

This was an action of debt on a joint and several note, under seal, given by the defendants and one Joel Cany to John Jones, deceased, the testator of the plaintiffs. The pleas were, non est factum and failure of consideration.

At the trial defendants' counsel moved for a non-suit, on the ground that Cany should have been joined as a defendant in the action. It was said that he did not reside in the State, but that did not appear by the record, nor was it proved.

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*His Honor granted the motion, and plaintiffs appealed, and now moved this Court to set aside the non-suit for error in the ruling of the Judge, that the non-joinder was ground of non-suit.

Wright, for appellants.

Addison, contra.

April 27, 1869. The opinion of the Court was delivered by

MOSES, C. J. The action was against the defendants, who, with another, were the drawers of a joint and several note to the testator of the plaintiffs.

The pleas were, non est factum, and failure of consideration.

On the trial, a non-suit was granted for the non-joinder of the other drawer.

The motion is, to set aside the non-suit, on the ground that the objection should have been made by plea in abatement.

The exception is well taken, as a reference to the authorities will clearly show. When the contract is several, as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint. But if there be more than two parties to a joint and several contract, as where three obligors are jointly and severally bound, the plaintiff must either sue them all jointly, or each of them separately; though, if two only be improperly sued, the objection should be taken by plea in abatement, or by writ of error, if the defect appear on record, and it is not a ground of non-suit.—1 Chit. Pl., 43, 46.

The practice in this State has conformed to this rule, and there has been no variance from it. The objection must be made by plea in abatement, and cannot prevail by way of

non-suit.—Derrill v. Charleston Steamboat Company, MS., Nov., 1826; Valentine v. Gerard, 2 Rich., 9; Exum v. Davis, 10 Rich., 357.

The motion to set aside the non-suit is granted.

WILLARD, A. J., concurred.

1 S. C. *111

*ELIZA A. TINDAL v. JOHN J. TINDAL and Others.

(Columbia. April Term, 1869.)

[*Equity* ⇨413; *Executors and Administrators* ⇨507.]

Bill for settlement of the insolvent estate of a decedent. The accounts of the executrix were referred to the Commissioner, and, on the first day of the next term, he made his report, showing a considerable balance in her favor. On the next day the report was confirmed without objection, and the counsel of executrix then moved an order that the balance due her be paid out of the assets, in preference to the claims of creditors. This order was objected to by creditors, but the Court granted it, holding that it followed as a consequence of the order confirming the report. On appeal—*Held*, That the Court below erred in so holding; and, inasmuch as the time within which creditors had the right, under the rule of Court, to except to the report on the accounts had not expired when that report was confirmed, both orders were set aside, with leave to creditors to except to the report on the accounts.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 928; Dec. Dig. ⇨413; *Executors and Administrators*, Cent. Dig. § 2188; Dec. Dig. ⇨507.]

[*Equity* ⇨429.]

[It is a mistake for a chancellor to suppose that he is concluded by an erroneous order, merely because he has appended his signature thereto. As long as the cause is before his court, any order made by him is within his entire control, and he may modify or reverse the same in accordance with the view he may entertain before finally discharging himself.]

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1021; Dec. Dig. ⇨429.]

Before Lesesne, Ch., at Manning, May, 1868.

This was a bill by the plaintiff, as executrix of James S. Tindal, deceased, alleging that the estate of the testator had become insolvent by the emancipation of his slaves, and praying that it be wound up by the Court. The legatees and devisees, and some of the creditors, were made parties defendant.

At May Term, 1867, the accounts of the plaintiff, as executrix, were referred to the Commissioner, and on the 28th May, 1868, the first day of the next term, he made his report, showing a balance due the plaintiff, at the foot of her accounts, of over \$3,500. On the next day, May 29th, the report was confirmed, without objection, and, thereupon, an order was moved, on behalf of plaintiff, which directed, inter alia, that the balance

due the plaintiff be paid out of the assets of the estate in preference to the claims of creditors. This order was objected to, on behalf of specialty and other creditors, and it was insisted that the accounts should be looked into, and that the order could not be granted unless it appeared, from the character of the accounts, that the executrix was entitled to priority of payment. His Honor granted the order, holding that the matter was concluded by the confirmation of the report.

The creditors appealed, on the grounds that the rank of the plaintiff's claim must be determined by the rank of the debts paid by her, and the character of her disbursements; that His Honor erred in ruling that these matters were concluded by the confirmation of the report, and that the order confirming the report was beyond his control; and on other grounds, which it is deemed unnecessary to state.

Haynsworth & Fraser, Moise, for appellants.

J. S. G. Richardson, contra.

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*April 29, 1869. The opinion of the Court was delivered by

MOSES, C. J. It is true, as urged by the counsel for plaintiff, that a report of the Commissioner, not objected to, is conclusive. Where a party withholds his notice of exception beyond the period within which he is permitted to file it, he occupies the position of one who, neglecting to avail himself of a privilege conferred in express terms by the rules of practice, is to be regarded, at least, if not asserting, as admitting that he has no just cause of dissent.

The complaint, however, here is, that the presiding Chancellor, while the case was actually before him, with the fund, whose appropriation he was adjudicating, still under the control of the Court, disposed of it by an order, which he declined to reconsider, or against which to hear argument by the opposing counsel, not that he was satisfied of its propriety, but because his signature had rendered the matter *res adjudicata*.

While the cause was before the Court, any order made by the Chancellor was within his entire control, and could have been changed, modified or reversed, according to the views he at any time entertained, before he finally discharged himself from it.

It would illy comport with the position of a presiding officer of a Court of superior jurisdiction to bind him to an erroneous order, and concluded by the mere fact of having signed it, while the whole case was before him for the purpose of adjudging the various orders which, in the progress of it, might be submitted.

His powers would, indeed, be narrow and contracted, if circumscribed by such limits.

This erroneous view of his authority would

be sufficient, on objection urged, to compel us to set aside the order thus made. There are, however, other exceptions to it, which are well taken.

The report was filed on the 28th day of May, 1868, the first day of the term of the Court of Equity for Clarendon.

It came up for consideration on the 29th, when an order, confirming it, was passed, which seems to have escaped the attention of the various counsel who represented several parties having an interest against the plaintiff, and who stood in the relation of creditors of the testator.

Then followed the proposed order, among other things directing payment to the plaintiff of the balance due her, according to the report. This was opposed, but without effect.

The objection, in point of fact, did prop-

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erly raise questions, *which should have been considered by the Court, growing out of the report on the accounts.

On the character of the accounts, which resulted in a balance in favor of the plaintiff, might depend the propriety of the order for her payment, in preference to debts due by the testator. Such a result does not necessarily follow, but possibly might be a legitimate consequence of an account primarily showing a balance in favor of an executrix.

As a strict matter of right, the creditors had, under the rule of Court, the whole of the day of 29th May, 1868, on which to file their exceptions, and to have them heard, considered and reported on by the Commissioner. Unless they waived this, they cannot be affected by any order made to their prejudice. Here, so far from waiving, they expressly insisted on their right to object to the consequences which followed the order, which gave material efficacy to the report.

It is true, as was said in *Meek v. Richardson*, 4 Rich. Eq., 88, that the practice, under the rules of Court, may be moulded at the discretion of the Chancellor, and he may suspend their operation in particular cases. As is added, though, it must be to promote the ends of justice, so as to meet the exigencies of the case.

There the Chancellor conceived himself bound to the very letter of the rule as to time. The Appeal Court, however, said that he had the power to extend the time, to promote the ends of justice.

There is a wide difference between a discretion which permits a Judge to enlarge the provisions of a rule of Court, for fear of a miscarriage of right, and that which holds him authorized to reduce the time within which a party is at liberty to take some step in the progress of his case or defense. The one extends a favor, the other withholds a right.

We do not regard the occasion inopportune

for a remark in relation to a careless practice, the effect of which is apparent in the matter before us. The order of reference was made in May, 1867. The whole term of the Court is but three days, and yet no reference was held until the 28th May, 1868, the first day of the next succeeding sitting; for the account of the executrix is marked by the Commissioner as then filed, and no reference on the account could have preceded its filing, and the report is dated the very day. It is probable that not one of the counsel attended the reference.

This loose practice does not commend itself to the approval of the Court, and should not be encouraged. The whole trouble here,

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*doubtless, owes its origin to the fact of undue haste in term time, after a year's delay in vacation.

It is ordered, that all the orders made in said cause on May 29, 1868, save so much of them as refers to the payment of costs, the survey of the lands, and the admeasurement of the widow's dower, be set aside; that all parties interested have until the 1st day of June next to file exceptions to the report of the Commissioner; and that the case be remanded to the Circuit Court for further orders and disposition.

WILLARD, A. J., concurred.

I S. C. 114

JAMES B. FLOYD, Adm'r. v. JAMES M. ABNEY and Others.

(Columbia. April Term, 1869.)

[*Appeal and Error* ⇐987.]

The Supreme Court has no power, under the Constitution, to award new trials for errors of fact in the verdicts of juries. Its authority, in granting new trials, is limited to cases where there are errors of law in the decisions and rulings of the Judge.

[Ed. Note.—Cited in *Elmore v. Scurry*, 1 S. C. 140; *State v. Rankin*, 3 S. C. 447, 16 Am. Rep. 737; *Winsmith v. Walker*, 5 S. C. 473; *Steele v. Charlotte, C. & A. R. Co.*, 14 S. C. 332.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 3893-3896, 3913; Dec. Dig. ⇐987.]

Before Glover, J., at Edgefield, Spring Term, 1868.

The report of the presiding Judge is as follows:

"The cause of action was a single bill, dated 2d April, 1857, for \$1,173.12, payable December 5th, after date, with interest thereon from date, and a credit endorsed of \$200, dated January 9th, 1860.

"James M. Abney, the defendant, swore that the consideration of the note was for negroes, and some hogs bought at the sale of intestate's estate, and that over \$1,100 were

given for the slaves, (one woman and two children.)

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"*They were diseased, and were sold as unsound, and he bought them as unsound, and at a low rate. When emancipated, the woman had three children. The jury found a verdict of \$23.25 for the plaintiff."

The plaintiff appealed, and now moved this Court to set aside the verdict of the jury, and for a new trial, on the grounds:

First. Because no reduction should have been made on account of the unsoundness of the slaves, for which a large portion of the note sued on in this case was given, as they were sold at public auction as unsound, and the defendant purchased them at a very reduced price on that account, as he stated on the stand himself.

Second. Because the fact that these slaves were set free by the Government was not sufficient to warrant the jury in striking out of said note the price of said slaves, as the plaintiff's warranty of title, which is only an implied one, does not extend to acts of Government.

Third. Because the verdict of the jury is contrary to law, and not sustained by the evidence.

Jones, for appellant.

Wright, contra.

April 30, 1869. The opinion of the Court was delivered by

WILLARD, A. J. The grounds of appeal set forth only exceptions to the verdict, and none to the decisions or rulings of the Judge before whom the case was tried. This Court, in the *State v. Bailey*, (Ante., p. 1,) decided that it had no authority under the Constitution to grant new trials, except for errors of law in the decisions and rulings of the Circuit Judge. That decision disposes of the present case.

The appeal will be dismissed.

MOSES, C. J., concurred.

I S. C. *116

*JAMES P. BLACKWELL and Wife v. ELLINGTON SEARLES, Adm'r, and Others.

SUSAN SEARLES, Adm'x, v. ELLINGTON SEARLES, Guardian, and Others.

(Columbia. April Term, 1869.)

[*Appeal and Error* ⇐1022.]

The Supreme Court will not reverse the concurring judgment of the Master and Chancellor upon a question of fact, except on clear and overbearing evidence.

[Ed. Note.—Cited in *Alston v. Alston*, 4 S. C. 119; *York County v. Watson*, 15 S. C. 10, 40 Am. Rep. 675.

For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

[*Guardian and Ward* ⇨ 157.]

The evidence reviewed, and held to sustain the conclusion below.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 511-513; Dec. Dig. ⇨ 157.]

Before Carroll, Ch., at Edgefield, June, 1868.

These cases came before the Court on appeals from the decrees of His Honor, the Circuit Chancellor, overruling exceptions which had been taken to reports of the Commissioner upon questions of fact merely. The case first stated was against the defendant, as administrator of Pleasant Searles, deceased, who, in his lifetime, was guardian of the female plaintiff; and the second case was against the defendant, as guardian of James R. Searles, deceased. The questions arose on taking the accounts of the guardians.

Abney & Wright, for appellants.

Bacon, contra.

May 6, 1869. The opinion of the Court was delivered by

MOSES, C. J. If the appellant in the respective cases fails to sustain the first of his grounds of appeal, the consideration of those which follow will be rendered entirely unnecessary.

The guardian in the one case, who is himself the representative of the guardian in the other, insists that the whole estate of the several wards was invested in negro property, and, upon this assumption, he asks that they be relieved from all liability to account, as the results of emancipation threw the loss upon the infants.

Unless he can satisfactorily establish the allegation, that the estate of the wards in their hands did consist of such property, the consequences of emancipation need not be considered.

A liability to account is resisted because it is averred that, without fault on the part of

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the guardians, the property of their wards has been lost. To sustain the claim to exemption it is incumbent on them first to shew that the estate of the wards did consist of such property. That was a single question of fact, and the judgment of the Chancellor and Commissioner both concur in solving it against them.

Ordinarily, that alone would be sufficient cause to stay the interposition of this Court. In *Lyles v. Lyles*, 1 Hill Eq. 76, it was held that, in doubtful questions of evidence, the Court will not interfere with the decision of the Master and Chancellor. We have, as this term, held, in the case of *Austin & Kinsman*, that the testimony, to reverse the judgment of the Master and Chancellor, on a question of fact, must be clear and overbearing.

The examination which we have given to

this case leaves us without doubt as to the issue of fact upon which the decision must rest.

Ellington Searles, himself, in his testimony, does not aver that, at the sale of Richard Searles' estate, he and Pleasant Searles, the respective guardians, purchased the negroes for the children, but that he bought, intending, when James R. (the ward) came of age, to let him have them; and that the same understanding prevailed with his father, Pleasant Searles, the guardian of the other minors, as to the negroes he purchased; and that he (Ellington) received his own note in payment of the share of the said James R. Did the title thus vest in the wards or the guardians? Could the wards, when of age, be compelled to accept them as their estate? Concede that, if the title was in them, they would not object, it is not inappropriate, when the investment is charged to have been made on account of the estate of the wards, to inquire who had the legal title. The very expression of an intent to let the children have them when they arrived at age, admits that the title on the purchase was not vested in the children. The purchase of negroes by Ellington Searles, at the sale of the estate of Richard Searles, amounted to \$5,420, and by Pleasant Searles, to \$5,541, and yet the receipt to the administrator was for \$2,317.76, in full of the distributive share of James R., the minor, in the estate of his father, received as guardian, and of the second (Pleasant) for \$4,538.34, expressed in the same language, as guardian for Martha and Josephine. Who held the interest in the negroes for the excess of the prices at which they sold beyond the sums expressed in the receipts as the full distributive share of the respective children? Who but the purchasers could have such interest?

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*There is one fact, however, which is so inconsistent with the position assumed by the said ground of appeal that it defies explanation.

If the negroes, bid off at the sale of the estate of Richard Searles, by or at the instance of Pleasant Searles, were bought for the children, and this with the knowledge of Ellington Searles, with what pretence of right could he, as administrator of Pleasant Searles, sell, as part of his intestate's estate, the very negroes, and purchase them, as he says, to carry out the arrangement which had existed between Pleasant and himself, at the time of the sale of the estate of Richard Searles? What change, as to the title in favor of the children, was to be affected by the operation? If they were the property of the female wards, how could he, as administrator of Pleasant, their guardian, undertake to sell them, as of the estate of his intestate? Did he regard it necessary to change the title by what could be, in that

view, nothing but an idle ceremony? If so, it is in strange inconsistency with the position he now assumes to free him from liability.

When, too, it is remembered that the returns of the guardians to the Commissioner do not refer to any negroes as held by them for the wards, or any receipt for hire therefor, and that the arrangement was never known to any member of the family, so far from the question being reduced to one of doubt, a just consideration of the facts can lead but to one conclusion.

It would be most prejudicial to minors, if they were to be held bound by any understanding, on the part of a guardian, which could be turned to his advantage and their wrong, at his mere option. This Court would favor no such pretension.

The motion in each case is dismissed.

WILLARD, A. J., concurred.

I S. C. *119

*T. H. CLARK and Another v. S. S. TOMPKINS and Others.

(Columbia. April Term, 1869.)

[*Guardian and Ward* ⇨157.]

The mere belief of the sons and widow of a deceased guardian, that certain Confederate States bonds, found among his effects, were held by him as investments for his wards, is not evidence that the investments were in fact made.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 511-513; Dec. Dig. ⇨157.]

[*Guardian and Ward* ⇨33.]

A guardian, who died in 1864, held not to have become liable for distributive shares of his wards in the estate of their brother, who died in 1863—the administrator of the deceased brother remaining liable to them, and it not appearing that they had lost by the failure of the guardian to receive the shares.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 154; Dec. Dig. ⇨33.]

[*Dower* ⇨88, 107.]

A widow is entitled in equity, when dower is assigned her, to an account of rents and profits, or, if money be assessed in lieu of dower, to interest.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 179, 184, 337-339; Dec. Dig. ⇨88, 107.]

[*Parties* ⇨84.]

Exception, for want of proper parties, should be made by demurrer, if the defect appear on the face of the bill; if not, then by plea.

[Ed. Note.—Cited in *Fraser & Dill v. Charleston*, 13 S. C. 543.

For other cases, see *Parties*, Cent. Dig. § 137; Dec. Dig. ⇨84.]

[This case is also cited in *Tompkins v. Tompkins*, 18 S. C. 29, as to facts.]

Before Lesesne, Ch., at Edgefield, June, 1867.

This case will be sufficiently understood from the Circuit decree, and the statement

contained in the judgment of the Supreme Court. The Circuit decree is as follows:

Lesesne, Ch. The testator, James Tompkins, was appointed guardian of the plaintiff, Atticus C. Tucker, and his deceased brother, Pickens L. Tucker, in the year 1856, and gave bonds to the Commissioner of this Court, with the defendants, Landon Tucker, J. H. Jennings and W. D. Jennings, as his sureties. He received for each of his wards the sum of 7,709.31-100 dollars, on account of their distributive shares of their father's estate. The bill also charges that, as two of the distributees of a deceased brother, Thomas L. Tucker, the said Atticus and Pickens Tucker were entitled to the further sum of 3,630 dollars, which their guardian received, or should have received, from the administrator of Thomas. The testator died in the year 1864, and the defendants, Stephen S. and John W. Tompkins, qualified as executors of his will. The bill prays that an account may be taken of the amounts for which the deceased guardian, James Tompkins, was liable to his wards, and expressing doubt as to the solvency of the estate of the said James Tompkins, and, complaining of the tardiness of the executors in the performance of their duties, prays that they may account for their actings and doings, and for the entire estate of the testator, and be required to give bond for the faithful discharge of their trust; that the creditors be called in and enjoined; the whole estate, real and personal, be sold for payment of the debts; and the assets of the estate be marshalled.

The executors, in their answer, express

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the belief that the testator, in the year 1863, invested the funds of his wards in certain Confederate securities, which were found among his papers, and that, unless said investment be sustained, the estate will be insolvent. They also state that a tract of land, containing 500 acres, included in the appraisal as part of the estate, called the Gin House Tract, did not, in fact, belong to the testator at the time of his death, but to the defendant, John W. Tompkins, and was erroneously placed in the inventory, as was also a law office, in the village of Edgefield, which, in fact, belongs to the estate of R. W. Tompkins. They also ask that the creditors may be required to prove their claims before the Commissioner, and enjoined from suing at law.

The testator's widow, Mrs. Huldah Tompkins, in her answer, claims her right of dower in the lands of the estate.

It appears that the testator, upon receiving the funds which constituted the estates of his wards, simply charged himself with the amounts, instead of setting them apart and investing them, as it was his duty to do. He thus made himself their debtor; and even if it were proved satisfactorily that

the Confederate securities mentioned were purchased as investment for them. I do not think the debts would be thereby discharged. The case is like that of Griffin v. Bonham, in this District, and Martin v. Marshall, at Abbeville; and I refer to my decrees in those cases for a fuller statement of my views.

The plaintiffs are entitled to the accounts they pray for, but not to the requirements of security from the executors.

The question of title, as to the Gin House tract of land, must be referred to the law Court. As to the law office, it is clear, for the reasons stated by the defendants, that it was erroneously placed in the inventory of the testator's estate.

The widow is entitled to her claim of dower.

It is ordered and decreed as follows:

1. That it be referred to the Commissioner to take an account of the amounts that were received by the testator as guardian of Atticus C. Tucker and Pickens L. Tucker, or for which he was liable to his said wards.

2. That the executors account before the Commissioner for their actings and doings as such, and for the entire estate, real and personal, of the testator, in their hands or under their control.

3. That the Commissioner call upon the

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creditors of the testator, *by advertisement, in the usual manner, to prove their claims by the first day of December next.

4. That a feigned issue be made up and respectfully referred to the Court of Common Pleas, wherein John W. Tompkins shall be plaintiff, and Mrs. Huldah Tompkins, devisee of testator, defendant, to try and decide the title to the tract of land mentioned in the pleadings as the Gin House Tract.

5. That a writ issue, according to the practice of this Court, to admeasure and assign to Mrs. Huldah Tompkins her dower in all the lands of which the testator was seized during her coverture with him.

The Commissioner will report to the Court on the matters hereinbefore referred to him, with leave to report any special matters; and any of the parties have leave to apply, in Chambers, at the foot of this decree, for such further orders as may be necessary or proper in the cause.

The defendants, Stephen S. Tompkins and John W. Tompkins, executors of James Tompkins, deceased, appealed, and now move this Court for a new trial, on the following grounds:

1. The Chancellor errs, it is respectfully submitted, in deciding that the investments made by James Tompkins, guardian, in Confederate securities, for his wards, are not to be reckoned pro tanto in discharge of his indebtedness.

2. The decree is erroneous in so far as it orders any accounting upon the estate of Thomas L. Tucker, deceased, inasmuch as

the answer of the executors sets forth that their testator never received any portion of the estate of the said Thomas L. Tucker. That the said Thomas L. died in 1863, and the testator, James Tompkins, in 1864, and that it was impossible to collect the moneys in the hands of the administrator of said Thomas L., owing to the stay laws of the State then in force. And that the said administrator was perfectly solvent.

3. The Chancellor errs in supposing that "the testator, upon receiving the funds, which constituted the estates of his wards, simply charged himself with the amounts, instead of setting them apart and investing them, as it was his duty to do." No such disposition of the funds appears either from the answers or the evidence. But, in point of fact, the contrary.

4. It is respectfully submitted that the decisions as to Confederate investments, in Bonham ads. Griffin, and Martin v. Marshall,

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cited *by the Chancellor in confirmation of this present decree, have not, and can not, be sustained by the Court of Appeals of this State—but, on the contrary, have been reversed.

5. The Chancellor errs in omitting to notice the statement of the executors, as also the argument of counsel in that regard, that R. Augustus Tompkins, a son of the testator, had not been made a party to the bill; and that, admitting he had been such party, his death, before the hearing of the cause, necessitated a bill of revivor.

6. It is respectfully submitted that, under the decisions of this State, the widow of testator is not only entitled to dower in the lands of her husband, but, also, to a share in the rents and profits thereof since his death; and that the Chancellor erred in omitting so to order in his decree.

Bacon, for appellants.

Abney & Wright, contra.

May 8, 1869. The opinion of the Court was delivered by

MOSES, C. J. The bill was filed by Tillman L. Clark, administrator of Pickens L. Tucker, and Atticus C. Tucker.

It alleges the appointment, in 1856, of James Tompkins as guardian of the said Pickens L. and Atticus C., his entering into the usual bonds, with Landon Tucker, J. H. Jennings and W. D. Jennings as his sureties, and the receipt by the said guardian of \$7,709.31 for each of the said wards, as their several distributive shares in the estate of their deceased father; that they were, also, entitled to a further sum of \$3,630, as distributees of a deceased brother, Thomas L. Tucker, which the said guardian received, or should have received, from his administrator; that the testator died in 1864, leaving a large real and personal estate,

and the defendants, T. S. Tompkins and J. W. Tompkins, qualified as executors of his will.

It prays for an account, by the executors, of the actings and doings of their testator as guardian; and, expressing doubts as to the solvency of his estate, asks that the executors be required to account, the creditors called in, the estate marshalled, and the sale of the whole estate for the payment of debts.

The executors, in their answers, express the belief that the testator, in 1863, invested the funds of his wards in Confederate securities, found among his papers, and, unless the investment be sustained, the estate will prove insolvent. They ask that the

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creditors *be enjoined from suing at law, and required to prove their claims in this Court.

The Chancellor made his decree, and it will only be necessary to notice so much of it as may be involved in the questions presented by the grounds of appeal.

The first and third of these submit error in deciding that the investments made by the guardian in Confederate securities for his wards are not to be taken pro tanto in discharge of his indebtedness.

This assumes a higher position for the guardian than was conceded to him by the Chancellor. Had he, in good faith, with funds in hand, made an investment for his wards, which was lost from circumstances beyond his control, he might have submitted a claim to the Court for an extension, in his behalf, of the principles which govern it, in passing on the conduct of those who occupy fiduciary relations. All reference to these is precluded by the fact that no investment was ever made.

Apart from the mere belief of the sons, the executors, and the widow, that the Confederate securities in the possession of the testator at the time of his death were held by him for his wards, there is not a tittle of proof that he in any way invested the money which he received for his wards, in 1856, into any other representative of value.

The mere circumstance that Confederate securities, amounting to a few thousand dollars, and Treasury notes, to some \$15,000 or \$16,000, were found among his assets, in no way leads to a conclusion that he had bought and held the first for the infants. Dying in the year 1864, was it at all extraordinary that a man of his large estate, great prudence, energy and thrift, should have left on hand that amount in the only currency existing in the country?

We can perceive no reason for which to differ from the Chancellor in the conclusion to which he arrived in this regard.

We do not, however, consider that, in the accounting to be had, the estate of the guardian is to be charged with the amount of the distributive shares in the estate of the broth-

er, Thomas L. Tucker, to which each of the wards was entitled. He died in 1863, and the testator in 1864. Apart from the very short period intervening between their deaths, the Courts were closed, and the condition of the country rendered impossible any resort to the tribunals of the State for remedies in civil causes. Nothing has been lost by any want of action on the part of the testator. The administrator of T. L. Tucker is still liable to account to the brothers, and

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they *are now at liberty, without hindrance, to proceed against him. It has not been shown, even if necessary for the relief of the testator in this behalf, that anything has been lost to the wards by the mere forbearance of action on the part of the testator.

The claim of the widow to dower is allowed by the decree, and a writ for its admeasurement ordered. On its assignment, she is entitled to an account for rents and profits from the time when her right to it attached, or to interest, if a sum of money is assessed in lieu of it.—*Keith v. Trápier*, Bail. Eq., 64.

It has been submitted to this Court that its action should be stayed, because all the parties proper to the bill are not before it.

The bill was filed, primarily, by the plaintiffs against the executors of the testator for an account as guardian. To insure, probably, relief by the least circuitous mode, the sureties to the guardianship bonds were made parties defendant, as were, also, the devisees and legatees having an interest under the will. An order to amend the bill appears to have been passed by the Commissioner, for the purpose of preferring a claim to an account of some alleged interest in a mine and tannery, that the executors might give bond for the faithful administration of their trust or relinquish it, and to account for the rents and profits of the estate of the testator since his death. To the original bill, as has been said, all the devisees and legatees were parties, and, without holding that it is not necessary, under any amended bill, to serve anew with process to answer, all the parties defendants to the original bill, we do not think that the failure to serve R. Augustus Tompkins, (one of the devisees,) under the amended bill, should arrest all action in these proceedings.

If the objection could prevail, it was not taken in the Court below in the form in which it should have been presented.

Exception for want of proper parties must be by demurrer, if the omission appears on the face of the pleadings; if not, by plea. When the defect is thus established, the Court will suspend judgment until all the proper parties are before it.—*Neely v. Anderson*, 2 Strob. Eq., 262.

As observed, however, by Chancellor Dargan, in that case, the rule is subject to exception. It was adopted for convenience, and conducive to the due and proper ad-

ministration of justice, and would not be regarded as inflexible where its application would be absurd, impracticable, or lead to inconvenient delay."

While preserving and protecting all prop-

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er rights, we must be careful that this is not attended with unnecessary protraction, and, therefore, should not be astute in an exploration of difficulties with which to impede the course of justice.

We feel less hesitation in not favoring the objection taken here, inasmuch as the said R. Augustus Tompkins and the widow have both died since the decree, and further progress in the Court below will be suspended until their representatives and distributees are made parties by proper proceedings, to do which leave is now given.

It is ordered that the decree of the Chancellor, explained by the views herein declared, be affirmed.

WILLARD, A. J., concurred.

I S. C. 125

SUSANNAH E. BERRY v. JESSE HART
and Another, Executors.

(Columbia. April Term, 1869.)

[*Executors and Administrators* ⇨468.]

Executors who purchased, at their own sale, slaves of their testator's estate, cannot, in accounting to a legatee, set up as a defence, under Art. 4, Sec. 34, of the Constitution, that their liability arises from the purchase of slaves.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1999; Dec. Dig. ⇨468.]

[*Executors and Administrators* ⇨163.]

The obligation of an executor to account to a legatee springs out of the relation of the parties, and a purchase by the former, from himself, of the chattels of the estate, does not convert the obligation into one arising from the contract of sale.

[Ed. Note.—Cited in *Finch v. Finch*, 28 S. C. 170, 5 S. E. 348, 13 Am. St. Rep. 665.

For other cases, see *Executors and Administrators*, Cent. Dig. § 640; Dec. Dig. ⇨163.]

Before Johnson, Ch., at Edgefield, August, 1868.

Jesse Hart, the testator in the cause, died in 1855, leaving a will, by which he appointed the defendants executors thereof, and bequeathed to the plaintiff, his grand daughter, a certain share of his estate, to be paid to her at the age of twenty-one—she being a minor at the time. The personal estate, consisting chiefly of slaves, was sold by the defendants, and they became the purchasers, at the sale, of several of the slaves. The bill in this case, which was filed in April, 1867, prayed an account of plaintiff's share of the estate, and at June Term, 1867, an order to account, reserving the equities, was made. At the reference before the Commissioner, defendants

contended that they could not lawfully be

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charged with their purchases of slaves; but the Commissioner held otherwise, and stated an account in which they were charged with the sums at which they had bid off the slaves—the foot of the account showing a balance due by the defendants to the plaintiff of \$955.-43. Exceptions were taken by the defendants to the report, and at an extra term of the Court, in August, 1868, the report and exceptions came before His Honor Chancellor Johnson, who overruled the exceptions, and decreed for the plaintiff the full amount reported to be due to her by the defendants.

The defendants appealed, and now moved this Court to modify the decree, on the ground that so much of plaintiff's claim as was based upon the defendants' purchases of slaves had been made void by the provision of the Constitution declaring all contracts, the consideration of which was the purchase of slaves, to be null and void.

Wright, for appellants.

Adams, contra.

May 8, 1869. The opinion of the Court was delivered by

WILLARD, A. J. On an accounting between the complainant, a legatee under the will of her grandfather, Jesse Hart, and the defendants, executors under said will, it was claimed by the executors that they should be allowed, as a credit, the value of certain slaves belonging to the testator's estate, purchased by the executors, and which, having become emancipated in the hands of the executors, they claim that they are not liable to account for the purchase money of said slaves by reason of the act of emancipation. The ground upon which the executors seek to place themselves is, that, in charging them in the present accounting, it is, in effect, attempting to enforce a contract the consideration of which is the purchase of slaves, (Const., Art. 4.) The Chancellor decreed an accounting on a principle of charging the executors with the purchase money of the negroes, and the defendants have appealed from such decree.

It is to be presumed that the slaves were sold for cash, and that immediately thereupon the executors charged themselves, in account, with the purchase money, giving the estate a corresponding credit. Assuming that they could rightfully become purchasers at the sale of the testator's estate, and this is what they ought to have done, and equity holds it as done, the complainant is not compelled to resort to the contract for the sale of the negroes to obtain her rights by its enforcement. That contract was between the

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executors, in their representative character on the one side, and their individual character on the other side, and was completely

satisfied, and ended when a credit was given for the amount of the purchase money.

If the complainant elects to rest upon this completed transaction, it is not for the executors to complain.

The obligation on which the claim of the complainant rests springs out of the relation of an executor to a legatee, and not out of that of a vendor and vendee of chattels; and it would be a gross abuse of the powers of a Court administering equity to open transactions of executors closed by their own act, to enable them to make an unconscionable defence, growing out of matters transacted long afterwards.

The appeal is dismissed, and the decree confirmed.

MOSES, C. J., concurred.

I S. C. 127

HENRY A. MEETZE v. W. PADGETT and Another.

(Columbia. April Term, 1869.)

[*Judicial Sales* ⇨4.]

A Chancellor had power, in ordering a sale for foreclosure, to direct the sale to be made by any officer of the Court, or even by one who was not an officer. (a)

[Ed. Note.—Cited in *Adams v. Kleckley*, 1 S. C. 143; *Moseley v. Hankinson*, 25 S. C. 522.]

For other cases, see *Judicial Sales*, Cent. Dig. § 14; Dec. Dig. ⇨4.]

[*Executors and Administrators* ⇨352.]

So much of an order for sale as designates the officer or person by whom it is to be made is administrative, and may be modified, changed or rescinded by a succeeding Judge.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1458; Dec. Dig. ⇨352.]

Before Platt, J., at Edgefield, February Term, 1869.

The facts of the case, and the point made by the appeal, are fully stated in the opinion of the Supreme Court, delivered by the Chief Justice.

Bacon, for appellant.

Norris, contra.

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*May 8, 1869. The opinion of the Court was delivered by

MOSES, C. J. Under the bill which was filed for the foreclosure of a mortgage of certain real estate, His Honor Chancellor Johnson directed a sale of the premises to be made "by the proper officer of the Court."

On February 12, 1869, His Honor Judge Platt, sitting in the Circuit Court of Common Pleas, which now exercises equity jurisdic-

(a) The law now provides that sales of real estate shall be made in the County where it lies by the Sheriff of the County, or by a referee. See Code, § 310, p. 490.

tion, ordered the sale, so, as above directed, to be made by the Sheriff of the County, on the terms prescribed by the former order.

The defendants appeal, and the only question submitted to this Court is as to the validity of the said order of Judge Platt.

We propose to confine ourselves to the point thus made.

It is, and must be, assumed that Chancellor Johnson had the power to designate the person to make a sale ordered by his own Court. He was not confined to the Sheriff or any other officer under his control and direction. In fact, he may have selected some person not an officer of the Court, who, on acceptance of the appointment, would, quoad hoc, have maintained to the Court the relation of an officer. The delegation of this mere ministerial duty was entirely within the control of the Court.

So much of the order as is in question here, is of that class known and recognized as merely administrative. It may not only be modified or changed by a succeeding Judge, but may be rescinded, provided he has jurisdiction in the subject-matter.—*Pell v. Ball*, 1 Rich. Eq., 361.

The motion is dismissed.

WILLARD, A. J., concurred.

I S. C. *129

*E. J. MOODY, Assignee, v. C. B. HASELDEN and Others.

(Columbia. April Term, 1869.)

[*Mortgages* ⇨298.]

On 21st September, 1859, H. gave to E. two mortgages, one of land, and the other of slaves, to secure the payment of a debt due by notes. On 20th December, 1861, a considerable part of the debt being due and unpaid, E., by his agent, seized the slaves under his mortgage, but allowed them to go into H.'s possession, on a bond for their forthcoming on sale-day in March, 1862, and they remained in his possession, uncalled for, until they were lost by the general emancipation, in 1865. In January, 1860, H. sold and conveyed part of the mortgaged land to M., and in November, 1863, he sold and conveyed the other part to G. On bill, by the assignee of E. against H., M. and G. to foreclose the lien on the land: *Held*, That G. had an equity to require that the value of the slaves, at the time of the seizure, should be applied to the mortgage debt, and that the lien on the land, purchased by him, should be foreclosed only for the balance, if any, after such application.

[Ed. Note.—Cited in *Green v. Scruggs*, 73 S. C. 405, 53 S. E. 612.]

For other cases, see *Mortgages*, Cent. Dig. §§ 836-854, 864, 871; Dec. Dig. ⇨298.]

[*Mortgages* ⇨298.]

Where there are mortgages of land and chattels to secure the payment of the same debt, and the mortgagee seizes the chattels after condition broken, a subsequent purchaser of the land from the mortgagor has an equity to compel the mortgagee to apply the value of the chattels seized to the mortgage debt, or show

that they had been lost without fault, or legal responsibility, on his part.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 847; Dec. Dig. ☞298.]

[*Chattel Mortgages* ☞162.]

Where the mortgagee, after seizure of the chattels, allows them to return into the possession of the mortgagor on a forthcoming bond, the legal possession is in the mortgagee—the mortgagor holding as his bailee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 286; Dec. Dig. ☞162.]

[This case is also cited in *Moody v. Ellerbe*, 4 S. C. 21, as to facts.]

Before Johnson, Ch., at Marion, December, 1868.

This case first came before his Honor Chancellor Johnson, at Marion, February, 1868, when he pronounced a decree therein as follows:

Johnson, Ch. On the 21st day of September, 1859, the defendant, Cyrus B. Haselden, purchased from Richard P. Ellerbe a tract of land lying and being in Marion District, and containing three hundred and nineteen acres, more or less, for the sum of six thousand dollars, payable as follows, to-wit: three thousand dollars on the first of December, 1859; one thousand dollars on the 1st of December, 1860; one thousand dollars on the 1st of December, 1861; and the remaining one thousand dollars on the 1st of December, 1862; with interest on each of the said sums from the 1st of December, 1859; and, for the purpose of securing the payment of the said sums of money, he gave his four several promissory notes for the same to the said R. P. Ellerbe; and, for the purpose of the more effectually securing the payment of the sums, he gave to the said R. P. Ellerbe not only a mortgage on the said tract of land, but also a separate mortgage of seven negro slaves. Soon after the three thousand dollar note became due, it was paid by the mortgagor to the mortgagee. On the 20th day of

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December, *1861, William P. Campbell, the Sheriff of the said District, as agent of the said R. P. Ellerbe, seized upon the mortgaged negroes, with the intention of selling the same and extinguishing the mortgage debt, but the defendant, C. B. Haselden, in some way succeeded in getting their release upon entering into bond for their production at Marion C. H. on the first Monday in March, 1862. After which they remained in the possession of the said C. B. Haselden, without being sold, until they were emancipated.

On the 15th of January, 1860, the defendant, C. B. Haselden, sold and conveyed to William H. Moody eighty acres of the said tract of land, who is now in the possession of the same; and on the 20th of November, 1863, he sold and conveyed the balance of the said tract of land to Asa Godbold, Jr., who is now in the possession of the same.

The three remaining notes, and the mort-

gage, were transferred, by various assignments, until they passed into the possession of the complainant, who is now the legal owner of the same, and seeks, by his bill, to foreclose the mortgage on the land; but the defendants insist that the seven negro slaves were more than sufficient to extinguish the balance due on the mortgage debt, and that their seizure, after the condition of the same was broken, operated, in law, as a satisfaction of the mortgage debt; or, at least, that, upon condition of the mortgage being broken, the negro slaves became the property of the mortgagee, and that he must suffer the loss of their emancipation, and not the mortgagor.

Upon condition broken of a mortgage of personal property, the property becomes that of the mortgagee, to the extent that he is justified in seizing it and selling it, and applying the proceeds of the same to the payment of his debt; but he does not thereby become the absolute owner of the property, and is not subject to such a loss as that resulting from emancipation.

It is ordered and decreed, that the above opinion be taken as the judgment of the Court.

And it is also ordered and decreed, that it be referred to the Commissioner to ascertain the amount still due on said notes, and that, upon the coming in of his report, either party may apply, at Chambers, for further orders, after giving ten days' notice thereof to the opposite party.

Asa Godbold appealed against the decree, and the Court of Appeals, at May Term, 1868, pronounced judgment on the appeal, as follows:

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*INGLIS, A. J. It is certainly true, at law, as is often affirmed in argument here, that a mortgage of personal chattels "conveys a legal estate to the mortgagee," which, subject originally to a condition of defeasance, becomes, upon nonperformance of such condition, absolute.—*Wolff v. Farrell*, 3 Brev., 68; S. C., Treadl., 151. Hence, without any judicial proceeding, the mortgagee may then seize and sell the property in satisfaction of the debt or duty.—*Johnson v. Vernon*, 1 Bail., 527—and for this purpose may, even in the night time, enter upon the premises of the mortgagor, if he can do so without violating the criminal law.—*Satterwhite v. Kennedy*, 3 Stroh., 458. He may, by assignment of his mortgage, transfer the legal title.—*Montgomery v. Kerr*, 1 Hill., 291. And he—or, after such assignment, his assignee—may, even before condition broken, maintain an action at law for recovery of damages for the conversion of the property, or a bill for its specific delivery, against a stranger—purchaser from the mortgagor or otherwise—who has it in possession.—*Wolff v. Farrell*, 3 Brev., 68; *Montgomery v. Kerr*, 1 Hill., 291; *Spriggs v.*

Camp, 2 Speers, 181; *Bellune v. Wallace*, 2 Rich., 80; *Bryan v. Robert*, 2 Rich. Eq., 11. It is equally true, however, that, in equity, this legal estate is regarded as merely put in pledge in the hands of the mortgagee, as a means whereby he may, himself, promptly and effectually enforce the fulfillment of some duty on the part of the mortgagor; and that all which he is really entitled to is the performance of this duty. And hence, whenever, "within the known limits," this duty is fulfilled, though not at the day limited in the terms of the deed, the estate of the mortgagee is defeated, and the mortgagor holds the property disencumbered as before the execution of the mortgage.—*Walling v. Aiken*, McMull. Eq., 13. This nature and purpose of the mortgagee's estate is recognized by the statute law, when, by its limitation, it concedes that, even though the mortgagee assert his legal title, upon condition broken, and seize the mortgaged chattels, yet the mortgagor may, at any time within two years after such seizure, by the fulfillment of the duty intended to be secured, redeem his property.—A. A. 1712, Sec. 15, 2 Stat., 587; *Hogan v. Hall*, 1 Strob. Eq., 323.

Where, under a mortgage exclusively of personal chattels, the mortgagee, upon condition broken, seizes the mortgaged property, and, instead of converting it into money, and applying the proceeds to the satisfaction of the debt or duty intended to be secured—as, in the regard of equity, and, usually, by the

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express terms of the deed, he ought to do—chooses to retain the possession of the property, and appropriate it, in specie, to his own use, there may, perhaps be ground to argue that this would operate as satisfaction of his secured demand, and that he ought to be precluded from any further or other remedy. There would be more apparent reason for such argument after the possession so acquired has continued throughout the statutory period. But upon these points this Court does not intend now to express any positive judgment. Certainly the mortgagee could not, in either of these cases, have such further or other remedy without first accounting for the true value of the property so seized, or showing its insufficiency.

Where the mortgage embraces both land and chattels, and, upon condition broken, the mortgagee elects to proceed, under the right conferred by the deed, to subject the chattels to the satisfaction of his demand—although the retention thereof by him, in specie, even throughout the full statutory period, would afford less ground to argue that such seizure and retention imported satisfaction ipso facto, since, by the concurrence of the parties on both sides, as evinced in the deed, the whole of the property of both classes was deemed necessary for the security of such satisfaction—yet he would not afterwards be allowed to proceed against the

mortgaged land without accounting for the chattels which he had seized, and showing that these had failed, or, at least, had proved inadequate to work complete satisfaction, without legal fault on his part. Upon familiar principles of equity, the obligation to exhaust or account for that portion of the mortgaged property which had been seized before alienation by the mortgagor of the residue thereupon left in his possession, before the lien of the mortgage will be allowed to be enforced against such residue in the hands of the alienee or purchaser for value from the mortgagor, is, if possible, still more clear and indubitable.—*Fowler v. Barksdale*, Harp. Eq., 164; *Gist v. Pressley*, 2 Hill Eq., 318; *Bank v. Howard*, et al., 1 Strob. Eq., 173; *Gadberry v. McLure*, 4 Strob. Eq., 175. For, if there had been no seizure whatever until after alienation of part of the mortgaged property, it need scarcely be said that the purchaser for value from the mortgagor would have an equity to compel the mortgagee to resort first to so much of the mortgaged property as, upon the consummation of his purchase, was still retained by the mortgagor, and exhaust his remedy against that, before he could come upon what such purchaser had acquired. Still clearer, then, is this equity, where, by a seizure of other

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parts of the property, *he has, as it were, given notice to all dealing with the mortgagor for the residue, that this residue is, for the time, discharged, or its liability postponed.

In the case before the Court, the mortgages embraced both land and slaves remaining in pledge for the security of the balance of a debt, when, on "20th December, 1861, the mortgagee, by the Sheriff, as his agent or bailiff, seized the mortgaged slaves, with the intention of selling the same, and extinguishing the mortgage debt," appointed the day of sale, to wit, the first Monday in March, 1862, and returning, for the interval, the possession of the slaves to the mortgagor, took from him a bond, with security, conditioned for their forthcoming for sale on the appointed day. Certainly, by this proceeding, the mortgagor became, *quoad hoc*, the mere bailee of the mortgagee, and his possession was, in law, thenceforth the possession of the latter.

Third persons, at least, might safely so regard it. This possession continued from the date of seizure for the space of three years and four months, and until the slaves had been emancipated, and thus their value, as property, for the practical purposes of the mortgage, was lost. On the 20th November, 1863—nearly two years after this seizure of the slaves—the mortgagor sold and conveyed to the defendant, Asa Godbold, Jr., the last parcel of the mortgaged land which he had retained; and the mortgagee now, in his present bill, seeks to subject this land, in the

hands of the alienee, to the satisfaction of the lien of the mortgage. We think the purchaser, Godbold, has an equity to require the mortgagee to show that the mortgaged chattels, seized nearly two years before his purchase, and so long retained in the possession, or under the control, and subject to the call of the mortgagee, have been lost, and so failed to produce actual satisfaction in full, or, at least, pro tanto, without fault on his part. But on this point the decree and the testimony are wholly silent. An opportunity will be given to supply, if it be possible, this showing, without which this Court hesitates to affirm, absolutely, the Circuit decree.

It is ordered that the cause be remanded to the Circuit Court for a further hearing upon the principles herein announced; and that the Commissioner do inquire and report to that Court the facts touching the seizure of the slaves, and the subsequent failure of the mortgagee to proceed, with diligence, to pursue the remedy against them, under his mortgage, which he had thus begun, and the causes thereof, together with any special

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matter touching the merits *of the controversy; and that thereupon, and upon such other proper hearing as may be had, the said Court determine whether the said chattels so seized were lost by, or without, the fault or legal responsibility therefor of the mortgagee, and make the appropriate orders that such determination may require.

The second decree of His Honor Chancellor Johnson, against which the appeal to the Supreme Court was taken, is as follows:

Johnson, Ch. This case having been remanded by the Court of Appeals to the Circuit Court, upon certain points therein specified, and the Commissioner having taken and reported testimony upon the points required, it appears that, at the time when Campbell, Sheriff, seized upon the negro slaves, mortgagee was absent in Florida, and that Campbell was never in the actual possession of the negroes; and that, in less than two years after the bond for the production of the negroes was taken, that the notes which were secured by the mortgage had been transferred to other parties; and that Haselden actually paid a consideration for forbearance on one of the notes after it had been transferred; and it is in proof that before two years after the bond was taken, Godbold became the purchaser of the land, knowing of the existence of the mortgage, and paying what might be regarded an inadequate price for the same in Confederate money; and that he has, subsequently to the emancipation of slavery, offered to pay twenty bales of cotton in satisfaction of the mortgage which it is sought to foreclose. If it be admitted, (which it is not,) that the Act of 1712 applies to this case, it would be necessary to tack the possession of the slaves against several parties, to complete the statutory pe-

riod—neither the mortgagee nor either of his assignees having had them for the space of two years. But the terms of the Act are, that the possession of the mortgagee shall be "actual possession," and not mere "seizure in form of law only," which was not the character of the possession proved in this case, and the Act, therefore, cannot apply. Was there such delay on the part of the mortgagee, and those holding under him, in enforcing their rights, that it operated as a fraud upon the rights of Godbold, a purchaser of the land, for valuable consideration? I think not, for it was during the existence of the war, and the stay law was passed in a day or two after the negroes had been seized, and the popular impression was, that it stopped the collection of all debts; and

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soon after that the money became so *depreciated that no person wished to enforce the payment of any claim which was well secured; and the debt for which the negroes was given certainly was well secured.

The opinion of the Court is, that the matter of defense set up by Asa Godbold, Jr., cannot be sustained, and that the mortgage on the land must be foreclosed.

It is ordered and decreed, that the above opinion be taken as the judgment of the Court.

It is also ordered and decreed, that it be referred to the proper officers of the Court to ascertain and report the amount due and not paid on the notes which are secured by the mortgage, and which are held by the complainant.

The defendant, Asa Godbold, Jr., appealed, and now moved this Court to reverse the second decree of His Honor Chancellor Johnson, on the grounds:

First. Because, by the seizure of the slaves and their subsequent possession by the agent or agents of the mortgagee, the amount due, secured by the mortgage, was satisfied in law; and the plaintiff has shown no such equitable causes as will deprive the defendant, the subsequent alienee of the mortgaged premises, of his strict legal rights to insist on such satisfaction.

Second. Because His Honor erred in his conclusion that, because the notes due, and the mortgage, had been assigned to various parties, it would be necessary to tack the possession, in order to make the two years required by the Act of 1712: it being insisted that the seizure being made by the Sheriff, who was the agent of R. P. Ellerbe, the mortgagee, the possession of Haselden was that of his bailee merely, and continued in the Sheriff, as agent of each and every of the assignees of the mortgage, without any impediment to the sale, and when it was proven Confederate money would have been, and in fact was, received by the mortgagee.

Third. Because the offer of defendant to compromise or buy his peace was not an ad-

mission of plaintiff's right, and the evidence of such offer was objected to as incompetent, was so, and should not have any weight in deciding the legal rights of the parties.

Harlee, for appellant.

Sellers, contra.

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*May 8, 1869. The opinion of the Court was delivered by

WILLARD, A. J. The bill was filed to foreclose a purchase money mortgage, executed by defendant, Haselden, to R. P. Ellerbe, the assignor of plaintiff, September 21, 1859, to secure certain notes concerning the purchase money on a sale of the mortgaged premises by Ellerbe to Haselden. Godbold, the alienee of the mortgagor, was made a party, and answered, claiming that the mortgagee should account for the value of certain slaves which had been mortgaged to him by Haselden at the same time that he mortgaged the land as part security for the purchase money, and which had been seized for condition broken and held under the mortgage. The agent of the mortgagee, on seizing the slaves under the mortgage, returned them to the mortgagor, taking from him a forthcoming bond. They remained unsold until released under the general emancipation in 1865.

This case was before the Court of Appeals, at May Term, 1868, on appeal from a decree of Chancellor Johnson. That Court decided that the possession of the mortgagor under the forthcoming bond was the lawful possession of the mortgagee, the former being, *quoad hoc*, his mere bailee. Also, that the purchaser, Godbold, "has an equity to require the mortgagee to show that the mortgaged chattels, seized nearly two years before his purchase, and so long retained in the possession or under the control and subject to the call of the mortgagee, have been lost, and so fail to produce actual satisfaction in full, or, at least, *pro tanto*, without fault on his part." It was ordered, "that the cause be remanded to the Circuit Court for a further hearing, upon the principles herein announced, and that the Commissioner do inquire and report to that Court the facts touching the seizure of the slaves and the subsequent failure of the mortgagee to proceed with diligence to pursue his remedy against them under his mortgage, which he had thus begun, and the causes thereof, together with any special matter touching the merits of the controversy, and that, thereupon, and upon such other proper hearing as may be had, the said Court determine whether the said chattels, so seized, were lost by or without the fault or legal responsibility therefor of the mortgagee, and make the appropriate orders that such determination may require."

The questions left open by the decree were, therefore: First. Whether satisfaction of the mortgage debt had been lost through the

fault of the mortgagee, as it regards the equi-

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ty of the alienee to have such *satisfaction made out of the mortgaged chattel property; or, Second. Whether such mortgaged chattels had been lost without legal responsibility therefor on the part of the mortgagee.

The case subsequently coming before the same Chancellor, he held that there was no such delay on the part of the mortgagee in enforcing his right; "that it operated as a fraud upon the rights of Godbold, a purchaser of the land for valuable consideration;" and he decreed the foreclosure of the mortgage for the entire mortgage debt.

We do not think the Chancellor correctly apprehended the bearing of the decision of the Court of Appeals. Under that decision the mortgagee was bound to free himself from fault. The decree, without excluding the existence of fault, is based upon the idea that the delay did not operate as a fraud on Godbold. The difference is not unimportant. The appellate decree held the mortgagee to diligence in enforcing his remedies against the chattel property, as an incident of the equity established in Godbold. The Chancellor confined his inquiry to whether Godbold's rights, as a purchaser for a valuable consideration, had been invaded by conduct on the part of the mortgagee, operating fraudulently to defeat or impair them. Godbold's equity to demand diligence on the part of the mortgagee did not rest alone on his character as a bona fide purchaser for a valuable consideration, but upon the fact that the mortgagee held another security, which ought, in equity, to be enforced before calling upon the alienee to redeem the land by paying the mortgage debt. Want of diligence on the part of the mortgagee might exist, notwithstanding the conclusions arrived at by the Chancellor.

The grounds of excusing the delay set forth in the decree are, the existence of the war, the stay law, passed a day or two after the negroes had been seized, and the popular impression that it stopped the collection of all debts, and the depreciation of Confederate money that soon thereafter occurred; "that no person wished to enforce the payment of any claim which was well secured; and the debt for which the negroes was given certainly was amply secured." All this recognizes the entire independence of the mortgagee of any necessity of considering the interests of the alienee of the land, and supposes him to be bound only to consult his own interests in regard to delaying the sale of the chattel property, thus wholly ignoring the idea of diligence enforced by the decision of the Court of Appeals. The reasons thus assigned are insufficient to sustain the conclusions arrived at by the Chancellor.

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*In what manner the existence of the war justified delay on the part of the mortgagee

is neither disclosed by the decree nor by the evidence. If at liberty to speculate on this subject, apart from all certainty of proofs, it would seem that prudence would have dictated a different course on the part of the mortgagee, in view of the eventualities of a war of great magnitude, jeopardizing all descriptions of property, and especially threatening the kind of property seized under the chattel mortgage. Wm. H. Moody, in his testimony, assigned the stay law as the cause of the delay in the sale of the slaves, but says nothing about the war.

The existence of the stay law has nothing to do with the case, as it did not pretend to interfere with transactions of this kind; nor can the popular impression to the contrary, if we are at liberty to assume the existence of such an impression, weigh anything in this Court. As well might the popular impression as to the state of the law, as between the mortgagee and the alienee of the land, be asserted to contradict the law of the case as declared by the Appellate Court. Neither has the depreciation of Confederate money anything to do with the case. Had the mortgagee offered the property for sale, and failed to realize an available currency in payment for it, a case for the consideration of the Court might have been presented. But such was not the case. The natural course for the mortgagee to pursue in that case was to appropriate the property, and, when called on to account for it, to allow its value on the mortgage debt.

It is evident that the mortgagee assumed to deal with the chattel property, without regard to the equity of Godbold, and is chargeable with the loss.

The decree will be set aside, and the cause remanded to the Circuit Court for an account of the value of the mortgaged slaves seized and held by the mortgagee, to be computed at the time of such seizure; and if the value thereof shall equal the amount due on the mortgage set forth in the bill of complaint for principal and interest computed to the time of such seizure, then the Circuit Court will dismiss the bill; and if such ascertained value shall fall short of such mortgaged debt and interest, then a decree of foreclosure will be made by the Circuit Court for such balance, with interest thereon to the date of such decree.

MOSES, C. J., concurred.

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*JOHN ELMORE, Assignee, v. R. M. SCURRY and Another.

(Columbia. April Term, 1869.)

[Appeal and Error ¶987.]

The Supreme Court has no power to set aside the verdict of a jury upon questions of

fact, even in a case tried in 1867, and taken, by appeal, to the late Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896, 3913; Dec. Dig. ¶987.]

[New Trial ¶1.]

Some suggestions in relation to the powers and practice of the Circuit Judge upon motions for new trials in causes which did not originate, nor were tried, in the Circuit Court as now constituted, and in relation to the time within which such motions may be entertained.

[Ed. Note.—Cited in State v. Rankin, 3 S. C. 447, 16 Am. Rep. 737.

For other cases, see New Trial, Cent. Dig. §§ 1-3; Dec. Dig. ¶1.]

Before Dawkins, J., at Newberry, Spring Term, 1867.

The report of His Honor the presiding Judge is as follows:

"The defendants were sued as sureties of B. F. Payne, on a sealed note, bearing date 18th November, 1862, for \$5,300, payable to the administrators of George Long, and by Michael Werts, one of the administrators, assigned to the plaintiff, on the 1st March, 1864.

"The consideration of the note was a family of seven negroes, purchased by Payne, at the sale of the property of the intestate. They were proved to be likely. One witness said "they sold for but little more than they would before the war;" and Gen. Kinard said "they sold rather higher." It was not pretended the negroes, or any of them, were unsound. The defense insisted on was a defect of title in consequence of the emancipation of the slaves, and, further, that plaintiff was bound to take payment in Confederate money. Upon the first ground, I ruled and charged that the title to the negroes vested in Payne when the terms of the sale were complied with. That the warranty of title only extended to a paramount one outstanding, and not against the future action of the State, when, from considerations of public policy, it saw proper to emancipate. The loss must fall on the legal owner. In point of fact, however, the negroes had been sold by Payne when he had an undisturbed possession of them. It was proved Payne received Confederate money for them, which is undisposed of. I am unable to perceive in that any reason why the loss should be visited on plaintiff. It was one of the hazards of the times.

"I was not impressed with the other ground. The proof was that the negroes sold for but little more than they would have brought before the war; and, though it may have been expected that it would be paid in the currency of the country, when the note fell due, yet there was no stipulation to that effect. There never was any tender, even of Confederate money, to the holder of the note. Werts, the administrator, said

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he met Payne and Spearman *in the road,

who said they had been to his house to pay, and offered to pay the note. He informed them he had that day assigned the note to plaintiff. This was on the 1st March, 1864, three months after the note fell due. No application afterwards was made to the plaintiff to pay it.

"I thought the plaintiff entitled to recover the amount of the note. The jury thought otherwise, and found for him something over \$800. (amount not recollected.) and I doubt, if he succeeds in his motion, whether he will ever do better."

The plaintiff appealed, and now moved this Court for a new trial, upon the grounds:

1. Because the defendants pleaded failure of consideration, relying upon the emancipation of the slaves, for whose purchase money the note sued on in this case was given, to sustain that plea; and because it was in proof that the principal in the note, the purchaser of the slaves, sold them before they were, in fact, emancipated, and was paid for them; they, therefore, should not have been relieved from the payment of any part of the principal and interest on the note.

2. Because the verdict is unsustainable by the law and the evidence of the case.

Baxter, for appellant.

Fair, contra.

May 8, 1869. The opinion of the Court was delivered by

WILLARD, A. J. Plaintiff obtained a verdict for \$800 on a sealed note. He claims that the verdict should have been rendered for the amount of the note (\$5,300) and interest; but that the jury assumed to reduce his demand in disregard of the instructions of the Judge, who, as it appears, disposed of all questions raised by the defence as matters of law, and instructed the jury accordingly.

No objections to the decisions and rulings of the Judge are brought before us by the grounds of appeal; but we are asked to set aside the verdict on matters of fact. This we have just held, in the case of *Floyd v. Abney*, [1 S. C. 114], decided at the present term, we have no authority to do.

It has been suggested at the bar that, as the practice on this subject is unsettled, a statement of the views of this Court, as to the proper mode of proceeding in such cases,

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will tend to prevent the evils likely to arise from the absence of a definite rule, fixing the relative jurisdictions of the Supreme and Circuit Courts in this respect. It admits of doubt, whether the decision of a Circuit Judge, granting or refusing a new trial on matters of fact, exclusively, can be reversed in this Court. But no opinion is intended

to be expressed at the present time on that point. It is important that the rule governing the exercise of this authority should be uniform throughout the Circuits; and, with a view to promote that end, some of the questions arising out of the circumstances of the present case will be considered.

It is urged that the case was tried before a Judge who is not now in office, and that a motion for a new trial, if made before the present Circuit Court, will be heard by a Judge unacquainted with the facts of the case, as elicited upon the trial. It is also doubted by counsel whether, for that reason, the Judge will deem himself authorized to act in the case.

The power to grant new trials is vested in the Circuit Court, and is neither limited, in terms, to the Judge who tried the case, nor to causes that have originated or been tried in the Court as now constituted. It is an important power of a remedial nature, and ought not to be encumbered with limitations and conditions not, in terms, or by necessary implication, imposed by the legislative authority. The statute must be interpreted as restoring to the Circuit Court what originally belonged to it at common law as a Court of general original jurisdiction, and, therefore, ought to be liberally construed, so as to secure a full administration of justice.

The want of sufficient evidence of what transpired on the trial will be felt less in the present case than in the majority of cases in which new trials will be sought, as it appears from the report of the Judge that the jury had nothing to consider under the ruling but the terms of the note sued upon.

It is suggested that the application may be regarded as not made in due time. In this respect the Circuit Court is at liberty to apply the most liberal rule demanded by the ends of justice. Neither the statute nor any established rule, beyond that which springs from the nature of laches, binds him.

In the present case, it appears that in due time after verdict the plaintiff prosecuted the customary means of setting the verdict aside. It is not clear how he can be charged with a neglect to prosecute his rights with diligence in awaiting the final disposition of his appeal.

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"If our ability to entertain the present appeal depended upon the hardships of the case, it would still be difficult to see any reason, as the case is presented to us, why relief might not be obtained upon an application to the Circuit Court.

The appeal will be dismissed without prejudice to any application that may be made to the Circuit Court to set the verdict aside.

MOSES, C. J., concurred.

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JAMES U. ADAMS v. JOHN KLECKLEY.

(Columbia. April Term, 1869.)

[Judicial Sales ¶4.]

The Sheriff is the proper officer to make sales ordered by the Court, though, if the Court sees fit, it may appoint the Clerk, or some one else, to make a sale.

[Ed. Note.—Cited in *Moseley v. Hankinson*, 25 S. C. 522; *Fort v. Assmann*, 38 S. C. 256, 16 S. E. 887.

For other cases, see *Judicial Sales*, Cent. Dig. § 14; Dec. Dig. ¶4.]

Before Boozer, J., at Chambers, Columbia, May, 1869.

This was a bill to foreclose a mortgage of real estate. On March 2, 1869, a decree of foreclosure was made, and the Clerk of the Court was ordered to sell the mortgaged premises on the first Monday in April. On that day he offered them for sale, and they were bid off by James Windsor, who refused to comply with the terms of sale, and this was a rule against him to show cause why he should not be attached for contempt.

He made return to the rule, and submitted for cause that the Sheriff was the proper officer to make sales ordered by the Court; that the Clerk could not be appointed for that purpose; and that a conveyance made by him would be ineffectual to pass the title to the property.

His Honor held that the Clerk was the proper officer to make sales under decrees on the equity side of the Court, and he made the rule absolute.

James Windsor appealed, and now moved this Court to reverse the order making the rule absolute, on the ground:

1. That the Sheriff, and not the Clerk, is the proper officer to make sales of real estate under decrees for foreclosure.

2. That, although the Judge may, in his

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discretion, upon sufficient cause shown, designate some other person to make a sale, yet no such discretion was exercised in this case, for the Judge acted under the misapprehension that the Clerk alone was authorized, by virtue of his office, to make such sales.

Carroll, Melton & Melton, for appellant.
Pickling & Pope, contra.

August 20, 1869. The opinion of the Court was delivered by

MOSES, C. J. The judgment we are about to pronounce in this case is not to be regarded as affecting the decision made in *Padgett and Corley ads. Meetze*, (ante., p. 127,) at the present term. As there ruled, it is in the discretion of the Circuit Judge, for reasons satisfactory to him, to nominate any fit and proper person as the agent of the Court, to make a sale ordered by it. Without, however, some cause sufficient, in his view, to

induce a different course, it is more consistent and conformable with the regular routine of the business of the Court to order the conduct of its sales by its own officer. The question now before us is, whether the Clerk or the Sheriff is the proper officer to make sales directed by the Circuit Court. We meet the proposition as a general one, not confining our inquiry only to a sale of land decreed under a foreclosure of mortgage. By the Constitution of 1868, (Section 16, Article IV, page 15,) the Court of Common Pleas was invested with jurisdiction in all matters of equity, but the Courts heretofore established for that purpose were to continue, as then organized, until the 1st day of January, 1869, for the disposition of causes therein pending, unless otherwise provided by law. By Section 1st of the same Article, the judicial power of the State was vested in a Supreme Court and in two Circuit Courts, to wit: a Court of Common Pleas, with civil jurisdiction, and a Court of General Sessions, with criminal jurisdiction only. The 27th Section of the same Article provides for the election of a Clerk of the Court of Common Pleas, and the 30th for that of a Sheriff of each County. The Act of 20th August, 1868, (No. 6, page 10,) entitled "An Act to organize the Circuit Courts," transfers all pending "suits in Equity to the Courts of Common Pleas, in and for their respective Counties, to be entered on the dockets of the said Courts, and to be heard and determined as if originally brought there," with a proviso, "that all causes pending as aforesaid, cognizable under the Con-

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stitution in the Courts of *Probate, shall be transferred to the said Courts." We have thus comprised all that the Constitution and the Acts since adopted contain bearing on the point before us. Commissioners of the Court of Equity were first appointed for the several Districts by the Act of 1791, (7 Statutes at Large, 258) "to establish a Court of Equity in the State," with certain enumerated duties, followed by a general power, to do and perform all other matters and things which are usually done, either by the Master or Register of said Court, previous to the hearing of any cause." The same Act, as well as that of 1839, (11 Statutes at Large, 110,) directed that they were to make all sales under the decree or order of the said Court. This last Act required of them the performance of all services provided by law in relation to Registers in Equity. Their powers were enlarged, from time to time, and judicial authority was added to their ministerial functions.

No provision has been made by the Constitution, or the laws since enacted, in regard to the sales ordered by the Circuit Court of Common Pleas in its exercise of equity jurisdiction. The Clerk and the Sheriff are both

officers of the said Court, and to determine upon which of these devolves the right and duty to make its sales, we must be governed by the existing statutes in reference to these officers, and the analogy which may exist between the powers respectively conferred upon them. The sale under an order of a Circuit Judge, made in a matter of equity jurisdiction, is not by the direction of a Court of Equity, but by that of a Court of Common Pleas. When the Judge below, therefore, says "that a Sheriff has never been employed to make judicial sales for a Court of Equity," he overlooks the fact "that the Courts heretofore established" for the administration of equity no longer exist, and their jurisdiction has been transferred to the Court of Common Pleas. Upon this transfer followed the entire abolition of all the offices and machinery incident and attached to them, except so far as retained by the existing law. We are not prepared to concur with the Judge in affirming "that the ministerial duties of the Commissioner have been wholly assigned to the Clerk of the Court of Common Pleas, who is also Clerk of the Court of Equity." Where or how has such assignment been made? It is not to be questioned that the duties which formerly pertained to the Register are to be performed by the Clerk of the Court, for they are necessarily incident to his office, and follow from the very constitution of it; but the ministerial duties of the Commissioner have

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not, by direct enactment, been transferred to him, nor are they required for the full and proper discharge of his office as Clerk of the Common Pleas. The office of Commissioner being abolished, and the offices of Clerk and Sheriff retained, we are led to an examination of the statutes as they stand in regard to these, so as to conclude which, by right, is entitled to make sales ordered by the Circuit Court.

The Sheriff is the executive officer of the Court. From the earliest legislation, all sales ordered by the Court of Law were made by him. The Act of 1839, (11 Statutes at Large, 28,) to go no farther back, requires "the Sheriff to serve, execute and return every process, rule, order or notice issued by any Court of Record in the State, or by other competent authority." The same Act (p. 27) requires him "to keep a sale book, in which he shall enter all sales which he may make under any order, decree, execution or final process of any Court in this State." Is any such obligation imposed on the Clerk? May it not admit of doubt when he makes a sale, under the order of the Court, that it is *virtute officii*, and in the event of a liability for neglect or malfeasance, a resort for indemnity could be had to his official bond? In the determination of the question, some force may be derived from the practice and procedure before the new Constitution

was adopted, in cases where the Court of Law exercised the functions of the Court of Equity.

Partition and foreclosure of mortgages are properly of equity jurisdiction. By the Act of 1791, (5 Statutes at Large, 163,) parties entitled to a distributive share of any estate, real or personal, may apply to the Court of Law for a writ of partition. If a sale becomes necessary, the Sheriff (and not the Clerk) has been the officer to make it. Here is the exercise by the Court of Law of equity jurisdiction.—*Smith v. Smith*, 1 Bailey, 70.

By another Act, passed in the same year, the Court of Law could, in certain cases, order the foreclosure of a mortgage of real estate; and when, under proceedings therefor, a sale has been directed, the Sheriff has always been the officer charged with the duty.—Forty-third Rule of Court; *Trescott & Inglesby v. McLaughlin*, 4 McC., 264. It would not comport with the symmetry which should prevail in the forms and practice of the same Court that, on an application, under the said Act of 1791, a sale should be required to be made by the Sheriff, and at the very next moment, on a bill for foreclosure, it should be required to be made by the Clerk. The whole purview of the Constitution seems to look to the adoption of the same forms of practice in the administration

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of law and equity by the Circuit Courts, for the fifth Article directs, "that justice may be administered in a uniform mode of pleading, without distinction between law and equity, they (the General Assembly) shall provide for abolishing the distinct forms of action, and for that purpose," &c.

In the United States Courts, where equity and law are administered by the same Judge, the practice in relation to sales is in conformity with the conclusion to which we have arrived. There the Marshal, the executive officer of the Court, is always the agent through which they are made.

We have taken a more extensive view of the subject than the particular case probably required. This course has been pursued because the counsel on both sides deemed a judgment of this Court desirable, on one of the grounds taken, that the practice of the Circuit Courts in regard to sales might be uniform. We are obliged, however, to affirm the judgment of the Court below, for it had the right to designate any fit and proper person to make the sale, and, therefore, might appoint the Clerk, as well as any other, on cause satisfactory to it.

Our judgment is, that where the Court intends the sale to be made by the proper officer, the Sheriff, and not the Clerk, is such officer. The judgment, however, of the Circuit Court in this case is affirmed, for the reasons stated.

WILLARD, A. J., concurred.

I S. C. *147

*ELIZA O'NEIL, Adm'x, v. MARIA T. McKEWN and Others.

(Columbia, April Term, 1869.)

[Payment \hookrightarrow 3.]

Congress has power, under the Constitution, to pass a law, making Treasury notes lawful money, and a legal tender in payment of debts payable in dollars and cents, whether such debts were contracted before or after the law was passed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 39; Dec. Dig. \hookrightarrow 3.]

[Payment \hookrightarrow 3.]

The "legal tender Acts" of Congress apply to debts contracted before the first of said Acts was passed.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 39; Dec. Dig. \hookrightarrow 3.]

Before Lesesne, Ch., at Charleston, March, 1867.

This was a bill to wind up the estate of Rev. P. O'Neil, deceased, under an order calling in creditors. The trustee of Mrs. Elizabeth Jones presented and proved a claim, by bond and mortgage, dated 12th November, 1859, the bond being conditioned for the payment of four thousand three hundred and thirty-three dollars and thirty-four cents, in two successive annual installments, the last of which fell due 12th November, 1861. The Master reported the amount due, March 11, 1867, to be \$5,047.86, to which should be added \$1,080.48, if the claimant was entitled to the premium on gold in United States currency, as it was contended he was entitled, and he submitted that question to the Court.

The following is the judgment of the Circuit Court:

LESENE, Ch. On reading Master Gray's report, dated March 11, 1867, and hearing Mr. Wilkinson, for the trustee of Mrs. Elizabeth Jones, and Mr. Phillips, for the plaintiff, and Mr. Brewster, Mr. Buist and Mr. Duryea, for creditors represented by them, it is ordered that Master Gray pay to the trustee of Mrs. Jones the cash part of the proceeds of sale of the property that was subject to the mortgage held by the said trustee, and hold the bonds of the purchaser subject to the further order of the Court. It is claimed that the trustee of Mrs. Jones is entitled to have his debt paid in the equivalent of gold in the United States currency, on the ground that the Act of Congress of March 3, 1863, Section 3, [U. S. Comp. St. 1913, § 6575], making United States notes a legal tender, was not intended to be retroactive, and, therefore, is inapplicable to this debt, which was contracted before its passage. The fund reserved will be more than sufficient to cover the residue of the debt, if this claim be allowed.

The question of the constitutionality of this Act—involving in it, also, as I remem-

ber, the question here made—is now before the Court of Errors. Having been argued once, and ordered to be re-argued, I mean to reserve my judgment in the premises until I

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shall have *had the benefit of the full argument expected. With this purpose, I will now sustain the Act of Congress on both points, without thereby committing myself with respect to my vote in the Court of Errors. And it is accordingly adjudged and decreed that the trustee of Mrs. Jones is only entitled to be paid the amount of his debt in the like amount of United States notes.

The claimant appealed, on the ground that the bond, having been made and become payable prior to the Act of Congress, passed in February, 1862, known as the "Legal Tender Act," should be paid in legal tender notes, with the difference of value in favor of gold added thereto.

Wilkinson & Gilchrist, for appellant.
Duryea & Buist, contra.

Oct. 9, 1869. The opinion of the Court was delivered by

WILLARD, A. J. This appeal is from an order establishing the right of a bond creditor of the intestate to assets, derived from the intestate estate. The Chancellor ruled that an installment on the bond that fell due November 12th, 1861, was subject, under the provisions of the Acts of Congress commonly known as the "Legal Tender Acts," to discharge by a payment in the Treasury notes of the United States, made a legal tender for the payment of debts. The bond was given before the war, and it is contended that, by the construction of the Acts in question, debts of that class are excepted from its operation, and can only be discharged in the currency prevailing at the time the obligation was incurred.

The counsel for the appellant, on the argument, made no question as to the constitutional power of Congress to pass the Acts, placing his case wholly upon what he claimed to be the true construction of the terms of the Act itself. It will, nevertheless, become necessary to look into the constitutional powers of Congress in relation to this subject, as a necessary element of the question of construction raised by the appeal.

This subject has been so often before the Courts, both Federal and State, and has been so ably stated in all its bearings, that it will only be necessary to state the conclusions bearing upon the question.

The contract to pay in lawful money means such currency as shall be lawful at the time of its actual fulfillment. It is, therefore, made, by the act of the parties,

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to depend, as to the medium by *which it may be discharged, upon the laws which shall subsist at the time of payment.

The legal tender Acts, extending from 1862 to 1864, concur in placing the various issues of Treasury notes, made under this authority, on the same footing, as it regards their capacity as money to discharge debts. The terms employed are, that such issues shall be "lawful money, and a legal tender in payment of all debts, public and private, except duties on imports," and interest, in case of certain transactions with the United States. No other exceptions are stated. The declaration that these issues shall be "lawful money" fixes their legal character, and draws them within the terms of contracts calling for payment in lawful money.

Their applicability to the payment of debts is to "all debts, public and private, within the United States," except certain specified obligations, not embracing the debt in suit. The exceptions to be allowed to the general expression employed, being fixed in express terms, it is not within the province of legal construction to seek to raise others by implication out of the spirit and policy of the Acts.

Unless it can be shown that Congress have no power to make Treasury notes a legal tender in payment of debts, the attempt to interpolate further exceptions must fail. It remains, therefore, only to examine the powers of Congress in the given case, under the Constitution.

A legal tender note is a contract, on the part of the Government, to pay its nominal value in coined dollars. Payment is not deferred by the terms of the promise, but results from the inability of the Government to satisfy it presently. It is not to be questioned that, if the legal tender note represented its nominal value in gold, to be drawn, at any moment, by the holder, it might be made a compulsory means of discharging contracts. If such is the case, the only reason that can be urged against the competency of the note, at the present time, for this purpose, is that the Government is unable to make specie payments, thus making the validity of laws, and the constitutional powers of Congress, to depend on the solvency of the Treasury, rather than on the terms of the Constitution.

It thus appears that the legal tender currency is based upon the gold and silver coinage of the country created under the power granted by the Constitution of the United States, (Art. I, Sec. 8,) "to coin money, and regulate the value thereof;" and the obligation expressed on the face of the note cannot

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be satisfied otherwise *than by payment of its nominal value in the coinage of the country, except with the consent of the holder.

But two things are observed in the relation of the Treasury note to the debt it discharges: First, the creditor is compelled to surrender a demand against his debtor for one against the Government; and, second, that the obligation of the Government is not

immediately collectable or otherwise convertible into coin to its nominal value.

The authority of Congress to enforce such an exchange of obligations is derived from two sources: First, from the grant to it of supreme legislative power in all matters of national concern; second, from its connection with certain special subjects of legislation, placed by the Constitution within the legislative province of Congress.

The propositions that are to be sustained from the sources of authority are: First, that Congress may communicate to the national obligation the characteristics of a legal currency, so as to discharge contracts, soluble in "lawful money," generally; second, that this may be done when, from the circumstances of the Treasury, the transaction amounts to a forced loan.

All necessary and usual powers of Government, not denied in express terms, or by necessary construction, by the Constitution, must be deemed vested in either the National Government or in the States, severally. The power of making the obligations of the Government a legal tender is inhibited to the States, (Art. 1, Sec. 8,) who are prohibited from making anything but gold and silver lawful tender; therefore, if the power under consideration is vested at all, it must reside in the National Legislature. That this power is not prohibited by the Constitution need only be stated. The power of making its own obligations a legal tender is a necessary and usual power of Government. The historic proofs on which this proposition rests are too widely known to need repetition. It is indispensable in the exigencies that occur to national finance, and from which no country, and no known condition of civilization, is exempt. It is especially important as a means of employing the national credit when the public burdens over-tax the ordinary sources of revenue.

The Constitution of the United States has not left this power to be inferred upon such general grounds, but has imposed duties and conferred powers with which it is inseparably connected. It is not necessary to place this source of authority in the grant of power

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*to "coin money" alone. The powers of Congress extend to levying and collecting taxes, duties, imports and excises, and to paying the debts, and providing for the common defence and general welfare, and to borrowing money on the credit of the United States.

Without power to regulate the currency of the country, by giving validity to public obligations, one of the most important means of attaining the objects thus set forth by the Constitution would be withheld from Congress. This power can only disappear from the category of legislative powers by a suitable expression of the sovereign will.

The power "to regulate commerce among the several States" involves, from its na-

ture, the necessity of regulating the currency. The regulation of commerce, whether regarded in reference to the relations of States or individuals, must begin with, and rest upon, a legal ascertainment of values. Not only the standards to be applied to intrinsic values must be fixed, but the proper representatives of such values, in the absence of coin, must be determined upon.

The proposition that the Government is at liberty to employ this power as a means of making its credit available to aid the Treasury, must rest mainly upon its authority to raise money by taxation or borrowing.—*Hylton v. United States*, 3 Dall., 171 [1 L. Ed. 556]. Any available means of attaining this end, falling within the general scope of legislative powers, and not inconsistent with the limitations of the powers of Congress, imposed by the Constitution, may be employed for this purpose. As to the necessity and appropriateness of such means, Congress is the judge, under its political responsibilities, so long as the power is actually exercised for a purpose intended by the Constitution. By the same right that the Government may require a citizen to contribute his property as an aid, it may demand that he shall give it a credit. Such is the effect, and the only effect, as bearing on the present question, of the making of a Treasury note a legal tender, in view of the condition of the national Treasury.

Bronson v. Rodes, (7 Wal., 229 [19 L. Ed. 141].) and *Butler v. Horwitz*, (7 Wal., 258 [19 L. Ed. 149].) decided in the Supreme Court of the United States, (Am. Law, Rev., April, 1869,) are inapplicable to the present case, as the contracts in those cases were, by their terms, to be discharged only by a particular description of money.

There is no just reason for doubting the

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authority of Congress to "enact the provisions of the "Legal Tender Acts," as it regards antecedent debts; and, therefore, no ground exists to construe these Acts as inapplicable to the case under consideration.

The appeal must be dismissed.

MOSES, C. J., concurred.

I S. C. 152

W. H. GILLILAND and Others v. JOHN E. PHILLIPS and Others.

(Columbia, April Term, 1869.)

[Constitutional Law ⚡156.]

An Act of 1830 repealed the clauses of the then existing statute declaring usurious contracts to be void and of no effect, and imposing penalties upon the lenders, and provided that every person lending "money upon unlawful interest shall be allowed to recover" the amount actually lent, which amount, "without any interest, shall be deemed and taken by the Courts to be the true legal debt or measure of damages," "to be recovered without costs;" and by

an Act of 1866, "all Acts and parts of Acts limiting the rate of interest recoverable upon contracts for the use of money," were repealed: *Held*, In an action upon a bond, at usurious interest, given in 1860, when the Act of 1830 was of force, that the lender was not entitled to recover more than the amount actually lent, without interest.

[Ed. Note.—Cited in *Hardin v. Trimmier*, 27 S. C. 120, 3 S. E. 46.]

For other cases, see Constitutional Law, Cent. Dig. § 432; Dec. Dig. ⚡156.]

[Contracts ⚡144.]

The Act of 1830 did not impose a penalty, nor was it of the *lex fori*. It was of the *lex contractus*, and became part of the contract itself, avoiding all that was expressed or implied therein relative to interest, and making it a contract for payment of the sum actually lent, without interest.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 724; Dec. Dig. ⚡144.]

[Statutes ⚡273.]

A contract forbidden by statute, either expressly or by implication, cannot be enforced by the Courts, nor does it make any difference, in this respect, that since the contract was made the statute has been repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 365; Dec. Dig. ⚡273.]

[Constitutional Law ⚡190.]

An Act of the Legislature, purporting to operate retroactively upon contracts, so as to add to or diminish the rights of the parties thereto, is void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 531-533; Dec. Dig. ⚡190.]

[Usury ⚡12.]

A lender of money, at usurious interest, cannot be relieved from the legal consequences of the usury, on the ground that at the time he loaned the money contracts similar to his were quite common, and were regarded as legal, and he so regarded his.

[Ed. Note.—Cited in *Carolina Savings Bank v. Parrott*, 30 S. C. 68, 8 S. E. 199; *Loan & Exchange Bank v. Miller*, 39 S. C. 196, 17 S. E. 592; *Mitchell v. Bailey*, 57 S. C. 345, 35 S. E. 581.]

For other cases, see Usury, Cent. Dig. §§ 23, 24, 146; Dec. Dig. ⚡12.]

Before Glover, J., at Charleston, June Term, 1868.

The report of His Honor the presiding Judge is as follows:

"This action was brought on the joint and several bond of the defendants, executed on the 10th September, 1860, to the plaintiffs, as trustees of the Savings Building and Loan Association, which was incorporated after said bond was given.

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"One of the plaintiffs died after the suit had been instituted. I instructed the jury that the action was properly brought in the names of the trustees, and that the death of one of them, as related, did not cause an abatement. There was no proof on the trial that the consideration moneys from the Building and Loan Association to the defendants was the purchase of negroes, but that the defendant, Phillips, obtained for his bond moneys which he applied to the purchase of

negroes, and I instructed the jury that the case did not come within the Ordinance referred to in the third ground of appeal. It was admitted that the contract was usurious at the time it was made, and it was contended, by the defendants, that the contract, having been made before the repeal of the usury law, was subject to the provisions of that law: and the plaintiffs urged that the repeal of the usury law related back to their contract, and remitted the penalty which, under the usury law, would have attached to it. On this point, I instructed the jury to find in accordance with the views presented by the defendants. The jury found for the plaintiffs an amount which represented their demand, less the deductions to be made in pursuance of the provisions of the usury law."

The plaintiff appealed, and now moved this Court for a new trial, upon the following grounds:

1. That the Act of 1866, having repealed all Acts and parts of Acts limiting the rate of interest recoverable upon contracts for the hiring, lending or use of money, the plaintiff was entitled to recover the full amount loaned to the defendants, with interest at seven per cent., and costs of suit.

2. That, to constitute usury, there must be a corrupt and wilful intent to violate the statute fixing the legal rate of interest.—*Mortimer v. Prichard*, Bañ. Eq. 505. In this case it is submitted that, though the contract sued upon has been held usurious in the recent case of *Association v. Bollinger*, (12 Rich. Eq., 124 [78 Am. Dec. 463]), yet as, at the time it was made, such contracts were regarded as legal, and the plaintiffs had, therefore, manifestly acted without a corrupt and wilful intent to violate the statute, and under a mistake of law, they were entitled to be relieved against the consequences of the stipulation.

Pressley, Lord & Inglesby, for appellant.
Magrath & Lowndes, contra.

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*Oct. 9, 1869. The opinion of the Court was delivered by

MOSES, C. J. The plaintiffs rest their first ground of appeal on the following positions:

First, that the act of 1777, as modified by the first Section of the Act of 1830, avoids the contract only as to the excessive interest, leaving it valid and binding as to the principal and legal interest.

Second, That the second Section of the Act of 1830 did not regulate the *lex contractus*, but the *lex fori*, and, therefore, could, at any time, be repealed by the Legislature, both as to past and future contracts.

Third, That the said second Section imposed a penalty for the violation of the usury laws.

Fourth, That the Act of 1830, imposing this penalty, having been repealed by the

Act of 1866, the penalty can no longer be enforced.

Hence, they conclude they were entitled to recover the amount loaned, with interest at the rate of 7 per cent. per annum.

While the Act of 1830 (6 Stat. at Large, 409.) repeals so much of that of 1777, (4 Stat. at Large, 363,) as makes utterly void and of no effect all bonds, specialties, contracts, promises and assurances whatsoever, which reserve interest above the rate of 7 per cent. per annum, and removes the forfeiture consequent upon such reservation, it expressly enacts that every person lending money, or other commodity, upon unlawful interest, shall be allowed to recover the amount actually lent and advanced, and that the principal sum so lent or advanced, without any interest, shall be deemed and taken to be the true legal debt, or measure of damages to be recovered without costs.

Against this plain and express provision, it is sought to set up this bond, executed in 1859, on which more than legal interest was stipulated to be paid, because, as contended by the fourth position taken, it was but the imposition of a penalty, and the Act of 1866 (13 Stat. at Large, 463,) having repealed it, the penalty cannot be enforced.

It is a principle of law, which will not be disputed, that no contract forbidden by the express words of a statute, or by implication prohibited, can be enforced in any Court.—*Smith on Contracts*, 144.

The Act of 1830 restricts the recovery to the principal sum alone, and it was in view of it that the parties must be supposed to have contracted. The liability of the defend-

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ant, and the extent of the *plaintiff's recovery, must be regulated with reference to the laws in existence at the time of the contract. Any other rule of interpretation would conflict with the principles which require effect to be given to the obligation according to the intention of the parties, having relation to the law which prevails when it is entered into.

At the date of the bond the Act of 1830 was of force. If, as contended, the Act of 1866 operated to enlarge the sum to be deemed and taken as the "true legal debt," notwithstanding the plea, then the obligation of the contract would be actually impaired.

It is urged that "the Act of 1777, as modified by the first Section of that of 1830, avoids the contract only as to the excessive interest, leaving it valid and binding as to the principal and legal interest."

Is that, however, the legitimate effect of the Act? Is it binding, as to the legal interest, when it is declared, in express words, that "the principal sum, amount or value, without any legal interest, shall be deemed and taken by the Courts to be the true legal debt, or measure of damages, to all intents and purposes whatsoever?" The contract, no

matter on what usurious interest founded, stands only of force for the principal sum.

What can be left for implied construction, under the Act of 1866, to revive the contract to the whole extent of the principal and legal interest, when the Act, existing when it was made, declares that it shall only stand good for the principal sum loaned? If the Legislature, in 1866, had declared that this very bond should be set up for the amount advanced, and all the accruing interest, it would have been powerless to vary, or in any way modify, the incidents and consequences which attached to it under the Act of 1830. Whatever were the rights of the respective parties under the contract, either at common law or by virtue of any statute which could act upon them, such rights were vested, and no subsequent action of the Legislature could add to or diminish them.

How can the Act of 1866 extend the interests of the plaintiffs beyond those to which they were entitled at the inception of the contract?

The repeal of the prohibitory Act does not make valid a contract entered into in violation of the Act repealed.—*Milne v. Huber*, 3 McLean, 212 [Fed. Cas. No. 9,617].

Chief Justice Marshall, in *The United States v. Schooner Peggy*, 1 Cranch, 110 [2 L. Ed. 49], says: "It is true that in mere private

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cases between *individuals a Court will, and ought to, struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."

In our judgment, the opinion in the case of *Magwood v. Duggan*, 1 Hill, 182, sustains the conclusion we have arrived at. There it was held that the Act of 1830, repealing certain clauses of the Act of 1777, and confirming an usurious contract, to the extent of the principal sum, could not give vitality to such an agreement executed before 1830.

The reasoning of the Court affirms the propositions we have relied on to show that the contract must stand by the law [in] of force when it is made. The contract, under the Act of 1777, imposed no obligation on the defendant, when it was entered into. The contract, however, under the Act of 1830, did impose an obligation to pay the principal sum.

The second Section of the Act of 1830 did not regulate the *lex fori*, but the *lex contractus*. It was of the essence of the contract that, as to the matter of usury, the plaintiff should, notwithstanding, collect the principal sum loaned or advanced. As was said in *Magwood v. Duggan*, "the *lex fori* regulates the mode of proceeding in the Court; the *lex contractus* directly affects the contract itself."

As to the second ground, the question be-

fore the Court and jury was, whether the bond was usurious. The jury, we are to conclude, found that more than 7 per cent. per annum was reserved, and upon this the legal consequence followed.

What was offered in evidence but the bond?

There is no doubt, as is said in 3 *Parsons on Contracts*, 128, that if a contract is accidentally usurious, or made so by some error in fact, against the intention of the parties, the mistake may be corrected, and the contract saved. It was upon this principle that the Court ruled in *Glasford v. Laing*, 1 Camp, 149. Mistake is a matter capable of proof.

In *Thompson v. Nesbit*, 2 Rich., 73, the Court held that no proof of a corrupt agreement is necessary, for the contract may be usurious, though the parties did not know that it was against the law.

In *Hammett v. Tea*, 1 Bos. and Pull., 151, C. J. Eyre said: "Whether more than lawful interest is intentionally taken, is a mere question of fact for the jury, and must always be collected from the whole of the transac-

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tion, as it passes, between the parties." *We are not informed by the report, whether this question was presented to the jury, and passed upon by them. If it was not, the omission was the fault of the party now making it; if it was, the finding is conclusive as to the intent.

Mortimer v. Pritchard, Bail. Eq., 505, relied on by the plaintiffs, was a case in Equity. There were doubts, with some members of the Court, whether the contract was usurious. The decision was put upon the ground that, if it was, the facts submitted prove, "palpably, that the parties acted upon a mistake of the law, and not with a corrupt and wilful intent to violate the statute."

Here it is claimed that, though the contract is usurious, yet, until lately, such agreements were not so regarded. It is said by counsel that hundreds of associations, similar to those organized by the plaintiffs, had been engaged in the business of lending money upon bonds identical with the one under consideration.

It might have been added, too, that, as soon as the question was made in the Courts, they were declared usurious. Men may enter into any agreements they please, and as between themselves, may either respect or disregard them. When, however, they are submitted to the Courts for adjudication, they must be tested and governed by the law.

The grounds of appeal, of which notice was given by the defendants, were abandoned at the hearing.

The motion of the plaintiffs is dismissed.

WILLARD, A. J., concurred.

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***JAMES T. CAMPBELL v. THE HOME INSURANCE COMPANY.**

(Columbia. April Term, 1869.)

[Evidence \hookrightarrow 162.]

11., a corporation chartered by, and having its principal place of business in, New York, issued in South Carolina, through its agency there, to C., a citizen and resident of South Carolina, a fire policy of insurance on property in Charleston. A loss, within the terms of the policy, occurred in November, 1857, and the amount thereof was adjusted, by compromise, on 1st April, 1858. In January, 1858, two creditors of C., residing in New York, commenced actions against him, in that State, under the New York Code of Procedure, and sued out warrants of attachment against his property. C. was not made a party in either action by personal service in New York, but was made a party, as the Code directs, in one case, by publication of the summons, and in the other, by personal service thereof in South Carolina. C. did not appear in either action, and judgments therein were entered against him, in the usual course of procedure, according to the New York practice. In this action, in South Carolina, by C. against H., to recover the amount of the loss, the defence was, payment to the Sheriff in New York, after a seizure of the debt by him under the warrants of attachment; and, to sustain the defence, exemplifications of the records in the action and of the warrants of attachment were produced, but the returns to the warrants did not show that any levy of the debt, or other property of C., was made, nor did the fact of payment appear anywhere in the proceedings:

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 536-542; Dec. Dig. \hookrightarrow 162.]

Held, That it was competent for H. to prove, by parol, that the warrants of attachment were levied by the Sheriff on the debt, and that H. paid it to the Sheriff, under the levies, after executions on the judgments had been entered with the Sheriff:

[Attachment \hookrightarrow 63.]

Held, further, That the debt due by H. to C., under the policy of insurance, was liable, under the laws of New York, to seizure, in the hands of H., under a warrant of attachment against the property of C., and that it made no difference, in this respect, that the preliminary proofs, required by the conditions of the policy, had not been furnished when the seizure was made.

[Ed. Note.—Cited in *Ex parte Perry Stove Co.*, 43 S. C. 186, 20 S. E. 980.

For other cases, see Attachment, Cent. Dig. § 167; Dec. Dig. \hookrightarrow 63.]

[Judgment \hookrightarrow 822.]

The sovereign jurisdiction of a State includes the power to appropriate debts due by its citizens to non-residents, to the payment of debts due by such non-residents to other citizens of the State, and to prescribe the remedial means, or judicial proceedings, by which such appropriations may be made: and when the proceedings in an action for that purpose are in conformity to the laws of the State, they are final and conclusive upon the non-resident so far as the fund itself is concerned, though he was not served with process, and did not appear in the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. \hookrightarrow 822.]

[Evidence \hookrightarrow 347.]

Sec. 1 of Article IV of the Constitution of the United States, declaring that full faith and

credit shall be given in each State to the "records and judicial proceedings of every other State," and that Congress may prescribe the manner in which such records and proceedings shall be proved, and the effect thereof, embraces two classes of cases: (1) Records; and, (2) Judicial proceedings not of record; and, Congress having omitted to prescribe the manner in which proceedings of the second class shall be authenticated, they may be proved by parol, according to the common law rules of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1369; Dec. Dig. \hookrightarrow 347.]

[Evidence \hookrightarrow 162.]

Where a judicial proceeding, though consisting chiefly of matter of record, yet contains matters which rest in parol, so much thereof as is matter of record can only be proved by the record or an authenticated copy; but so much thereof as rests in parol may be proved by oral evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 536-542; Dec. Dig. \hookrightarrow 162.]

[Attachment \hookrightarrow 175; Evidence \hookrightarrow 162.]

Under the New York Code of Procedure, a warrant of attachment is merely an accessory or incident of the action. If not returned before judgment, it is merged in the execution. The fact of a levy or seizure under it is not jurisdictional. And the practice further stated and reviewed, and the conclusion reached, that the facts of levy or seizure by the Sheriff, under

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the warrant, *and of payment under the levy, or seizure after execution lodged with the Sheriff, are matters resting in parol, which may be proved by evidence aliunde.

[Ed. Note.—Cited in *Allen v. Partlow*, 3 S. C. 418; *Williamson v. Eastern B. & L. Ass'n*, 54 S. C. 597, 598, 32 S. E. 765, 71 Am. St. Rep. 822.

For other cases, see Attachment, Cent. Dig. §§ 518-523; Dec. Dig. \hookrightarrow 175; Evidence, Cent. Dig. §§ 536-542; Dec. Dig. \hookrightarrow 162.]

[Judgment \hookrightarrow 824.]

A proceeding against an absent debtor by action and attachment, under the New York Code of Procedure, is entitled, under the Constitution of the United States, to full faith and credit in every other State.

[Ed. Note.—Cited in *Mars v. Virginia Home Ins. Co.*, 17 S. C. 519.

For other cases, see Judgment, Cent. Dig. §§ 1449, 1450; Dec. Dig. \hookrightarrow 824.]

Before Glover, J., at Charleston, June Term, 1868.

This was an action on a policy of insurance against fire, dated May 27, 1857, and issued by the defendant to the plaintiff, in Charleston, South Carolina, on property in that city. The defendant is a corporation, created under the laws of New York, and having its principal place of business in the city of New York, but having, in the years 1857 and 1858, an agency in Charleston, by which the policy was granted. The plaintiff, in those years, was a citizen and resident of South Carolina.

The loss occurred in November, 1857. The amount claimed by the plaintiff was \$2,000, but it was fixed, by a compromise made 1st April, 1858, in Charleston, at \$1,600. This action was commenced October 2, 1858, to recover that sum and interest.

The defence was, that the debt due by the defendant to the plaintiff, for which the action was brought, was seized in New York, in the hands of the defendant, in January, 1858, under two warrants of attachment, issued in that State, against the plaintiff, and that, in May, 1858, the defendant paid the debt, under the seizure, to the Sheriff, who had made it.

The plaintiff having proved his case, the defendant, to sustain its defence, produced, in evidence, the exemplifications of two records in the Supreme Court of the City and County of New York. These were actions under the New York Code of Procedure against the plaintiff—one by Dennis Carolin and James A. Carolin, and the other by Charles Nourse. They were commenced by summons, dated January 20, 1858, and were for money demands on contracts. The summons, in Carolins' case, was served by publication, and that in Nourse's case, by personal service, on the plaintiff, in Charleston, South Carolina, on 3d March, 1858. Judgments were entered about 1st May, 1858, and the proceedings in both actions were regular, according to the provisions of the New York Code of Procedure in cases of absent defendants having property within the State. The defendant also produced, in evidence, the exemplifications of two warrants of attachment against the property of the plaintiff, issued in the same cases, and dated

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January 21st, 1859. *These warrants were directed to the Sheriff of the City and County of New York; they were marked as "Received, January 21, 1858," by the Sheriff, and his return to each was as follows: "Merged in judgment, and execution issued May 3d, 1858: J. C. Willett, Sheriff."

The defendant then offered in evidence the depositions, taken by commission, of Frederick L. Vultee, to prove that he, the witness, was the Deputy Sheriff, in whose hands the warrants of attachment were placed; that on 21st January, 1858, he levied both warrants on the debt due by defendant to plaintiff; that executions on the judgments were entered in the Sheriff's office, on the 3d May, 1858; that on the 25th May, 1858, the defendant paid to the Sheriff \$1,597.89, the aggregate amount of the executions, inclusive of interest and Sheriff's fees; and that the executions were thereupon marked "Satisfied: J. C. Willett." The depositions of other witnesses, to prove the seizure under the warrants and payment to the Sheriff, were also offered by defendant. His Honor, for the reason stated in his report, excluded this evidence.

The defendant also offered in evidence depositions, taken by commission, of attorneys and counsellors of the New York Courts, to prove, generally, what was the law of New York and the practice of the Courts of that State, in reference to proceedings by

attachment; and, specifically, that the Supreme Court of the City and County of New York was a Court of Record, having general original jurisdiction in cases of attachment; and that the proceedings in the cases of Carolinus and Nourse, against the plaintiff, were regular, and in conformity to the directions of the New York Code of Procedure. The substance of this evidence is recited in the judgment of the Court.

It was proved that Dennis Carolin, James A. Carolin, and Charles Nourse, were citizens and residents of New York, in the year 1858.

The report of His Honor the presiding Judge is as follows:

"This action was commenced October 2, 1858, on a policy of insurance, to recover for a loss by fire. The policy is dated May 27, 1857. The fire occurred November, 1857, and an adjustment or compromise was effected April 1, 1858; and April 6, 1858, James H. Taylor, defendants' agent, informed them of the compromise. The defendants did business in New York, where Carolin and Nourse, it was alleged, issued an attachment, January, 1858, against plaintiff, and served copies on the defendants, as garnishees;

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that *judgment was rendered on this attachment, and that the same was satisfied by payment to the Sheriff of New York. The liability of defendants was not denied, but the defence relied upon was, that the amount paid on the attachment in New York, in which defendants were garnishees, should be allowed to the extent of said payment in satisfaction of plaintiff's claim. Volumes of evidence, and the statute law of New York, together with the opinions of juriconsults, were offered: but it will be necessary only briefly to refer to either, and only so far as the grounds of appeal may render it necessary.

"The defendant offered in evidence an exemplification of judgment in attachment rendered in New York against them as garnishees. I was of opinion that the exemplification did not show a valid judgment, as it did not appear that defendants were made parties to the proceedings by the service of warrants of attachment on them; and I held that evidence aliunde was inadmissible to prove the fact of service; and the jury, under my instruction on this point, found for the plaintiff. If, in this, there was error, a new trial should be granted. It appeared to me that the force and effect of a judgment of a Court of another State, either as the foundation of an action, or as evidence, must be judged of by the inspection of the proceedings; and, if it appears that the defendant was not made a party for want of service, or that the Court had no jurisdiction of the person or the cause, the judgment possesses no validity, and that parol evidence, to show service or jurisdiction, is inadmissible

(*Miller v. Miller*, 1 Bail., 242.) If the exemplification does not show service, it would be dangerous in practice to allow a party to supply the omission by parol evidence. To a plea of nul tiel record, the only reply is the record, with a prayer that it be inspected, and evidence to supply defects is not admissible.

"In the progress of the trial, evidence was admitted in proof of the service; but the effect of it was not perceived until the exemplification was discussed and the point was made.

"The plaintiff's counsel had commenced to state the points which he intended to make and argue, and the law upon which he relied; but, after some conversation with defendants' counsel, he said that he did so from courtesy, and did not acknowledge the right of defendants' counsel to compel the statements. I am not advised of any rule which enforces such a duty. It is very seldom that counsel, entitled to the reply, refuses to state his points and authorities, and, as a courtesy, is better in the observance than the breach."

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*The defendant appealed, and now moved this Court for a new trial on the grounds:

1. Because His Honor charged the jury that the exemplifications of the judgments, not containing within themselves proof of the service of the warrants of attachment, the defect could not be supplied by parol proof of the fact of such service, and that they should not regard such proof, although he had admitted, as competent, proof of such service to be introduced and to go to the jury.

2. Because His Honor excluded all the material testimony sought from the juriconsults examined, as to what was the law of New York on the subject of attachments and proceedings therein, and in relation to the practice of the Courts.

3. Because, although it was proved—and allowed by the Judge in proof—by the evidence of Mr. Vanderpool and Mr. Davidson, in answer to one of the interrogatories, as follows, to wit: "That there is usually a return made by the Sheriff serving the order of attachment. It is made at any stage of the proceedings which may suit the convenience of the officer, or any of the parties. In practice but little attention is paid to the making of this return, a compliance with the statute in this respect not being regarded as jurisdictional, and a non-compliance being regarded and treated as an irregularity merely:" yet His Honor refused to charge the jury that they might regard that opinion, and be governed by it, as proof of the construction of the law, and of practice in such cases, in New York.

4. That Messrs. Vanderpool and Davidson proved that, although the service of the attachment on the defendants did not appear

in the exemplification, yet, in their opinion of the law of New York, if it could be proved aliunde, the liability of the defendant was complete; and yet the Judge excluded their testimony, and, furthermore, excluded the proof by the Deputy Sheriff, who served the warrants, of the service actually made by himself.

5. Because the Judge ruled that the plaintiff's counsel, who had the right, in the state of the pleadings, to open and reply in argument, was not bound to state the points he intended to make in his argument, and give the law relied on to sustain them, but might reserve such statement of points and authorities until he came to reply to the argument of the defendants' counsel.

Simons & Simons, for appellant.
Wilkinson & Gilchrist, contra.

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*The opinion of the Court was delivered by

WILLARD, A. J. The defendants appeal, and show the following state of facts: Plaintiff, a resident of South Carolina, sued on a policy of insurance issued by defendants, a foreign corporation created under the laws of the State of New York, and having their principal place of business in the city of New York, with an agency within this State. The property insured was within this State. A loss was established within the policy, and an adjustment, by compromise, effected April 1st, 1858. Previous to this adjustment, and in January, 1858, D. Carolin and James A. Carolin, claiming to be creditors of plaintiff, commenced an action against him in the Supreme Court of the State of New York, Campbell being absent from that State, and took out an attachment against his property within the City and County of New York. A similar suit and attachment proceeding was instituted in the same Court, and at or about the same time, by Charles Nourse, claiming, likewise, to be a creditor of Campbell. The plaintiffs in both attachment suits were residents of the State of New York. Judgments were obtained in the suits of Carolin and Nourse, respectively, and executions issued and satisfied out of money paid by the present defendants, and claimed by them to constitute a credit in their favor, as against the present plaintiff.

On the production, before the Circuit Court, of the exemplified proceedings in the New York suits, it appeared that Campbell was not personally served with process within the State of New York. Defendants undertook to establish a credit in their favor by proof of the attachments, and of a levy under them, and a payment, in pursuance thereof, of the sum in dispute. Exemplified records of the attachment proceedings were produced, distinct and separate from the proper judgment records in the suit in the

course of which the attachments were issued, following the practice of New York, as will be more fully explained hereafter. The return endorsed upon the attachments did not show that the funds due to Campbell had been seized in the hands of the present defendants, and they, accordingly, offered parol evidence, taken under a commission issued in this suit to the State of New York, of the fact of a levy upon the debt due from them to the present plaintiff, and the payment thereunder of the sum in dispute into the hands of the Sheriff of the City and County of New York. The plaintiff objected to parol evidence of these facts being admitted,

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contending that the fact of a levy and payment could only be made out by matter appearing of record, and that the introduction of proof aliunde was inadmissible. The Judge sustained the objection, holding "that the exemplification did not show a valid judgment, as it did not appear that defendants were made parties to the proceedings by the service of warrants of attachment on them," "and that evidence aliunde was inadmissible to prove the fact of service;" and the jury, under this instruction, found for the plaintiff.

The first, third and fourth grounds of appeal rest upon this instruction, and will be considered together.

The subject of controversy is a chose in action, a debt admitted as due by one domiciled within the State of New York to a citizen of South Carolina. The creditors of Campbell, being citizens of the State of New York, were entitled, by the laws of that State, to pursue the fund in question, in order to obtain satisfaction of their demands. So far as it concerned the appropriation of that specified fund, the sovereign jurisdiction of New York extended to the adjudication of all rights pertaining thereto as between the domestic creditors, the absent debtor and the holder of the fund, and, also, to the designation of the remedial means by which such appropriation should be effected.—Story *Confl. Laws*, § 549. The fund itself became, under the operation of the laws of New York, assets for the satisfaction of domestic debts, and, as such, was specifically amenable to the domestic jurisdiction.

According to principles of public law, especially recognized by South Carolina and New York, as well as under the operation of Art. IV, Sec. 1, of the Constitution of the United States, proceedings for the satisfaction of the New York creditors, out of funds within that State, if pursued in conformity to the authority of that State, were final and conclusive upon the debtor resident in South Carolina, although not served with process, and though he did not appear and defend therein. It is true that, in order to render the judgment obtained in New York operative in South Carolina, for the purpose of

further satisfaction here, it was necessary that it should operate in personam, which can only take place when the defendant has been subjected to the jurisdiction of the Court rendering the judgment, either by process served within its territorial jurisdiction or by the voluntary appearance of the defendant for the purpose of a general defence. Yet, as it is not sought, in the present suit, to employ the judgment for any other purpose than to evidence transactions fully com-

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pleted within the State of New York, it is unnecessary to consider what is due to render the proceedings in question binding in personam.

It follows, therefore, that we have only to consider the legal consequences and effects of the attachment proceedings under the laws of New York, and to give effect to Art. IV, Sec. 1, of the Constitution of the United States, by allowing the same effects and consequences within this State.

The language of the Constitution is as follows: "Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof."—Con. U. S., Art. IV, Sec. 1. Congress has exercised this authority to the extent of prescribing the mode in which records shall be authenticated, (Act 1790, 1 Stat., 122,) but has not defined the mode of proving such matters as rest in parol. Matters of record must be proved by the production of the record, or that which is made, by law, of equal import with the record itself, namely: a duly authenticated copy. Matters resting in parol must be proved by parol.

Judicial proceedings, which, from their nature, cannot be proved in the manner prescribed by the Act of Congress, are, nevertheless, in this State, held entitled to full faith and credit under the Constitution, and are to be proved in accordance with the rules of the common law. This was settled in *Lawrence v. Gaultney*, (Cheves, 7,) although, when the previous case of *Clark v. Parsons*, (Rice, 16,) was decided, the Court was not prepared to go so far. The judgment considered in *Lawrence v. Gaultney* was rendered by a Justice of the Peace of North Carolina, and, not emanating from a Court of Record, was not capable of being evidenced by that which, in strictness, was to be regarded as a record. This being determined in a case where it was sought to give the judgment effect in personam, is applicable, with still greater force, to a case where the only effect sought is that which ought to be allowed to a judgment in rem. It was evidently the intent of the Constitution, as expressed by the phrase "records and judicial proceedings," to include proceedings that

could not properly be described as "records," or, in other words, that could only be evidenced by matter of parol.

Having thus distinguished two classes of cases to which the Constitution relates, namely: proceedings capable of being wholly evidenced by matter of record, which ought

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to be authenticated in accordance with the Act of Congress, and proceedings which cannot be so evidenced, but are to be proven on the principles of the common law, there remains to be considered a class, embracing the case under consideration, where certain matters are susceptible of proof by means of an authenticated record, and others demand a different form of proof. It is obvious that the principles that have been stated as governing the two first named classes control the one last named. That which ought to be proven by matter of record cannot be evidenced by proof of less dignity, and that which cannot be so proved is to be evidenced in the best manner that the nature of the case will admit of.

The question, then, arises, whether the facts of a levy of the attachments and satisfaction by payment under it, ought to be evidenced by a record authenticated under the Act of Congress. This question depends wholly upon the laws of New York; for rules of evidence arise out of the nature of the thing evidenced, and that, in the present instance, is a proceeding, the creature of the laws of New York. Are these facts properly matters of record, under the laws of New York?

The attachments in question were taken under the Code of Procedure of that State. Their system of practice has materially modified the foreign attachment, as understood in this State, and as the same formerly existed in the State of New York. The attachment is not the initial process of a suit or proceeding, but is a remedial writ, issued in the course of an action at law, and accessory to it.—N. Y. Code of Procedure, Section 227. It is not the foundation of the record, nor the ground of jurisdiction, but an incident, and accessory merely. The action in the course of which the attachment issues is, in form and essence, a suit at law, in which the non-resident debtor is the only party defendant. The jurisdiction of the Court, so far as the laws of New York are concerned, depends upon proof of the non-residence of the defendant, coupled with the fact that he has property within the State. This proof is brought before the Court by affidavit, on a motion for an order of publication of the summons, the real initial process in the case. The order of publication may be executed, either by publishing the summons in certain public newspapers, and depositing a copy of the same in the post office, addressed to the defendant at his place of residence, and prepaying the postage, or, at the option or con-

venience of the plaintiff, by the actual service of the summons upon the defendant personally, though without the State. The for-

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mer course was pursued in Carolins' case, the latter in Nourse's case, the summons having been served on the defendant in Charleston. After due service is effected in the manner before stated, a complaint, the equivalent of a declaration, is filed, and unless the defendant appears and pleads to it in due time, a reference to ascertain the indebtedness of the defendant is ordered, as upon a default for want of answer, and, on the coming in of the referee's report, ascertaining a sum due, judgment is given against the defendant. Proof of the levying of an attachment is not necessary to authorize the entry of judgment. Execution is issued on this judgment, and satisfied out of property taken under the attachment, as well as out of all other property of the defendant found within the State.

The attachment is either issued at the same time with the summons or subsequently. It directs the Sheriff to seize and hold, subject to any judgment that may be recovered in the action, all property of the defendant within the County. Neither in the attachment, nor in the affidavit on which it issues, is there required to be any specification of what the property consists of, nor in whose hands held. It may be levied on any property of the defendant which the Sheriff may be able to find within his County. At no stage of the proceedings does the person holding the defendant's property appear in any character upon the record. He has no opportunity to plead and defend otherwise than in the name of the absent debtor. He cannot arrest the proceeding or dissolve the attachment otherwise than in the name of the defendant of record. The attachment may be levied on the choses in action of the non-resident, and, in such cases, is levied by delivering a copy thereof to the person owing such debt, who is bound, if the debt is acknowledged, to furnish the Sheriff with a certificate of the amount due.

If the debt is denied, the Sheriff is put to his action against the person alleged to be indebted to the non-resident debtor, in which action such person appears and defends, as to any right that he may possess, as against the Sheriff claiming in right of the attaching creditors. When the warrant of attachment is fully executed or discharged, the Sheriff is required to return it with his proceedings thereon.

It frequently happens that the attachment cannot be fully executed prior to the issuing of the execution. For, it is not only necessary to levy but to reduce to possession, in order fully to execute its mandate. If the person sought to be charged, under the attachment, contradicts the fact that he has

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property of, or is indebted to, the non-resident debtor, and an action has to be commenced, it is evident that the attachment may remain, in part, unexecuted at the issuing of final execution, especially when the non-resident makes no defence. It also may happen, as in the present case, that the Sheriff, after levying the attachment, suffers the property to remain in the hands of the person with whom it was found, having obtained constructive possession. In such case the attachment may remain, in part, unexecuted at the time the execution is deposited in the Sheriff's hands. The moment the execution is lodged the attachment is merged, the provisional process being displaced by the final, and the Sheriff proceeds to execute the judgment, and makes his return of execution accordingly. The attachment in the case supposed is returned as merged in the execution. This was the course of practice adopted by the Sheriff in the cases under consideration, and is, undoubtedly, conformable to the practice of that State. The attachment having been returned according to the fact, it is not easy to see what more could be demanded.

It seems to have been supposed by counsel that there was some jurisdictional necessity of having the fact of a seizure in the hands of the present defendants appear as matter of record. But this was evidently based upon the idea that the attachment, as existing under the New York Code of Procedure, was a special statute remedy, in derogation of the common law, subject to a strict rule of construction, and in which the jurisdiction of the Court depended upon a return showing property seized under the attachment. This is an entire misconception of the nature of the proceeding. The Supreme Court of New York is a Court of Record of general original jurisdiction, and the proceeding before it being an action in the ordinary form, all the intendments are to be allowed to that Court appropriate to cases in the usual course of law. The fact that the property in dispute was found in the hands of the present defendants, was not a fact at all material to be known as matter of record evidence between the parties to the attachment suits. The present defendants had no control over the record, and no means of placing on it any fact necessary for their protection, and it would violate the principles of justice to make their protection depend upon the existence of a record to which they are strangers. It follows, that the levy and payment of the amount in dispute could not properly appear as matter of record, and that, upon principles of the common law, should be shown by the best

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evidence the nature of the case admitted of, and that was the testimony of the officer who served the writ, and others cognizant

of the facts. The Circuit Judge erred in his instructions to the jury, inasmuch as he refused due weight to the parol testimony adduced by the defendants, relative to the facts of the levy of the attachment and the payment of the defendants of the sum in dispute thereunder.

Having considered the question of proofs raised by the rulings of the Circuit Judge, it remains to notice certain objections going to the validity of the attachment proceedings themselves.

The two principal objections are, in substance, as follows: First, that the subject of the attachments was not a debt due in the State of New York, but was a contract made in South Carolina, contingent and immature, and, therefore, not the subject of attachment proceedings in the former State; and, second, that the record produced does not disclose such a proceeding, by foreign attachment, as can be recognized in the Courts of this State.

The duty of enforcing obligations rests, primarily, on the Court having jurisdiction of the person bound by such obligations. The superior efficacy of the remedy, when the person of the defendant is actually subjected to the jurisdiction of the Court, instead of being reached, indirectly, by means of duress laid upon his property, and the manifest justice of putting a defendant to answer where a defence can, ordinarily, be most conveniently made, have ascribed to the forum of the domicile, or residence, of the defendant, a peculiar fitness to determine controversies to which he may be a party. This principle extends itself to corporate as well as natural persons; for, although their appearance is not strictly personal, still the means of compelling corporate action are most abundant in the country under whose laws the corporation has its legal existence. This right, though undoubted, is not, however, exclusive; as, under peculiar conditions, the Courts of States or countries other than that of the defendant's domicile, or residence, may acquire jurisdiction both of his property and his person. The same may be said of bodies corporate, though, from their intangible character, a personal jurisdiction cannot always be obtained out of the country under whose laws they exist. This defect is remedied by provisions of law, such as were referred to by counsel as existing in this State, in virtue of which certain foreign corporations are required, before being permitted to transact business here, to subject themselves to local regulations, by which, among other things, liability to be sued here is secured.—

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12 Stat., 563. *Such regulations have the effect to place natural persons and corporations on the same footing, in regard to liability to suit, outside the forum of their domicile. This casual liability to suit elsewhere has never created a doubt as to the right

and propriety of pursuing the debtor in that forum. The plaintiff had an undoubted right to prosecute the defendants in the Courts of New York, and, under the laws of that State, it was competent for his creditors to intervene, as the plaintiff himself might have intervened, to enforce such obligation, pro tanto, to the extent of satisfying their claims against him.

The cases cited in support of the objection under consideration, so far as it is based on the competency of the Courts of this State to enforce the obligations of the plaintiff's policy of insurance, go to this extent only; they hold that, for certain purposes, a corporation may be deemed present in a State foreign to that under which it holds its legal existence, so as to subject it to local laws and jurisdictions within such foreign State; but they do not sustain any proposition that will go to limit the forum of domicile in favor of the jurisdiction of such a foreign State.

In reference to the foregoing principles, it makes no difference whether the contract out of which the obligation springs was made at home or abroad. That circumstance may have an influence in shaping the obligation, but none in establishing any superiority of claim to jurisdiction in the country where it was made over the domicile of the contracting party.

The objection that the debt was not due, in consequence of the preliminary proofs not having been duly presented, is untenable. The clause of the policy, demanding preliminary proofs, was intended solely for the benefit of the insurer. The insured had no interest in the performance of that act sufficient to sustain a claim that he had been prejudiced by their waiving such proofs in behalf of his creditors. The cases cited to this point only show that the creditors had no right to compel a waiver of the condition of the contract in their favor; but leave the right of the garnishee to waive those conditions unquestioned.

The second objection is equally untenable. The duty imposed upon the Courts of this State to respect judicial transactions, happening within a competent foreign jurisdiction, does not depend upon any technical peculiarity of the remedy, known as a foreign attachment, but upon the terms of the Constitution of the United States, and in cases to which that instrument does not extend, on

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*the principles of international comity, the bond of civilized national society.

The well settled rule that, to give to a judgment extra territorial efficacy, it must have been pronounced by a Court having jurisdiction of the case, obtained either by personal service of the defendant within the jurisdiction of the Court, or by an actual seizure of his goods, is not in conflict with

the present position. That rule rests on a principle of natural justice, and is of vital, rather than of technical application. Had there been no actual seizure of the plaintiff's property to sustain, on the principles of international law, the claim of the Supreme Court of New York to jurisdiction of the cases, a question might have arisen under the rule just stated; but, in the present case, the property appears to have been actually attached in time to enable the plaintiff, or his agent in New York, to intervene in the suit for their protection. It is not, therefore, a case to apply a rule resting on abstract justice, and not on merely technical grounds.

Examining the second ground of appeal in connection with the report of the Circuit Judge, it is left in uncertainty what was the precise ruling in reference to the evidence obtained by the examination of counsel as to the laws of New York under the commission. It is not important, however, to look further into this part of the case, as the view previously presented disposes of the case.

The fifth ground of appeal is unaccompanied by any statement of facts showing that the result of the trial was injuriously affected by the alleged error in the decision of the Judge as to the duty of the plaintiff to disclose the grounds on which he rested his case. We cannot assume that any unfair practice existed on the part of the counsel for the plaintiff, nor that the Judge sanctioned any such course. The matter raised by this ground of appeal being, therefore, immaterial, will not be considered.


A new trial is ordered.

MOSES, C. J., concurred.

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*ROWENA MORRIS CLARKE and Others v.
J. PORTEOUS DEVEAUX and Others.

(Columbia. April Term, 1869.)

[Trusts  359.]

C. conveyed, by deeds, certain bonds to D., in trust, to pay the income to C. for life, for the maintenance and support of himself and wife, and the support and education of his children—neither corpus nor income to be liable for his debts—and to hold the corpus, after his death, upon certain limitations, for the benefit of his wife and children, with power in D. to receive payment of the bonds, and, from time to time, at the request of C., to sell the corpus, and make investments; and with power in C. to discharge D., with his consent, and substitute another trustee in his place. The bonds were collected by D., and invested in other securities; and, in 1863, C. executed an instrument, under seal, whereby, with D.'s consent, he discharged him from the trust, and substituted R. in his place; and, thereupon, D. accounted to R., and, leading him to believe that all the securities had been realized in Confederate money, transferred to him the corpus of the estate in that currency, taking from him a receipt ex-

pressed to be "in full for principal of said trust in his (D.'s) hands;" *Held*, That the wife and children of C. could maintain a bill in equity against D., C. and R., to compel D. to transfer to R., as trustee, certain of the securities, which had not been realized when he accounted to R., in 1863, and which he had fraudulently retained for his own benefit, they being, at the time, of much greater value than their amount in Confederate money; or to account for their value.

[Ed. Note.—Cited in *Koon v. Munro*, 11 S. C. 152.]

For other cases, see *Trusts*, Cent. Dig. § 565; Dec. Dig. ☞359.]

[*Trusts* ☞345.]

The interest of the wife and children of C. in the income was alone sufficient to entitle them to maintain the bill—semble.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 510; Dec. Dig. ☞345.]

[*Trusts* ☞345.]

Cestuis que trust, whose interests are future and contingent, may, upon sufficient ground, maintain a bill against the trustee and tenant for life to have their interests secured.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 510; Dec. Dig. ☞345.]

[*Powers* ☞25.]

The powers reserved to himself by C. did not make him the sole and absolute owner of the property; nor did the power to sell and invest affect the rights of the parties further than this, that, upon a sale under the power, the trusts attached upon the proceeds, and then upon investments when made.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. § 72; Dec. Dig. ☞25.]

[*Trusts* ☞13.]

A voluntary covenant to convey property in trust, will not be enforced in equity; but where the trust has been created by an actual transfer or conveyance, equity will protect the interests of the cestui que trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 11; Dec. Dig. ☞13.]

[*Trusts* ☞169.]

The wife and children of C. *held* not to be concluded by the instrument discharging D. from the trust, and substituting R. in his place, and the receipt in full given by R. to D. for the corpus of the trust estate.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 222-224; Dec. Dig. ☞169.]

[*Trusts* ☞296.]

A deed, executed under a power reserved in a trust discharging the trustee, and appointing another in his place, is not, of itself, a release of the discharged trustee from liability to account.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 415; Dec. Dig. ☞296.]

[*Payment* ☞74.]

A receipt is never conclusive when fraud or mistake is alleged against it; and even a release given upon a fraudulent consideration is void.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 226; Dec. Dig. ☞74.]

[*Equity* ☞345.]

The evidence reviewed, and the answer *held* to be contradicted by two witnesses and corroborating circumstances.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 715-724; Dec. Dig. ☞345.]

[*Trusts* ☞198.]

A trustee's purchase from himself will be set aside at the mere option of his cestui que

trust; and in no way can he advance his own interests at the expense of the latter.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 261; Dec. Dig. ☞198.]

[*Trusts* ☞336.]

It was not a fraud on D., under the circumstances, to retain the Confederate money he paid, and then, after it had become worthless, file a bill against him to compel him to transfer the securities.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 497; Dec. Dig. ☞336.]

[*Trusts* ☞365.]

The remedy *held* not to be barred by lapse of time.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 568-573; Dec. Dig. ☞365.]

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*Before Johnson, Ch., at Charleston, Fall Term, 1867.

This was a bill in equity, filed 29th September, 1866, by Rowena Morris Clarke, Charlotte Elizabeth Clarke and Mary Buist Clarke, plaintiffs, by their next friend, A. S. Johnston, against J. Porteous Deveaux, Frederick Richards and Joseph Pringle Clarke, defendants.

To the facts of the case, as stated in the Circuit decree and the opinion of the Supreme Court, it is only necessary to add here that the paper dated 28th October, 1863, a copy of which was filed with the answer of Deveaux as an exhibit, and which he relied upon as a release, was an instrument, under the hand and seal of the defendant, Clarke, whereby, after reciting the power of removal and substitution reserved to himself in the deeds of trust, he, with Deveaux's consent, discharged him from the trusts of the deeds, and appointed the defendant, Richards, trustee, in his place and stead; and that, after the Circuit decree had been filed, His Honor the Chancellor made a report, wherein he stated that his notes of evidence had been inadvertently destroyed, and certified that, on the trial of the case, "the Hon. J. B. Campbell, who was the attorney of J. Pringle Clarke when the settlement was made, and Frederick Richards, who was substituted as trustee in the place of Deveaux, were both sworn, and testified, substantially, that, from the representations made by Deveaux, at the time the settlement was made, they inferred that he had collected all the claims in action belonging to the trust estate, and that the estate consisted entirely in Confederate money."

The decree of His Honor the Chancellor was filed 27th November, 1868, and is as follows:

Johnson, Ch. On the 28th day of July, 1852, Joseph Pringle Clarke, the husband of Rowena Morris Clarke, and the father of Charlotte Elizabeth Clarke and Mary Buist Clarke, assigned and transferred to J. Porteous Deveaux a certain bond, conditioned for the payment of \$20,000, secured by a mortgage on a plantation and fifty-four ne-

gro slaves, in trust, that he should pay over the interest or income to the said Joseph Pringle Clarke, or permit and suffer him, for life, to receive the same for the maintenance and support of himself and his wife, Rowena, and for the support and education of any children which they then had, or which they might thereafter have, so that

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neither the premises settled, nor the *income thereof, should be in anywise liable for the debts of the said Joseph Pringle Clarke; and after the death of Joseph Pringle Clarke, if his wife should survive him, then in trust to permit and suffer her to receive the interest during her life—or widowhood, if she should marry again—for the support of herself and child or children; and after her death or marriage, whichever should happen first, then in trust as to the premises settled, for the absolute use of the child or children of the said Joseph Pringle Clarke and Rowena M. Clarke, at that time living, if more than one, share and share alike; the issue then living of any deceased child to take by representation the parent's share, the share to be paid to them respectively on attaining the age of twenty-one years; and, until then, so much of the interest or income as J. Porteous Deveaux might deem necessary, to be applied to their support and education; and the surplus, if any, to be invested and added to the capital of the settled estate. But should J. Pringle Clarke survive his wife, then in trust, from and after his death, for the absolute use of his child or children at that time living, share and share alike, if more than one; the issue then living of any deceased child to take by representation the parent's share, the share to be paid to them on attaining the age of twenty-one years; and, until then, so much of the interest as J. Porteous Deveaux might deem necessary to be applied to their support and education; and the surplus, if any, invested and added to the capital of the settled estate. And, in case all the children of Joseph Pringle Clarke should die under the age of twenty-one years, without leaving issue, and unmarried, then in trust for such person or persons, and to and upon such estate, as Joseph Pringle Clarke might thereafter appoint, or direct by deed or will. And, in case Rowena M. Clarke, and all her issue, should die in the lifetime of Joseph Pringle Clarke, then from and after the extinction of Rowena M. Clarke and her issue, in trust for the absolute use and behoof of Joseph Pringle Clarke, his executors, administrators and assigns.

In the deed of assignments it is provided that it should be lawful for J. Porteous Deveaux, or any future trustee to be appointed in pursuance of the terms of the deed, to receive payment of the securities settled; and, from time to time, at the written request of J. Pringle Clarke, to sell the same, or any property which might be purchased by virtue

of the power therein contained, and to invest as well the money to be so received in payment of the securities as the proceeds of such sales, with the written consent of Jos-

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eph *Pringle Clarke, in some other property, real or personal, subject to the same uses, powers and provisions therein expressed and declared, of the securities for the money settled. And, also, that if J. Porteous Deveaux, or any future trustee, should die, or be desirous to be discharged from the trusts created, it should be lawful for Joseph Pringle Clarke, by deed under his hand and seal, executed in the presence of two or more subscribing witnesses, to nominate and appoint some other person to be trustee, for the purposes aforesaid, in the place of J. Porteous Deveaux, or such other trustee as should die or desire to be discharged; and such new trustee, so appointed, should, from thenceforth be equally interested in the trusts expressed, and be invested with the same powers as the trustee so dying or becoming discharged had been.

On the 13th day of January, 1854, the said J. Pringle Clarke executed another deed, by which he conveyed to the said J. Porteous Deveaux two other bonds, amounting, in the aggregate, to over \$24,000, in trust; that he should hold the same, both as regarded the principal and interest, upon substantially the same trusts, limitations, conditions and provisions as were contained in the trust deed first executed, and which is, in effect, set out above.

J. Porteous Deveaux accepted the trust, and received into his possession the securities conveyed to him, and collected them, and invested the principal in the bonds of other persons. And upon making a showing of the securities which he had for the trust estate, on the first day of July, 1862, these were the securities, amongst others, which he exhibited as belonging to the trust estate, to wit: a bond of E. Witsell, conditioned for the payment of \$3,350; a bond of C. M. Furman, conditioned for the payment of \$4,000; a bond of I. K. Furman, conditioned for the payment of \$2,500; and a balance of \$5,500 of the corpus of the trust estate in the hands of the trustee.

On or about the 1st of November, 1863, Frederick Richards was substituted as trustee, under the deeds of settlement, in the place, room and stead of J. Porteous Deveaux, as provided for in said deeds, and, in a few days afterwards, a settlement was made between the said Richards and Deveaux, in which the latter gave the former a check on the Bank of the State of South Carolina for the sum of forty-five thousand one hundred and ninety-two dollars and seventy-eight cents, as constituting the entire principal of the trust estate; and the money was drawn from the bank in the Treasury notes of the Confederate States of America—because the

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bank was *then, and had for some time previously been, banking exclusively on such notes—and they have proved almost a total loss to the trust estate.

At the time this settlement was made, Joseph Pringle Clarke and Frederick Richards both supposed, from the information which they had received from J. Porteous Deveaux, that the whole trust estate had been actually collected in, and really consisted in Confederate Treasury notes; but, since the close of the late war, it was ascertained that the bonds of E. Witsell, C. M. Furman and I. K. Furman, were still unpaid, and in the hands of J. Porteous Deveaux.

The bill prays that the three bonds which, together, are conditioned for the payment of nine thousand eight hundred and fifty dollars, be produced and transferred to Frederick Richards, as a part of the trust estate; or, if either of them has since been collected, that he do pay over to the new trustee the proceeds, with interest on the same from the time it was collected; and, also, that he shall make good and pay any amount which he, or the firm of Deveaux & Heyward, owed the trust estate at the time of the settlement.

For any amount of money which the trustee, Deveaux, had on hand at the time of the settlement, I do not think that he can now be made liable for the same, for it was inferred, from what he said at the time, that he had the whole amount of the trust estate on hand, and, acting upon that information, Confederate money was received in payment.

The evidence before the Court is, that private bonds, well secured by mortgages on real estate, as were all of the three above mentioned, were worth, in Charleston, in November, 1863, a high premium; and two of the witnesses concur in the fact that they would have sold at a premium of five hundred per cent. Can such a transaction be protected in this Court, where trustees are required to deal with open hands—to make no profit out of the trust estate, except such as the law gives them? The trustee was cautious to protect himself by the mere forms of law, but this Court cannot sanction such a transaction.

It is ordered and decreed, that J. Porteous Deveaux do produce and transfer to Frederick Richards the bond of E. Witsell for \$3,350, the bond of C. M. Furman for \$4,000, and the bond of I. K. Furman for \$2,500; and if either of them, or any portion of them, has been collected by the said Deveaux, since

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said settlement was *made, that he do account to the said Richards for the same, with interest.

It is also ordered and decreed, that it be referred to Master Gray to ascertain and report what payments have been made on said bonds since the first of November, 1863, if any; and also that he have leave to report any special matter.

It is also ordered and decreed, that J. Porteous Deveaux do pay the costs of these proceedings.

It is also ordered and decreed, that further orders may be taken at the foot of this decree.

Jno. Porteous Deveaux, executor of the last will of J. Porteous Deveaux, the defendant, who died after the argument, but before the decree was filed, appealed on behalf of his testator, and now moved this Court to reverse the decree, on the grounds:

1st. Because the bill, as to Deveaux, is a bill for discovery and relief, while, as to the other defendants, it is simply a bill for discovery; but the Chancellor has not only not given Deveaux the benefit of his answer, but has evidently used the other answer, contrary to all rule and reason, as evidence against Deveaux, though it was perfectly competent for the complainants to examine the defendants as witnesses.

2d. Because Deveaux's answer, denying the fact of fraud or misrepresentation charged in the bill, and to which he is specially interrogated, is conclusive, unless contradicted by two witnesses, or one witness and strong corroborating circumstances; that this was done does not appear from his Honor's recollection of the testimony, even if that be accurate, which is not admitted.

3d. Because there is no complainant before the Court who has any interest, either vested or contingent, in the subject of the suit, except Clarke, the defendant: no one has the least interest until his death; while, by the several powers reserved to himself, he may, at any time, change, destroy, or convert to his own use, the whole or any part of the trust estate; he is, therefore, still the owner, and the sole and absolute owner, of the whole property included in the said deeds.

4th. Because, while it is admitted that Clarke himself might have maintained a bill against Deveaux as his trustee, by reason of his possession of the choses in action, it is denied that any other person could; for if there are covenants in either of the deeds,

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they are *between Clarke and himself, or Clarke and Deveaux, for the benefit of Clarke alone; there are certainly none between Clarke or Deveaux and the complainants; besides, whatever, if any covenants there are in the said deeds, they are purely voluntary, and not enforceable in equity.

5th. Because it would be impossible for the complainants to maintain a bill against Clarke himself, to have the trusts of the two deeds declared and fixed; nor could the Court make such a decree without changing contingent into vested rights, excluding after-born children, and taking from Clarke the powers which he has expressly reserved to himself by the said deeds.

6th. Because if the said Frederick Richards or the said Clarke, had, in November, 1863, declined to receive the check of the

said J. Porteous Deveau on the Bank of the State of South Carolina for \$45,192.78, which they knew would probably be paid in currency, or had refused the currency when offered, and immediately given Deveau notice, instead of waiting for near three years, it would have been in the power of the said Deveau to use the money to great advantage; it is submitted, therefore, that their conduct in this particular was a fraud upon Deveau, and accounts for their not being before the Court as complainants.

7th. Because if Clarke, who is not before the Court complaining of fraud or unfairness, is concluded by the release and settlement of November, 1863, as he certainly is, it is not competent for any one else claiming only through him to complain; neither can a defendant give to his answer the form of a bill of complaint against his co-defendant, and thus deprive him of the benefit of his answer.

8th. Because the decree is otherwise contrary to law and equity, and ought to be reversed.

DeTreville, for appellant.

McBeth & Buist, Simons & Seigling, contra.

Oct. 9, 1869. The opinion of the Court was delivered by

MOSES, C. J. The counsel for the defendant, Deveau, submits, as a preliminary objection—fatal, in his judgment, if sustained—that there is no one but Joseph Pringle Clarke (his co-defendant) who has any interest in the subject-matter of the suit, he being still the owner, and the sole and absolute owner, of the whole property included in the deeds.

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*While the deeds convey the securities to the trustee, in trust, to pay the interest to Clarke, for life, or suffer him to receive it for the maintenance and support of himself and wife, and the support and education of his child and any children which he might thereafter have—so that neither the premises settled or the income should be in any wise liable for his debts—they convey interests, upon his death, to the wife and children, and it is not necessary to enquire whether they are vested or contingent.

In either event, they have the right to claim the interposition of the Court against the trustee for the security of the fund; and the relation in which they stand to the deeds under the first provision they direct, authorizes them to demand of him an exhibition of his accounts, so that they may have the means of knowing on what they could calculate for maintenance and education. The power reserved to the trustee, to receive payment of the securities settled, or, at the written request of Clarke, to sell the same, or any property purchased by virtue of the authority conferred, and invest the proceeds

of said payment or sales in other property, to be held subject to the same uses, powers and provisos as in the deeds are expressed, did not change or affect any rights of the plaintiffs.

If the remainder is only contingent, still the party representing it, as we have said, is not prevented from seeking the aid of this Court for its safety and preservation.

A cestui que trust, though entitled to a mere contingent benefit, may, upon reasonable cause shown, apply to this Court to have his interest properly secured.—*Lewin on Trusts*, 728.

In *Carson v. Kennerly*, 8 Rich. Eq., 269, the Court said: "That it would be unwise and unsafe to hold that no contingent interest shall be protected by a remedy for the preservation of the property in case the contingent interest becomes vested. It would be unwise and unsafe to hold that no contingent interest should be protected in this way. An interest might be contingent, and yet so certain as to amount in value to a vested estate."

In *Simmons and Wife v. Logan*, reported in a note in 9 Rich. Eq., 184, Chancellor Harper, in a Circuit decree, not only maintains the same doctrine, but carries it further.

The bill here, in point of fact, seeks no more than to compel the original trustee to pay into the hands of the substituted trustee the securities which belong to the trust. It avers that he withheld the true and valuable securities for his own use, against his duty, and against equity and good conscience,

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and, in their stead, has trans*ferred to the new trustee Confederate Treasury notes of no value; and that he did this, leaving the parties interested to suppose that he had received payment in the said notes, when the truth is conclusively established to the contrary. It comes within the principle of the cases referred to. The first trustee, whose office had entirely ceased by the appointment of the second, has now no right to retain the specialties returned by him, or the money which he may have received on them in payment; they should be in the hands of the legal owner, to be held and preserved by him for the persons beneficially interested.

It might not, probably, be stretching the jurisdiction of equity too far to say that one who holds for a contingent remainderman, and who fraudulently converts the estate confided to him to his own use, may be held to answer for such disposition, either by requiring an account, and the payment of the money into Court, or, if the property is still under his control, to transfer it to the succeeding trustee.

An express trust, under the deeds, is declared in favor of the wife and children during the life of Clarke. The trust assumed by Deveau was to pay over the interest or income to Clarke, or permit and suffer him,

for life, to receive the same for the maintenance and support of himself and his wife, and for the support and education of his child, and of any children he might thereafter have, so that neither the premises settled, nor the income thereof, should be, in any wise, liable for his debts, contracts or engagements. The wife and children were the beneficiaries contemplated during the life of Clarke. As against him, a trust is created in their favor; and the fact that the income is not to be liable to his debts shows that he has no power to abridge or destroy it.

There are no powers so reserved to Clarke, by the deeds, which constitute him still the whole owner of the property, as averred in the third ground of appeal. On their execution, his legal title was conveyed to the trustee on the conditions, limitations, and for the purposes expressed; and, although he holds, under them, interests and powers, he cannot be regarded as having the legal title. It would be a contradiction in terms to say that the very deeds which were to change the legal ownership so operated as to confer the title on the donor.

The power of the trustee, on the written request of Clarke, to sell the securities settled, or any property purchased by virtue of the authority expressed, and invest the mon-

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ey or proceeds of sale in *other real or personal property, made no change in the relations of the parties, or alterations of the trusts under which the trustee held. Whether, on payment of the securities, the money remained in the hands of the trustee, or was invested in property, the trusts of the deeds attached to the same extent as they did on the original fund.

It is claimed that the covenants in the deeds are voluntary, and can not be enforced in equity. If they are, however purely voluntary, they will, notwithstanding, be held good and binding between the parties.

Lord Eldon, in *Ellison v. Ellison*, (6 Vesey, 661,) says: "I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stocks, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court."

Mr. Story, in the 2d volume of his *Equity Jurisprudence*, Sec. 793, *a*, says: "If the transfer is actually made, it will be held valid against the donor and his representatives." It would be difficult to find any authority contravening the rule thus laid down. The trustee accepted the trust with provisions in favor of the very *cestuis que trust* to

whom he now denies the right to claim the benefit devolving on them by the very instrument to which he is a party.

It is assumed by defendant, Deveau, that the instrument filed as an exhibit to his answer, dated October 28, 1863, but not delivered till 3d or 4th November following, connected with the receipt of Richards, (the substituted trustee,) concludes Clarke, and that it is not competent for any who claim through him to complain.

It is a great mistake to regard the said paper as a release. It was never so intended—does not, on its face, pretend to be—and has not about it any of the essentials which would constitute a bar against Clarke, if he was a plaintiff seeking the relief asked by the bill.

The whole purpose of it was to execute the power conferred by the deeds, to wit: to assent to the discharge of the original trustee, and to nominate and appoint a succes-

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sor. It no where discharges *Deveau from any liability for an account of the trust, or even refers to the fact that any supposed settlement has been made.

It is true that, on the same day Deveau had submitted what he averred was a statement of the trust fund in his hands, to wit: Confederate Treasury notes to the amount of \$45,192.78, which were delivered over to the new trustee, through a check, and a receipt was given by him, expressed to be "in full for principal of said trust in his (Deveau's) hands," and that the accounts leaving that balance due had before been seen and examined by Clarke. From these facts, is it possible to deduce the conclusion which the defendant, Deveau, desires should be accepted by the Court?

The receipt was nothing but an admission of the amount received by Richards from Deveau. It was sufficient to impose a liability on the latter, but in no way prevented Richards or Clarke, or any one who had an interest under the deeds, to require Deveau to account for bonds which, at the time, he retained in possession, leading those with whom he dealt, as trustee, to suppose that he had received payment of them in a depreciated currency. A receipt is never conclusive when fraud or mistake is alleged against it.

If, however, Clarke had executed a formal release, founded on the knowledge and information which he had derived from Deveau as to what constituted the trust estate, and had the right, under the deed, to discharge him from all liability to account, and was himself seeking to charge Deveau, under this bill, by reason of the allegations it contains, could such a release be successfully interposed?

Chancellor Harper, in *Gist v. Gist*, Bail. Eq., 346, quoting from Lord Redesdale, in *Roche v. Morgell*, 2 Sch. & Lef., 728, says:

"Every release must be founded on some consideration, otherwise (as Lord Chief Baron Gilbert says, *For. Rom.*, 57,) fraud must be presumed. That consideration must be either a valuable consideration then given, or the adjustment of depending accounts. In the latter case, the fairness of the accounts is of the essence of the consideration. If they are not fair, the consideration is not fair, and the instrument founded on such a consideration is in itself void, and, therefore, operates nothing."

Now, what consideration gives validity to the supposed release of Clarke? The bonds retained by Deveaux were of greater value than the Confederate money he paid over; and a trustee is not permitted to favor himself, in a pecuniary regard, at the expense of those whose interests he was appointed to preserve.

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*Two of the grounds of appeal seek a reversal of the decree: First, "because the bill, as to Deveaux, is a bill for discovery and relief; and, as to the other defendants, it is simply a bill for discovery; and the Chancellor has not only not given Deveaux the benefit of his answer, but has evidently used the other answer, contrary to all rule and reason, as evidence against Deveaux, though it was perfectly competent for the complainants to examine the defendants as witnesses;" and, secondly, "because Deveaux's answer, denying the fact of fraud or misrepresentation charged, and to which he is specially interrogated, is conclusive, unless contradicted by two witnesses, or one witness and strong circumstances."

Deveaux's answer in the important particular, to wit, the fact that he misled the parties with whom he was treating as to his retention of the three bonds, is contradicted by the two witnesses, Hon. J. B. Campbell and Mr. F. S. Richards. It is true that neither the answer of Clarke or of Richards could be used as evidence against the co-defendant, Deveaux; but there is no rule of law which forbids effect to the testimony of Richards, because he was a party defendant to the record. He, with the other witness, according to the report of the Chancellor—by which we must be governed—testified "that, from the representations made by Deveaux, at the time the settlement was made, they inferred that he had collected all the claims in action belonging to the estate, and that the estate consisted entirely in Confederate money."

Here is a direct contradiction of the answer by two witnesses. Circumstances, too, corroborate the allegations of the plaintiffs.

On the 1st of July, 1862, Deveaux furnished a statement of the principal of the trust estate, which showed that it consisted of bonds to the amount of \$39,642.78, and a balance of cash of \$5,500 due by him. On

the 3d or 4th of November, 1863, when the parties met, the estate was transferred to the new trustee, not in the bonds, but in Confederate Treasury notes, to the amount of \$45,192.78. Deveaux, in his answer, says that he was authorized by Clarke to receive Confederate currency. Although he denies that he said he had collected the bonds, had not the parties reason to assume that he had done so? No conversation in relation to the payment of the bonds was had as to what time received between July, 1862, and November, 1863, within which periods the Confederate currency had largely depreciated. He alleges that Mr. Campbell was aware that he had the three bonds with him; but in this the testimony of Mr. Campbell, so far from

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concurring, is *directly contradictory. If he did have the bonds with him, how was it that, of all the persons present, Mr. Campbell alone had knowledge of the fact?

No question is made as to the liability of Deveaux for the other bonds referred to in his statement of July, 1863. The plaintiffs have abandoned their grounds of appeal, and the question before us is only as to the bonds of C. M. Furman, I. K. Furman and E. Witsell; and, as to these, what are the facts?

They are admitted to have belonged to the trust estate which Deveaux held under the deeds. They were in his possession, unpaid, at the date of the supposed settlement. What was his plain duty? To have transferred them to Richards, who succeeded him as trustee. As they had not been paid, from whom did he purchase them, if he claims to hold them as owner? Suppose that Clarke had power, under the deed, to change the securities, and had so directed Deveaux, was it competent for him so to sell them as to secure a benefit to himself, and induce a prejudice to his *cestui que trust*?

The relation between trustee and *cestui que trust* is one of such a delicate and confiding character that the Courts are watchful to preserve it, not only by requiring the utmost good faith, but also by preventing every wrong which might possibly flow from the advantages which the position affords. It is, therefore, held that, even if a trustee purchases the trust property at its full value, the *cestui que trust*, at his option, may set aside the sale. The *bona fides* of the transaction is not involved. The act may bring no loss to the *cestui que trust*; but, to secure the administration of the trust according to the intention and purpose of the instrument creating it, those who accept this position—so necessary and important to society—must be held to such an account as will preserve the estate confided to them to the ends proposed by the trust. If any other rule was substituted the trustee would have an advantage which could be converted to his own benefit to the prejudice of those

whose interests he was intended to promote. "So that, in fact, in all cases, where a purchase has been made by a trustee, on his own account, of the estate of his cestui que trust, although sold at public auction, it is in the option of the cestui que trust to set aside the sale, whether bona fide made or not. So a trustee will not be permitted to make any profit or advantage to himself in managing the concerns of the cestui que trust; but whatever benefits or profits are obtained will belong exclusively to the cestui que trust. In short, it may be laid down as a general rule, that a trustee is bound

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not *to do anything which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it."—1 Story Eq., § 322.

He cannot purchase or acquire, by exchange, the trust property.—*Wormley v. Wormley*, 5 Wheat., 424 [5 L. Ed. 651]. And, if he has power to sell and re-invest, he must exercise it justly and fairly, and without the influence of selfish purposes.—*Ibid.* And, above all, he is not permitted to advance his own interest at the expense of the cestui que trust.—*Garrow v. Davis*, 15 Howard, 272 [14 L. Ed. 692]; *Prevost v. Gratz*, Pet. C. C., 364 [Fed. Cas. No. 11,406].

The principles thus intimated have been constantly enforced by the Courts of this State. They are founded in wisdom and morality, and are necessary to guard against the temptation and cupidity by which the best of men may sometimes be betrayed.

We do not perceive how it can be maintained, as claimed by the sixth ground of appeal, that the conduct of the said Richards and Clarke, in the receipt of the Confederate money, operated as a fraud upon Deveaux. They accepted it under the belief that the said bonds had been bona fide paid to him in the same currency which was depreciated, when compared with gold, to the extent of \$12 for one, as is shown by the testimony. This false impression was induced by him; and to hold that, because the currency received was not returned, the plaintiffs are debarred from a remedy through which the bonds may be saved to the trust estate, in which they are interested, and which bonds he, Deveaux, induced them to suppose had been paid, would, in truth, be giving him the benefit of his own wrong.

Deveaux's trust did not terminate until the third or fourth of November, 1863, and the bill was filed on 29th September, 1866. There is nothing in this lapse of time which can protect him.

The motion is dismissed.

WILLARD, A. J., concurred.

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*M. C. HALL v. JOINER and McCALLISTER.

(Columbia. April Term, 1869.)

[*Discovery* ⇨6; *Specific Performance* ⇨38.]

Verbal agreement between A. and B., whereby A. agreed to make advances to B. in money, provisions, &c., to enable the latter to carry on a turpentine farm; and B. agreed to deliver to A. the products of the farm, to be by him sent to market, sold, and the proceeds applied to refund the advances. A. made advances under the agreement, and B., in denial of, and in fraud of, A.'s rights, shipped products of the farm to market; *Held*, That A. could not maintain a bill in equity against B. for discovery, specific performance of the agreement, or injunction.

[*Ed. Note.*—For other cases, see *Discovery*, Cent. Dig. § 7; Dec. Dig. ⇨6; *Specific Performance*, Cent. Dig. § 113; Dec. Dig. ⇨38.]

[*Fraudulent Conveyances* ⇨239.]

B. also, with intent to hinder and defraud A., made a fraudulent conveyance to C., of property embraced within the agreement; *Held*, That A. could not maintain a bill to set aside the conveyance.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 681-683; Dec. Dig. ⇨239.]

[*Discovery* ⇨1.]

The former remedial jurisdiction of equity, which arose out of the necessity for discovery, was superseded by the Act making parties competent witnesses.

[*Ed. Note.*—For other cases, see *Discovery*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

[*Equity* ⇨50.]

It is a consequence of the Act which excludes Courts of Equity from jurisdiction, where there is plain and adequate remedy at law, that where a new remedy is conferred at law it operates to destroy the pre-existing jurisdiction in equity assumed for want of such legal remedy.

[*Ed. Note.*—Cited in *Butler v. Ellerbe*, 44 S. C. 281, 22 S. E. 425; *Easler v. Southern Ry. Co.*, 60 S. C. 120, 38 S. E. 258; *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 145, 70 S. E. 396.

For other cases, see *Equity*, Cent. Dig. § 146; Dec. Dig. ⇨50.]

[*Equity* ⇨47.]

Bill for specific delivery of a chattel lies only in a case where the value of the chattel to the owner cannot be estimated by reference to market value, as where it is a work of art, or a deed, &c., and the value to the owner arises from moral or artistic considerations, or is not intrinsic, or commercial, but representative.

[*Ed. Note.*—For other cases, see *Equity*, Cent. Dig. § 154; Dec. Dig. ⇨47.]

[*Fraudulent Conveyances* ⇨241.]

A simple contract creditor cannot maintain a bill in equity against his debtor and the grantee, to set aside a fraudulent conveyance of the debtor's property, even though the debtor be insolvent, and, without the aid of an injunction, the debt may be lost. He must first proceed at law, and exhaust his remedy there.

[*Ed. Note.*—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 726; Dec. Dig. ⇨241.]

Before Johnson, Ch., at Williamsburg, February, 1868.

The decree of His Honor the Chancellor is as follows:

Johnson, Ch. In this case, it appears to the Court, from the pleadings, exhibits and testimony, that Mark C. Hall, the complainant, and Benjamin Joiner, one of the defendants, in January, 1867, made, or entered into a verbal agreement that said Hall would furnish provisions to feed the employes, and money to pay the rent and work hands; that said Joiner, and McCallister, his partner—at least, in the net proceeds—would place in his hands, of the first turpentine made on a farm to be cultivated by them, enough with which to pay for said advances; that, with this understanding, the defendants, Joiner and McCallister, commenced to cultivate their turpentine farm, hired hands, and went vigorously to work; that about all the means they had to rely on, in carrying on their operations, was to be obtained from said complainant, who regularly furnished the necessary supplies for a few weeks; that, even as early as somewhere in February, he failed, on one occasion, to furnish the work hands, and on several occasions

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afterwards, to *the great inconvenience of said defendants; that said failures so greatly embarrassed the operations of said Joiner and McCallister as to seriously threaten the discontinuance of working their farm, and, in order to avoid such a calamity, Joiner went to Steele, one of the partners of McCallister & Steele, and proposed, if said firm would furnish supplies for said farm, that they should be paid out of the products thereof—out of the first turpentine which might be prepared for market; and, after some consideration, the offer was accepted. It further appears that McCallister & Steele were ignorant of the agreement between Joiner and the complainant, and that, after furnishing considerable goods and supplies to Joiner, the latter, hearing that the complainant was taking steps to attach his turpentine, or interfere, in some way, to obtain the balance due him by legal process, conveyed said turpentine on hand, with some other personal property, to McCallister & Steele, by way of pledge for the amount due them by him. The amended bill makes them party defendants, and attempts to make them account for the turpentine they received off said farm; and prays for attachment for contempt of Court against Joiner and McCallister for permitting said turpentine to be removed after the writ of injunction was served on them, under an order obtained from the Commissioner after the conveyance to McCallister & Steele.

In the view taken, it is not necessary to consider the plea of the statute of frauds, as applicable to this case, made in the answer of the defendants, Joiner and McCallister. It appears to the Court that McCallister & Steele were purchasers of the turpentine, without notice. Even if the complainant had any claim to a lien, as to Joiner and McCal-

lister, he could have none on the property conveyed, after the same had gone into the possession of McCallister & Steele, purchasers for valuable consideration, without notice. They cannot, therefore, be made to account for the turpentine received by them under said conveyance. Nor can the Court perceive that contempt of its process has been committed by Joiner and McCallister, in permitting McCallister & Steele to receive the turpentine, which they had purchased before a writ of injunction was ordered. The evidence submitted leads to the irresistible conclusion that it was because of the failure of the complainant to perform his part of the verbal contract between himself and Joiner, which compelled Joiner to go elsewhere to obtain supplies, and enter into new obligations therefor. Such failures, even if the same had been in writing, and notice thereof given to the world, would have been

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good cause *for Joiner and McCallister to have refused to perform their part of the contract, and this Court would not enforce it. It seems, however, that Joiner and McCallister did place in the hands of complainant, turpentine enough to pay largely on the account for supplies—perhaps enough to cover this part of the account; and that, if proper credits were given, it might appear that the balance due is for other than supplies, or money advanced with which to pay off the farm hands. It is further contended that the accounts kept by complainant were erroneously and improperly entered; in fact, that no proper book of original entries was kept by the complainant. The testimony submitted does not satisfy the Court that Joiner, as well as McCallister, are not solvent, and able to pay such a verdict as a Court of law might render in an action of assumpsit for goods sold and delivered. In the hasty examination, by the Court, of this voluminous case, without being satisfied with the reasoning given herein, yet the conclusions are satisfactory, and it is the opinion of the Court that the injunction heretofore issued should be dissolved, and that the bill should be dismissed, and it is so ordered.

The complainant appealed, and now moved this Court to reverse the decree of the Chancellor, on the grounds:

1. Because there was no sufficient failure, on the part of the complainant, in performing his part of the contract, to deprive him of the rights to a specific performance from the defendants.
2. Because, no matter how plain, there was and is not any adequate remedy at law.
3. Because the contract does not fall within the statute of frauds.
4. Because, if originally within the purview of the statute, part performance has taken it out of it.
5. Because the nature of the contract was such as to give the complainant an equitable

lien upon all the products of the turpentine farm, to the extent of his advances.

6. Because the remedy sought in the present proceedings affords the only adequate remedy to enforce said lien.

7. Because McCallister & Steel, the assignees of Joiner, if they took any interest in the deed made to them at all, took subject to all the equities existing between the complainant and the said Joiner.

8. Because the said deed was made under such circumstances as to show, conclusively, that it was fraudulent, and it, therefore, should be set aside.

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*9. Because the plea of purchase for valuable consideration, without notice, will not avail the defendants in this case:

I. Because the turpentine assigned was a chose in action.

II. Because the consideration of the deed was an antecedent debt.

III. Because the defendant, Steele, the managing member of the firm, did have notice sufficient to have put him upon the inquiry, while he purposely avoided making any inquiries.

S. W. Maurice, for appellant.

—, contra.

Oct. 9, 1869. The opinion of the Court was delivered by

WILLARD, A. J. This is an appeal from a decree dismissing the bill of complaint. The bill alleges a verbal contract between complainant and the defendants to the original bill, to the effect that, in consideration that the complainant should, from time to time, as occasion might require, furnish defendants with means to pay the rent of their lands, with provisions to feed their employes, and money to pay the said employes, the said defendants would deliver to complainant the productions of their farm, to be by him, in his own name, sent off to market, sold, and so much of the proceeds applied as might be necessary to refund the advances made by complainant. It was also agreed, upon the same considerations, that defendants should manufacture turpentine barrels, to be delivered to a third party, the price of said barrels to be charged against the complainant, on account of his advances. This part of the contract appears to have grown out of certain arrangements existing between the complainant and such third party, and is not essential to an understanding of the case. The bill alleges a violation, on the part of the defendants, of this contract, and an indebtedness by them for advances made by the complainant, in accordance with his agreement; also, a shipment to market, by the defendants, of turpentine, part of the product to which the contract related, in denial and in fraud of the rights of the plaintiff, and prays a discovery and a specific

performance of the contract. It also contains a prayer for general relief and for an injunction.

The defendant, Joiner, answered, admitting a verbal contract with himself, irrespective of his co-defendant, but alleging it in terms somewhat different from those set

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forth by the complainant; *though not changing its substantial effect, in its relation to the questions decisive of this appeal. McCallister answered, but it will not be necessary to consider either of the answers more in detail.

The complainant amended his bill, setting forth additional facts, to wit: That, with intent to hinder and defraud said complainant, as their creditor, and in fraud of his rights under the contract set forth in the original bill, the defendants had made a fraudulent and colorable conveyance of property embraced within the original contract, to McCallister & Steele—charging McCallister & Steele with fraudulent complicity—and prayed a writ of subpoena against them, and a decree.

The appellants set forth many grounds of appeal, which it will not be necessary to consider in detail, as the view taken of this case disposes of it upon more general grounds.

Under the aspect of the case presented by the original bill, it would be necessary for the complainant to establish a fiduciary relation, in the nature of a trust, either express or implied, as between himself and the original defendants, in order to warrant the interference of a Court of Equity with the course of the common law, as applicable to the case.

As a bill of discovery alone, it cannot, independent of other equitable grounds of relief, be maintained. The right to examine the parties to an action as witnesses, conferred by statute, affords an adequate remedy at law for that class of cases in which a remedy was formerly allowed in equity, on the ground of the necessity of a discovery. In this State, the exclusion of Courts of Equity from jurisdiction in cases in which an adequate remedy is conferred at law rests on the statute; (*Eno v. Calder*, 14 Rich. Eq., 154; *Dunkin, C. J.*;) consequently a new remedy at law operates to destroy the pre-existing remedies in equity allowed for the want of such legal remedy.

Nor can the bill be maintained on the ground of specific, or part, performance. The latter doctrine is wholly inapplicable to the case, as the complainant's difficulty does not arise out of the statute of frauds, but from the nature of his contract, and the limited powers of a Court of Equity. No authority exists for specifically enforcing, in equity, a contract of the character set forth in the pleadings as the foundation of the complainant's demand for a decree. It cannot be lik-

ened, with any success, to a bill for the specific delivery of chattels. The chattel property that was the subject of that exceedingly limited and exceptional jurisdiction

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tion, was *always of a peculiar character, the value of which, to the owner, could not be estimated by reference to market value. Equity valued the right of property of the owner as affected by an attachment to the individual piece of property claimed, resting upon moral or artistic grounds, as in the case of slaves, works of art of an original character, &c., &c., or by the circumstance that in certain cases such value was neither intrinsic nor commercial, but merely representative, as in the case of deeds or other evidences of title or right.

The element of value to which the complainant's contract looked was commercial purely, and capable, therefore, of just ascertainment at law.

It is proper to remark that the complainant has not adopted the mode of dealing with the defendants that would secure, at common law, or under the statute, a legal lien on the property against which he seeks relief. Can he claim an equity of a substantial value to him equal to that of a legal lien on the property? This is what he, in effect, seeks.

As has been said, a fiduciary relation must be shown to exist between the complainant and the original defendants before such a result can be obtained. The contract warrants no such assumption. The complainant agreed to make certain advances, in order to secure the factorage of property to be derived from a specified venture. The profit to which he looked was commissions. His security was the covenant of the original defendants; and the extent of his risk, in addition to the ordinary casualties of business, depended on the good faith of those defendants in performing their covenant. There was no community of profit and loss to characterize the transaction as a partnership. The complainant's advances were made upon the faith of the defendants' agreement to consign the product of the business to him. The only trust affecting the advances made by complainant in the hands of defendants was, that they should be laid out in the production of certain goods, and this was done. The trust, such as it was, was fully executed, the only complaint being that the product of the business was not consigned, as the defendants contracted to do. This, at most, is a breach of contract, for which the only redress is at law.

The relations established by the contract involve nothing of a fiduciary nature from which a trust, express or implied, can arise useful to the complainant. The confidence reposed is in the nature of a commercial credit, and no relief can be afforded on this ground in equity.

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*The ground presented by the amended bill is equally untenable. A simple contract creditor, in a case *inter vivos*, has no standing in a Court of Equity to set aside a fraudulent conveyance. He must exhaust his remedy at law, and it is only after judgment, and in aid of his execution, or to have a discovery of assets, after satisfaction at law has failed, that he can appeal to a Court of Equity.—*Eno v. Calder*, *supra*.

The circumstance that the judgment debtor is insolvent, and that, without the aid of an injunction, the debt will be lost, is, in itself, insufficient to sustain the allegation that there is no adequate remedy at law.

The decree must be affirmed; but without costs to the prevailing party.

MOSES, C. J., concurred.

I S. C. 192

JAMES S. KILGORE and Others v. JOHN MOORE and Others.

(Columbia. April Term, 1869.)

[*Executors and Administrators* ⇨ 125.]

F. H. and K. were joint administrators of S., against whose estate there were certain claims by promissory notes, drawn by S., and endorsed by K. It was agreed among the executors to pay these notes in full out of the assets of S., and if they should prove insufficient for that purpose, that K. should make good the deficiency. It turned out that the assets were insufficient to pay simple contract debts in full: *Held*, That, as between the administrators, K. was liable, on his agreement, to make good the deficiency.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 518; Dec. Dig. ⇨ 125.]

Before Johnson, Ch., at Newberry, April, 1868.

This was a creditors' bill for administration of the personal estate of James Kilgore, deceased.

Simeon Fair and Peter Hair presented a claim against the estate, which arose out of the following circumstances: They and James Kilgore were joint administrators of John W. Summers, deceased. Shortly after the death of Summers, some promissory notes, held by an incorporated Bank, which had been drawn by him and endorsed by Kilgore, were presented for payment, and it being doubtful whether the assets of Summers

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were sufficient *to pay simple contract creditors in full, it was verbally agreed, between the three administrators, to pay the notes in full, and if it should turn out that the assets were insufficient for that purpose, then, that Kilgore should make good the deficiency. The notes were accordingly paid out of the assets of Summers, and it turned out, when his estate was finally wound up by Fair and

Hair, as surviving administrators, Kilgore having died in the meantime, that the assets were insufficient to pay the promissory notes by about 35 per cent., and Fair and Hair claimed that the deficiency should be paid out of the assets of Kilgore's estate.

The Commissioner, to whom it had been referred to take an account of the debts of Kilgore, rejected the claim, and reported against it, but, on exception taken to the report, His Honor ruled that the claim was entitled to payment, and he so decreed.

The plaintiffs appealed, and now moved this Court to reverse the decree of His Honor, and confirm the report of the Commissioner.

Baxter, for the motion.

Garlington, contra.

Oct. 9, 1869. The opinion of the Court was delivered by

MOSES, C. J. To meet the question presented to the Court in this case, it is not necessary to inquire whether, in the absence of the agreement referred to, Fair and Hair, the surviving administrators of Summers, would have any legal remedy against James Kilgore, if alive, or his representatives, who are now before us.

While it is not to be denied that an executor or administrator, who, under misapprehension, might make a payment which would operate as a devastavit against himself, could recover back the money, still the principle cannot affect the parties here, because any right of action which they might have against the bank does not preclude them from enforcing the agreement made on adequate consideration with James Kilgore, in his lifetime.

It is competent for parties to change the relation in which they stand to each other as to their legal rights. Whilst a maker is responsible to his endorsers on a promissory note, they may vary or waive the liability; and, if they can establish such agreement by sufficient testimony, the law holds them fixed and bound by their contract.—*Brunson v. O'Connor*, 10 Rich., 175.

The evidence in the case before the Court does not show that any change was made in the condition of the parties as to their respec-

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*tive positions on the Summers notes; but it was conclusive to prove that the payment of the notes endorsed by Kilgore out of the assets of the estate of Summers, by his administrators, (of whom Kilgore was one.) was made at his request, and upon the promise "that, if the estate did not hold out, the first endorser should pay the balance on the notes."

They may well demand of his administrators that they shall be placed in the same situation they would have occupied if they had not, at his request, paid the notes, and been held to answer for the devastavit such payment made.

We are to suppose that they acted on the undertaking assumed by him, and they should not suffer a loss by carrying out an agreement made, at his request, for his benefit.

The motion is dismissed, and the decretal order of the Chancellor affirmed.

WILLARD, A. J., concurred.

I S. C. 194

GILLILAND and HOWELL v. JOSEPH CALDWELL and Others.

(Columbia. April Term, 1869.)

[*Descent and Distribution* ⇨143.]

H., a member of the firm of S. and H., died intestate in 1844, leaving some real estate, of which his heirs took possession, and C. administered on his personal estate. The firm was indebted, by promissory note, to G., who sued S., the surviving partner at law, and recovered judgment against him, but failing to obtain satisfaction, he, in 1847, exhibited a creditor's bill against C. for administration of the personal estate of H. Creditors were called in, accounts taken, and a report made, which showed that the personal assets were sufficient to pay 31½ per cent. of the debts, and no more, and in 1849 the report was confirmed. The heirs of H. remained in possession of the real estate, using it as their own, until 1863, when G. exhibited this bill against them, to subject the real estate to the payment of so much of the debts as remained unsatisfied: *Held*, That the bill was barred by the statute of limitations.

[Ed. Note.—Cited in *Campbell v. Sloan & Seignions*, 21 S. C. 307.

For other cases, see *Descent and Distribution*, Cent. Dig. § 503; Dec. Dig. ⇨143.]

[*Executors and Administrators* ⇨453.]

A judgment, or decree, against an administrator, for a debt of his intestate, due by simple contract, in a suit to which the heirs are not parties, does not preclude them from availing themselves of the bar of the statute of limitations, when the creditor institutes proceedings against them to subject descended real estate in their possession to the payment of the debt.

[Ed. Note.—Cited in *Huggins v. Oliver*, 21 S. C. 153.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1902; Dec. Dig. ⇨453.]

[*Executors and Administrators* ⇨438.]

Though real estate may be levied on and sold under an execution against an executor or administrator, as such, yet the judgment does not otherwise bind the heir, and when he is sued the original cause of action must be established against him.

[Ed. Note.—Cited in *Wilson v. Kelly*, 19 S. C. 166; *Wheeler v. Floyd*, 24 S. C. 421; *Ariail v. Ariail*, 29 S. C. 94, 7 S. E. 35; *Brock v. Kirkpatrick*, 60 S. C. 351, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1772; Dec. Dig. ⇨438.]

[This case is also cited in *Wheeler v. Floyd*, 24 S. C. 413, and distinguished therefrom.]

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*Before Johnson, Ch., at Newberry, September, 1867.

The decree of His Honor the Chancellor is as follows:

Johnson, Ch. Taplow Harris, one of the members of the mercantile firm of Swindler and Harris, died in 1844, intestate, leaving surviving him his widow, Sarah Harris, and twelve children as his heirs at law. He left a tract of land, containing four hundred acres, more or less, and a small personal estate, but was insolvent, in consequence of the large indebtedness of Swindler and Harris. Soon after his death, James P. Caldwell administered upon his estate, and on the 25th day of May, 1847, a bill was filed in this Court, by the complainants, against him, as the administrator of the estate of Harris, alleging that Swindler was totally insolvent, and that he had wasted the assets of the firm of Swindler and Harris, and had removed from the State, and praying, amongst other things, that James P. Caldwell might be required to account for the personal estate of Taplow Harris, and certain assets of the firm of Swindler and Harris, which had gone into his possession. Upon coming in of the answer of the defendant, the creditors of the estate were called in by order of the Court, and the matters of account were referred to the Commissioner.

On the 30th day of June, 1848, the Commissioner made his report, from which it appeared that, after paying a few small judgments which had been recovered against Swindler and Harris, that the assets of the estate of Taplow Harris would be sufficient to pay 31½ per cent. of the debts due by it. From the report it appears that the complainants had, before filing their bill, prosecuted their claims to judgment against L. L. Swindler, the survivor of Swindler and Harris. Before the report was confirmed, James P. Caldwell died, leaving a will, and, on the 2d day of April, 1849, the proceedings were revived against Joseph Caldwell and William W. McMorris, the executors of said will, and the said report was confirmed.

There is no evidence that James P. Caldwell ever assumed any control over the land in any way. And the heirs at law of Taplow Harris were not made parties to the proceedings, and there was no effort made during the progress of the cause to subject the land to the payment of the debts of Taplow Harris.

Sarah Harris, the widow of Taplow Harris, continued, from the time of the death of her husband up to some time during the year

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*1852, in possession of the land, holding it and using it as her own, and she then died intestate, leaving, as her heirs at law, the other heirs at law of Taplow Harris. And her son, James Y. Harris, administered upon her estate, and held the said tract of land in possession for the benefit of himself and other heirs, until the 6th day of April, 1863, when the bill in this cause was filed, for the

purpose of subjecting the land to the payment of the unpaid portion of the debts of Taplow Harris.

To this claim the statute of limitations is interposed. At the time the intestate, Taplow Harris, died, the claims of the complainants were promissory notes. Is their character changed, so far as the liens are concerned, by the recovery of judgments v. L. L. Swindler, as survivor? I think not. And if not, they are seeking to enforce claims which are barred by the statute of limitations. And, in addition to this, I think that the heirs at law of Sarah Harris have a good title to the land under the operation of the statute of limitations, even though the claims of the complainants may not be barred.

The executors of James P. Caldwell and L. L. Swindler are called upon by the bill to account for the assets which went into the hands of James P. Caldwell, and the assets of the firm of Swindler and Harris. The executors of J. P. Caldwell have heretofore accounted, and, in the judgment of the Court, it is now too late to call upon L. L. Swindler for an account of the assets of the firm of Swindler and Harris.

It is ordered and decreed, that the foregoing opinion be taken as the judgment of the Court.

It is also ordered and decreed, that the bill be dismissed.

The plaintiffs appealed, and now moved this Court to reverse or modify the same, on the grounds:

1. Because His Honor erred in holding that the statute of limitations intervened to protect the land described in the bill from liability for the payment of the claims of the creditors of Harris and Swindler, adjudicated and sanctioned by a decree of this Court, to which the administrator of Taplow Harris was a party.

2. Because the decree is otherwise contrary to the law and facts of the case.

Jones & Baxter, for motion.
Garlington, contra.

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*Oct. 8, 1869. The opinion of the Court was delivered by

MOSES, C. J. It is not to be denied that, following the decision in *DeUrphay v. Nelson*, 1 Brev., 476, also found in note, 4 McC., 129, and *Martin v. Latta*, 4 McC., 128, the Courts of this State hold that the lands of a deceased are assets liable to be taken in execution on fi. fa. issued on a judgment recovered against his personal representatives.

The creditors of the intestate, Taplow Harris, do not, however, claim the benefit of the rule laid down in the cases above referred to. If they regarded their debts, proved before the Commissioner, thenceforward holding rank as judgments against the estate, what

prevents them from issuing their executions, and subjecting the land to sale under them? If they thus have a medium through which they can enforce their "established demands" to satisfaction, why seek the aid of the Court of Equity to subject the real estate of the intestate to their payment? Their prayer, that the land may be made liable by the decree of the Court, concedes that, as against the heirs, they do not hold the more favored position of a general creditor by judgment. They do not assume that they have any such lien, for, if they had, they would have applied to the Court for its process of execution to enforce it. So far, however, from this, they seek the aid of equity jurisdiction to require that the heirs at law shall be called in, an account taken of the real assets descended, and their application directed to the satisfaction of the debts.

It is proper, first, to inquire as to the effect of the order of the Court establishing their demands as simple contract debts against the estate of Harris. What consequence is to follow the right thus acquired, either as binding on the administrators or the heirs?

The decree was based on an order quod computet. It was necessary to ascertain the amount of the estate in the hands of the administrator, so that, if not sufficient to satisfy all the claims presented, a pro rata payment might be ordered. The judgment against Swindler, as survivor of Swindler and Harris, on the copartnership debt, created no lien against the estate of Harris. It merely merged the simple contract debt, so that a remedy on it could not be enforced at law against his administrator.

If the rule which prevails in equity on bills for marshalling assets had been strictly carried out, the amount found due by the administrator on the account taken should have

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been *brought into Court, and the several creditors paid by the Commissioner.

This not being done, the pro rata amount for each creditor remained in the hands of the administrator, and the several debts, to the extent of the fund, stood established as a liability against him. The assets were left with him for distribution, and the non-payment would establish a devastavit. They were specifically appropriated by the Court, and the decree on the debt was analogous to a judgment at law against the administrator of assets quando occiderent on a plea of plene administravit preter. What liability, then, was imposed on the heirs at law?

It is claimed by the plaintiffs, on the ground that the personal estate of the intestate being exhausted, the realty in their hands must respond for the deficiency.

The general proposition is not controverted, but the difficulty the plaintiffs encounter is, to apply it to the case in hand.

The demand was established as a simple contract debt. If by the decretal order it acquired any higher rank, as against the administrator, it was not converted into a judgment of the Court so as to affect the heirs who were not parties to it.

The statute of George II does make descended lands in the possession of the heirs liable for the payment of the debts of the ancestor; but the cause of action must be established against them in a suit to which they are parties, and they are not bound by a judgment against the administrator, to which they are neither parties or privies.—*Bird v. Houze*, Speer's Eq., 250; *Vernon & Co. v. Valk et ux.*, 2 Hill Eq. 257; *Drayton v. Marshall*, Rice Eq., 387 [33 Am. Dec. 84].

Whatever may be the character of the demands in the equity suit, and whatever place they may hold against the administrator in relation to the estate of the intestate, they stand but as simple contract debts against the heirs. These were not parties to the bill, and its whole aspect is inconsistent with any pretense that they are bound by it, because of real assets descended.

In the language of Chancellor Dunkin, in *Bird v. Houze*, "the cause of action must be established against the heir, and he is not bound by the judgment against the executor or administrator."

Even if the cause of action was so established as to conclude the heir from averring against it in the proceedings before the Court, it has acquired, in reference to him, no higher grade than it occupied in relation to the testator at his death, as a simple contract,

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*and it is therefore barred by the statute of limitations, as against the heir.

Although the Court of Equity does not assume to try the title to land, yet, incidental to its jurisdiction, when relief is there sought against the party in possession, it must determine whether the character of the possession is of a kind which allows it to be affected or disturbed by its decree. Here the heirs at law of Harris have been in the undisturbed use and occupation of the real estate, by themselves and tenants, exercising acts of ownership since his death, in 1844, and no sufficient equity has been shown which should act directly upon their legal rights, by subjecting them to the claim of creditors, who, to say no more, have been guilty of a laches which prevents any interference on their behalf.

The motion is dismissed, and the decree of the Chancellor affirmed.

WILLARD, A. J., concurred.

I S. C. 199

MARY LEAPHART and POLLY LEAPHART
v. MARTIN T. LEAPHART and Others.

(Columbia. April Term, 1869.)

[Witnesses 357.]

Where, in a civil action, it is material to prove that A. and B., who are strangers to the record, were husband and wife at a certain time, B., the wife, is a competent witness to prove that fact.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 157, 158; Dec. Dig. 357.]

[Depositions 388.]

It is not a valid objection to a commission to examine witnesses resident in a foreign country that, on its being produced in Court to be opened, the post mark is that of a foreign office.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 234; Dec. Dig. 388.]

[Equity 404.]

Where it is referred to the Commissioner to ascertain and report upon the facts with instruction to make a full report of the testimony—the parties to be at liberty to take out commissions to examine witnesses—he, the Commissioner, may, at the reference, permit the commissions to be opened and read.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 886, 887; Dec. Dig. 404.]

[Witnesses 319.]

It is not admissible to impeach the character of a person who has not been examined as a witness in the cause, merely because he made an affidavit, which was read at a previous stage of the proceeding, and had been active in procuring evidence for the opposite side.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1087–1093; Dec. Dig. 319.]

[Appeal and Error 1009.]

An appellate Court will not order an issue to try a question of fact which the Court below has decided, except in a case of great doubt.

[Ed. Note.—Cited in Shaw v. Cunningham, 9 S. C. 273.]

For other cases, see Appeal and Error, Cent. Dig. § 3970; Dec. Dig. 1009.]

Before Johnson, Ch., at Lexington, June, 1867.

The points made by the appeal in this case will be understood from the Circuit decree and grounds of appeal. The Circuit decree is as follows:

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*Johnson, Ch. On the ——— day of ———, 185 , George Leaphart died intestate, leaving, as his heirs at law, his children, Martin T. Leaphart, George Jefferson Leaphart, Simon A. Leaphart, and Sarah Leaphart, who has since intermarried with James E. Drafts, and leaving a considerable personal estate and a large real estate, lying in Richland and Lexington Districts; and soon afterwards John Fox took out letters of administration upon his estate. In 1853, after the death of George Leaphart, but before his estate was settled, his son, Simon A. Leaphart, died intestate, leaving, as is contended by the complainants, them, as his heirs at law, and, as is contended by the defendants, his said brothers and sister, and

leaving a small personal estate which he had had in possession, and his undivided portion in his said father's estate; and, soon after his father's death, his brother, Martin T. Leaphart, administered upon his estate. And in April, 1855, the bill in this case was filed against Martin T. Leaphart, for an account; but before he answered the bill he died intestate, leaving a considerable estate to be divided between George J. Leaphart and Sarah Drafts, or between them and the complainant, Polly; and Levi Guntter, soon after his death, took out letters of administration upon his estate; and a bill of revivor was filed for the purpose of bringing him before the Court. It has heretofore been established in this Court that Simon A. Leaphart, on the 1st day of December, 1852, married the complainant, Mary; and that, on the 1st day of April, 1839, she was married to Robert Ferguson, who, in the latter part of 1841, separated from her and went off, and has not yet returned. The question in the case is: Was the marriage between her and Simon A. Leaphart valid? If so, the complainants, as his widow and child, are entitled to his estate, and his child to a distributive share in the estate of Martin T. Leaphart; and if not, they are entitled to no portion of either.

The evidence of Cornelius Clark established the fact that Robert Ferguson was living in Alabama as late as 1853 or 1854.

In reply to this evidence, the complainants introduced a large amount of testimony, establishing the fact that Robert Ferguson, prior to 1836, had married a woman by the name of Vere Miller, in or near the city of Glasgow, Scotland; and that, in 1836, he left her and two small children, and came to Pennsylvania, and stayed there a short time, and then came to Columbia, South Carolina. The testimony also establishes the fact that his first wife is still living, in Canada West, as the wife of John Balfour.

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It was, however, insisted, on the trial, that a large portion of the testimony reported by the Commissioner should be ruled out by the Court: First, On the ground that two commissions which had been returned bore foreign post marks, and that there was no proof that they were authentic. And, secondly, That they were opened by the Commissioner without the consent of the parties, and not in open Court, upon motion, as is required by the twenty-first rule of Court.

The evidence was taken by the Commissioner under an order granted by Chancellor Johnston, 28th June, 1858: "That it be referred to the Commissioner to ascertain and report whether any legal impediment existed to the validity of the marriage of the plaintiff, Mary Leaphart, and the said Simon A. Leaphart, the intestate, at the time the said marriage was solemnized; and that he

do make a full report of the testimony; and that the parties be at liberty to take out commissions to examine witnesses out of the State, aged and infirm," &c.

I regard the first objection as entirely without foundation, and I think the order of the Court made it necessary for the Commissioner to open the commissions, in order that he might report the evidence to the Court; and I think the Commissioner acted in strict conformity to the practice of the Court. Vere Balfour was examined by commission, and her testimony was objected to by the defendants. I think it was competent; but were I to exclude it, and the testimony of all the witnesses who were examined by commission, I would hold that the former marriage of Robert Ferguson was established, and that his marriage with the complainant, Mary, was void.

It is the opinion of the Court that the marriage between the complainant, Mary Leaphart and Simon A. Leaphart, was valid, and that she and her daughter are his heirs at law.

John Fox, in his answer, sets up the fact that he has fully administered the estate of his intestate, and that he paid over to Martin T. Leaphart, as the administrator of S. A. Leaphart, his interest in the personal estate of his brother.

It appeared, from the pleadings, that Mary Leaphart was either administratrix de bonis non or pendente lite of her late husband.

It is ordered and decreed, that a writ of partition do issue to divide the real estate of George Leaphart and Martin T. Leaphart amongst the parties entitled to the same.

It is also ordered and decreed, that it be referred to the Commissioner to audit the accounts of Levi Gunter, the administrator of

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*Martin T. Leaphart, and that Mary Leaphart do account before him for any portion of her late husband's estate which may have come into her hands.

It is also ordered and decreed, that it be referred to the Commissioner to ascertain and report whether John Fox has closed up the personal estate of his intestate or not.

And it is also ordered and decreed, that the parties may take further orders at the foot of this decree.

The defendants appealed, and now moved this Court to reverse the decree, upon the grounds:

First. Because two commissions bearing foreign post marks, one purporting to have been executed in Scotland, and the other in Canada, were irregular, and not legally executed and authenticated; and His Honor erred in admitting in evidence the depositions of the witnesses examined under them, respectively.

Second. Because His Honor erred in sustaining the action of the Commissioner, in publishing the several commissions offered on

reference. And it is respectfully submitted that such publication not being made in open Court, and without the consent of the defendants, was in violation of the twenty-first rule of Court; and, further, that all testimony taken after the publication of these commissions was irregular, and should not have been admitted.

Third. Because the depositions of Vere Balfour, the alleged wife of Robert Ferguson, were incompetent, and His Honor erred in permitting them to be read as evidence.

Fourth. Because the declarations of Robert Ferguson, Thomas Miller, Mary Miller, and Vere Miller, the supposed wife of Robert Ferguson, were incompetent, and His Honor erred in admitting them in evidence.

Fifth. Because there was no proof of a valid marriage between Robert Ferguson and Vere Miller.

Sixth. Because the testimony was insufficient to establish the alleged marriage of Robert Ferguson and Vere Miller.

Seventh. Because the marriage of Robert Ferguson and the complainant, Mary Leaphart, was contracted in good faith, and was duly solemnized, was established by uncontested and indubitable evidence, and there was no legal impediment to its validity.

Eighth. Because there was no sufficient

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evidence of the identity *of the Robert Ferguson, who, it is alleged, intermarried with Vere Miller, in Scotland, and Robert Ferguson, the husband of the complainant, Mary Kelly.

Ninth. Because the testimony, in all the material points in the case, and especially as to the alleged marriage of Robert Ferguson and Vere Miller, of his identity with the man of the same name who intermarried with Mary Kelly, and the credibility of the witnesses on the part of the complainants, was so conflicting, uncertain and unsatisfactory as to require an issue to be tried by a jury, to pass upon these questions; and it is respectfully submitted that His Honor should have so ruled.

Tenth. Because His Honor erred in deciding that the complainant, Mary Leaphart, was administratrix de bonis non of Simon A. Leaphart, in requiring her to account as such, whereas the testimony was abundant and uncontradicted that she was only administratrix pendente lite.

Eleventh. Because His Honor erred in sustaining the Commissioner in excluding the evidence offered by the defendants, as to the character and credibility of Job Russell, who had made an affidavit, and was sworn as a witness in the cause. And the defendants crave that the Court of Appeals will have inspection of the original affidavits of the said Job Russell and Vere Balfour, upon which His Honor Chancellor Johnson, at June Term, 1858, granted the order from which His Honor quotes in his decree.

Twelfth. Because His Honor erred in stating in the decree that Martin T. Leaphart had not answered the bill in his lifetime, whereas the fact is that he had answered, and the cause had been partially heard, and orders passed, before his death.

Thirteenth. Because His Honor erred in requiring the defendant, John Fox, administrator of George Leaphart, to account for his administration, notwithstanding the said John Fox has stated in his answer that he had settled up the estate of the said George Leaphart in full before the filing of the bill, and there is no evidence contradicting his answer.

Fourteenth. Because His Honor erred in ordering and decreeing that it be referred to the Commissioner to audit the accounts of Levi Gunter, administrator of Martin T. Leaphart, notwithstanding he had stated in his answer the character of the assets and investment, and there is no evidence controverting or contradicting his answer.

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*Fifteenth. Because the decree is contrary to law and equity, and is not sustained by the evidence.

[For subsequent opinion, see Kaminer v. Hope, 18 S. C. 561.]

Boozer, Fair, Fort, for appellants.

Banskett, Caughman, contra.

Oct. 9, 1869. The opinion of the Court was delivered by

MOSES, C. J. Objection is made by the grounds of appeal to the competency of the witness, Vere Balfour, the alleged wife of Robert Ferguson.

It proceeds from an erroneous application of the well recognized common law principle, that husband and wife are not admissible as witnesses, in cases in which the other is a party. The exclusion is founded not only on the relation in which they stand to each other, but upon reasons founded on considerations of public policy.

Though they are not allowed to testify, where the interest of either is directly involved in the result, "yet, in collateral matters, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate, or may contradict the other, or may subject the other to a legal demand."—1 Green, Ev., 141.

The decision in the case of the King v. Cliviger, (2 T. R., 263.) which held that a wife shall not be called in any case to give evidence, even tending to criminate her husband, was considered and overruled by the case of the King v. Bathwich, 2 Barn. and Ad., 639, in which Lord Tenterden, C. J., drew the distinction between the application of the rule, where the proceeding made a direct charge against the husband for any offence, or its immediate result was to af-

fect his interest, and where it was only collateral, and did not, of itself, act on his interest.

On a prosecution for bigamy, or in an action for criminal conversation, proof of actual marriage is required. In all other cases, marriage may be presumed from cohabitation, reputation, acknowledgment of the parties, and other circumstances from which it may be inferred.—Fenton v. Reed, 4 John., 54.

In Allen v. Hall, 2 N. and McC., 114 [10 Am. Dec. 578], the principles above announced were carried to the extent of holding that the declarations of the husband or wife as to the marriage, were admissible.

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*The ground of appeal which charges a want of compliance, in the execution of the commissions, with the requisitions of the rules of Court, and the prevailing practice, is not well taken. Where the return itself shows that the commission has been executed according to the provisions of the law, he who avers against it must make good the objection, by affidavit, or in some other competent form. The allegation of want of proof that the Commissioners took the prescribed oath is founded in mistake. The certificate annexed to each commission, with a strictness not generally observed, states, distinctly, that the Commissioners were sworn before they proceeded to take the testimony. The envelopes bore on their face the foreign post mark, were received by the officer to whom they were addressed, in the regular course of mail, and we are not to presume fraud or wrong, in reference to any of the parties who had to deal with them.

It is complained that the Commissioner published the commissions offered on reference, when it should only have been done in open Court.

The order of Chancellor Johnson, at June Term, 1858, directed the Commissioner to make a full report of the testimony, with liberty to the parties to take out commissions to examine witnesses out of the State, &c. How could he report the testimony in full, without hearing that of all the witnesses offered; and if the commissions rightfully issued—which is admitted—the parties were as much entitled to the evidence thus obtained as if the persons who gave it were present to be placed upon the stand?

How can it be said that the commissions were not published in open Court?

The Commissioner was then holding the reference in obedience to the order of the Chancellor. Acting within the limits of his jurisdiction, he was presiding in his Court, with the same right as the Chancellor possessed, to decide on all questions touching the competency of testimony, and on all points incidentally arising before him. It would be a most singular conclusion, to hold that he had not authority to order the pub-

lication of a commission which contained testimony to be heard and reported by him.

The right was claimed by the defendants, on the reference, to attack the character of one Job Russell, who had made some affidavit, which, with others, was before Chancellor Johnson when he made the order of June, 1858, already referred to. The Circuit Court sustained the course of the Com-

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missioner in refusing to allow *such testimony, and error in this particular is submitted by one of the grounds of the appeal.

If a party was permitted to attack the character of an individual who had not been a witness in the cause, it is difficult to perceive where litigation, in such case, would terminate. The character of a witness is liable to attack, on the presumption that, in the course of the proceeding, he has sworn something of prejudice to the side which, therefore, thinks it necessary to weaken its force by assailing his reputation. If the defendants could attack the character of Russell, who was not a witness, because he may have had an active agency in collecting proofs for the plaintiffs, as well might the same course be permitted as against any one who had manifested an interest in the success of the cause, the one way or the other?

On the hearing, however, before the Chancellor, Russell was examined as a witness. The defendants then had full opportunity to impugn his testimony. When the opportunity was offered, they refrained from availing themselves of it, and then complain they were prevented from doing it, when, by the rules of evidence, it was not competent for them to do so.

We are now brought to the consideration of the only material point upon which the pleadings raise an issue.

That Mary, the plaintiff, was married to Robert Ferguson on the 1st day of April, 1839, and that, living the said Robert, she then married the said Simon A. Leaphart, on the 1st of December, 1852, are facts established by the testimony. Simon A. died in 1853, and the said Mary was his widow, unless the marriage was invalid by reason of some legal impediment. If her marriage with Ferguson was binding, because lawful, then the union with Leaphart was null, and neither heirship or any legal consequence could follow.

It became important, therefore, to the plaintiffs, to show that the first marriage of the said Mary was void, by satisfying the Court that, at the time of the supposed alliance with Ferguson, he had a wife living. It was incumbent on the plaintiffs to sustain the affirmative; the burden of proof was on them.

Marriage is a question of fact. Here it was to be solved by the Chancellor; and after a full hearing and consideration of the testimony he has decided that the marriage

of the plaintiff Mary to Ferguson was unlawful, because, at the time, he had a wife alive.

The principal argument that has been

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made in this Court against *the proof tending to sustain the conclusion of the Chancellor, is founded on the discrepancy and confusion exhibited in the testimony of the witnesses who were examined on the part of the plaintiffs.

It was suggested, with much zeal, that the testimony to identify the said Ferguson with the person who married Vere Miller should be entirely disregarded, by reason of the uncertainty created by the dates to which they refer, as fixing the periods when they trace him from Scotland to this country, and through several States of the Union.

These is, probably, nothing in which the memory is so much at fault as the matter of dates. Events which transpire before the eyes, and thus become impressed upon the mind, are borne in recollection by the incidents with which they are connected. They take position in the memory, and can almost be pictured on paper with the pencil. We know that they occurred, and the place of their occurrence is fixed with them. We can remember them with a singular vividness, can refer to the spot at which they transpired, but cannot fix the precise day on which they were witnessed. It is enough that the witnesses trace the said Ferguson, from time to time. True, it would be an important breach in the chain of testimony, if it established the fact that he was in the United States about the period it is affirmed he married in Glasgow.

The presumption so assiduously urged by the counsel, that the Vere Balfour, who has testified as being the woman the said Ferguson married, is not the same person whose maiden name was Vere Miller, is not founded on a particle of evidence in the mass which has been offered. Not a word of the testimony even intimates a circumstance to justify such an inference. The effort would have been more plausible to show that there were two Robert Fergusons, than that the Vere Miller has been personated by some woman, to play her part, as a witness, on behalf of these plaintiffs.

The Chancellor, after full consideration of the proof, held that the marriage between the plaintiff, Mary, and Simon A. Leaphart was valid, and that she and his daughter (the co-plaintiff) were his heirs at law and distributees.

We are asked to reverse his conclusions on the facts, or to order an issue under which they may be passed upon by a jury.

This renders it proper that we should advert to the course and practice of the Court in like matters.

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*In the City Council of Charleston ads. Hagemeyer et al., Riley's Eq., 120, the Court

say: "The object of an issue at law is to satisfy the conscience of the Chancellor, and motions for them are necessarily addressed to his discretion. This is a matter in which the Court rarely interferes, and never, except in cases of great doubt."

In *Paslay v. Martin*, 5 Rich. Eq., 354, Chancellor Johnston, in his Circuit decree, remarks: "Issues are ordered on matters of fact, at the discretion of the Chancellor, to relieve his mind. In this case, I have no doubt which would induce me to refer the facts to a jury."

Chancellor Dunkin, delivering the opinion of the Appeal Court, says: "That the judgment (of the Chancellor) is well sustained by the reasons which he has presented."

In *Kirkpatrick v. Atkinson*, 11 Rich. Eq., 30, the same Chancellor, expressing the views of the same Court, says: "This is an appellate tribunal, and it is incumbent on the party asking for a revision of the Chancellor's judgment to satisfy this Court that he has miscarried."

We are aware that this Court has the power to order an issue at law, even when no application has been made for it on Circuit; (*Sinclair v. Riddle*, 1 Hill Ch., 440;) but, in exercising it, we must have regard to the considerations which should prompt its action. Do our consciences require relief from any doubts which the verdict of a jury can administer? Do we regard the evidence so conflicting, or its weight so uncertain, that our judgment on the facts cannot readily incline in the one direction or the other?

We have not been reduced by our examination of the testimony to this condition of doubt, and, therefore, affirm the judgment of the Chancellor, establishing as valid the marriage of the said Mary Leaphart with the said Simon A. Leaphart.

We do not perceive any material error in so much of the decree as refers the accounts of the several personal representatives to the Commissioner. If there is no liability, by reason of assets received, they cannot be prejudiced by the order.

The motion is dismissed.

WILLARD, A. J., concurred.

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*LAURA E. NANCE v. R. D. NANCE and Another.

MARY W. NANCE v. SAME.

(Columbia, April Term, 1869.)

[*Guardian and Ward* 53.]

The authorities in this State show that a guardian or other trustee, having funds to invest, may loan them to private persons, provided he takes security. Primarily it is his duty to take, as security, mortgages of unincumbered real estate, of value sufficient to make the fund safe; and it is only where such real security cannot, with reasonable diligence, be procured,

that he may take personal security in lieu thereof. Where personal security is taken, it will devolve upon the guardian or trustee to make the necessity and propriety of such investment appear upon an accounting with his ward, or cestui que trust.

[Ed. Note.—Cited in *Allen v. Gaillard*, 1 S. C. 282; *Cureton v. Watson*, 3 S. C. 457; *Singleton v. Lowndes*, 9 S. C. 489, 490; *Pope v. Mathews*, 18 S. C. 450.

For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. 53.]

[*Trusts* 218.]

The discretion of a trustee, as to the class of securities in which he may make investments, is not unlimited; and it is only when he acts within the limits of his discretion that the rule applies which relieves him from liability for losses where he has acted in good faith, and with ordinary care and prudence.

[Ed. Note.—Cited in *Seigler v. Seigler*, 7 S. C. 324; *Singleton v. Lowndes*, 9 S. C. 489; *Pope v. Mathews*, 18 S. C. 449, 453, 454.

For other cases, see *Trusts*, Cent. Dig. § 310; Dec. Dig. 218.]

[*Guardian and Ward* 157.]

Failure of a guardian to report a security as an investment is not conclusive evidence against him, when, upon an accounting, he sets it up as an investment.

[Ed. Note.—Cited in *Crane, Boylston & Co. v. Moses*, 13 S. C. 584.

For other cases, see *Guardian and Ward*, Cent. Dig. §§ 511-513; Dec. Dig. 157.]

[*Trusts* 217.]

Where, upon a loan of trust funds, personal security is taken, it is not conclusive evidence of negligence that the real estate, included in a mortgage taken as additional security, was encumbered at the time.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 308; Dec. Dig. 217.]

[*Guardian and Ward* 53.]

That a guardian of two wards made investments on their joint account, without distinguishing their several interests in the same, is, of itself, no reason why the investments should be disallowed.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. 53.]

[*Guardian and Ward* 56.]

A loan to an individual, without security, will not be sustained, nor can the guardian himself become the surety. (a.)

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 257; Dec. Dig. 56.]

[This case is also cited and modified in *Pope v. Mathews*, 18 S. C. 444.]

Before Johnson, Ch., at Newberry, September, 1867.

The decree of His Honor the Chancellor is as follows:

Johnson, Ch. Drayton Nance, the father of the complainants, died on the 13th day of September, 1856, leaving of force his last will and testament, of which Frederick Nance and John A. Barksdale were appointed executors, and under authority of which they have nearly administered the whole estate. In the sixth clause of the will the testator directs his executors to have suitable

(a.) Vide *Allen v. Gaillard*, post [p. 279].

settlements made upon each of his daughters of all the property which he gives to them in the will, by the Court of Equity. In requiring this he expresses the desire that such settlement shall be made as liberal as the circumstances of each will justify. The testator also appointed his brother Frederick Nance testamentary guardian of the complainants, and, in making such appointment, conferred upon him the power to discharge all the duties of a guardian appointed by any of the Courts.

By virtue of such appointment he received the whole of the complainants' estate into his possession, which consisted entirely of money and choses in action.

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*In 1857 he made a return of his receipts and expenditures, on account of the complainants, to the office of the Commissioner in Equity, and upon being then informed by him that the returns should be made to the office of the Ordinary, afterwards then to that office.

In June, 1863, Frederick Nance died, leaving of force his last will and testament, of which his sons, Robert Drayton Nance and John K. G. Nance, were appointed executors, who have since qualified as such, and have taken possession of his entire estate, and have permitted a large portion of the same to go into the possession of the legatees and devisees; and two of the tracts of land which belonged to his estate have been sold by the devisees, and one of them is in the possession of Edwin G. Simpson, and the other in the possession of Dr. Wm. Phillips, who have been made parties to these proceedings by amended bills, for the purpose of requiring them to contribute a portion of the value of the same, if the assets retained by the executors should prove insufficient to meet the recoveries of the complainants in their case.

After the death of Frederick Nance, the pocket book, in which he kept his most important papers, was opened, and in one pocket was found a list of notes belonging to himself, and in another pocket was found a list of notes wrapped in paper, endorsed, in the handwriting of the deceased, "Notes belonging to me as the guardian of L. E. and M. W. Nance. (Signed) F. Nance."

The complainants have filed their bills for the purpose of having their estate accounted for by the executors of their late guardian, and for the purpose of following his estate in the possession of E. G. Simpson and Dr. Phillips, if the same should become necessary; and also for having their estate settled upon them, respectively, in accordance with the directions of their father's will. The matter in relation to the trustees and the proper terms of settlement has been referred to the Commissioner, and he has made his reports on the same, to which no exception has been filed.

The executors of Frederick Nance acknowledge their liability, as such, to account to the complainants for their estate, which went into the hands of their testator, or were retained by him; but they insist that they still hold two of the notes which he received as a part of their estates, and that their money was invested in the other notes contained in the second "list of notes," and in Greenville and Columbia Railroad scrip, &c.; and that all of which were abundantly good when the investments were made; and that

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if any *of them are not now good, it has resulted from the casualties of war, and not from any negligence on the part of their testator or themselves; and that they are entitled to credit for the same, in any accounting that may be had, either by turning over the same to the proper parties, for the benefit of the complainants, or by collecting the same, so far as they can, and paying over the proceeds to both parties, as the complainants may prefer.

The complainants, on their part, insist that they are entitled to money decrees for the whole amount of money and assets which went into the possession of their guardian, with interest on the same; subject, however, to payments made by him for their benefit, except for the amount of the note which was given by J. M. Baxter, Esq., which they consent to receive as so much money.

Was there anything imprudent, on the part of the guardian, in retaining notes which were turned over to him as a part of the estate of his testator, for the benefit of his wards, which were good at that time?

Was the money of the complainants invested in the other notes contained in list No. 2, and in the railroad scrip? and, if so, were the investments such as should be sanctioned by this Court? These are the questions which I am called upon to decide in their case.

The notes of L. L. Young and William F. Nance, the former for two thousand five hundred dollars, and the latter for six hundred and forty-seven dollars and seventy-seven cents, both of which were included in list No. 2, were made payable to Frederick Nance, without any reference to his representative character, and were taken by him without any security whatever. The proof is, that each party was good for amount of his note when he gave it; and the notes, so far as I know, are still good. But, supposing the investments to have been made, were they properly made, and can they be allowed? I think not. This Court never orders investments to be made without security of some kind.—*Spear v. Spear*, 9 Rich. Eq., 184.

The only evidence before the Court, in relation to the investments by the guardian of his wards' money in the stock of the Greenville and Columbia Railroad Company,

is a certificate by the President of the road, that he, as guardian, was the proprietor of 29 shares of such stock, for each of the complainants, on the 18th day of March, 1859, and a certificate by the Auditor and Treasurer of the road, on the same day, that the guardian had paid an assessment of 20 per cent. on the stock for them, and the

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fact that this *certificate was found amongst the notes in list No. 2. If I were fully satisfied that the stock had been purchased with the wards' money, at its proper value, which I am not, I would require further evidence to satisfy me that the investments were judicious and could be allowed. The position of the defendants, in relation to this stock, cannot be sustained.

The sealed note of Wm. P. Butler, S. Christie, J. A. Bland and F. Nance, for five thousand dollars, which was found in the list of notes No. 2, was made payable to Robert Dunlap, who was also a ward of F. Nance, or to bearer. The bearer and one of the makers of this note are the same person, and I do not think that a guardian should invest the money of his wards in notes that cannot be collected by the ordinary process of law. My opinion is, that, as an investment for the complainants, it must be rejected.

The sealed note of C. B. Griffin, S. G. Waller and Thos. Spearman, for four hundred and sixteen dollars and fifty-three cents, and the sealed note of G. M. Winn, U. W. Winn, and Wm. Mills, Jr., for seven hundred and eighty-four dollars and four cents, were found in list No. 2, and were given for purchases made at the sale of the property of Drayton Nance, by his executors, and were either retained by the guardian or were turned over to him by his co-executors as so much of the estate of his wards, and they were good at the time they were taken, and, no doubt, would have continued so, had it not been for the late war and its results, for which the guardian was in no wise responsible. The opinion of the Court is, that these notes must be received by the complainants as a part of their estate.

The sealed note of James D. Nance and Silas Johnstone, for two thousand one hundred and thirty-six dollars and thirty-one cents, is made payable to F. Nance, guardian, and was found in list No. 2. This note was, no doubt, taken as an investment for the complainants; and, although there is but one surety to the note, it was so abundantly good at the time that it was taken, and I suppose is still so, that I shall hold that it was a proper investment of so much of the complainants' money, and must be sustained as such.

The sealed note of B. S. James, Wm. East and Samuel East, for two thousand five hundred dollars, is made payable to F. Nance, or bearer, and was found in list No. 2. Wm. East testified that he gave the note for bor-

rowed money, and understood, at the time, that the money belonged to the children of Drayton Nance, and that F. Nance told him afterwards, perhaps in 1863, he could keep

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the *money till his wards came of age, and that the note was good when it was given, and that he did not regard it, at the time he testified, as being doubtful. I regard the evidence as being sufficient to establish the fact that the money of the complainants was invested in the note; and, also, that the investment was a judicious one, and must be sustained by the Court.

The sealed note of W. P. Butler, S. Christie, Elbert Bland and J. A. Bland, for ten thousand dollars, is made payable to F. Nance, or bearer, and was found in list of notes No. 2. F. W. R. Nance testified that his father, F. Nance, loaned Butler ten thousand dollars, and sent him to Newberry to get the money, and he got eight thousand dollars, but that not being as much as was called for by the note, his father gave him his note for \$2,000, as follows: "\$2,000. One day after date, I promise to pay to W. P. Butler, or bearer, the sum of two thousand dollars, for value received, this 23d day of Feb., 1859. (Signed) F. Nance, guardian for L. E. and M. W. Nance," to balance with note; and that he afterwards took up the note for his father.

R. Drayton Nance testified that, at the time the money was loaned, it was his understanding that the money was that of the complainants, and that F. Nance, for the purpose of more effectually securing the payment of the same, took a mortgage on twelve hundred acres of land and thirty-five negro slaves, and that, at the time the note was taken, it was abundantly good. There was a good deal of other testimony offered, going to establish the fact that the money of the complainants had been invested in this note; but, as I regard that already referred to as being sufficient to justify that conclusion, I will not allude to any more of it. The judgment of the Court is, that the money of the complainant was invested in the note of Butler, and others, and that the investment, at the time it was made, was judicious, and is sustained by the Court.

So much of the bills and amended bills as seek to subject such portions of the estate of Frederick Nance as have gone into the possession of the devisees or legatees, and, through them, into the possession of other parties, to the payment of any portion of the decree which may be recovered in these cases by the complainants, cannot be considered at this stage of the proceedings, are, therefore, retained for future consideration of the Court, if it should hereafter appear that it is necessary.

It is ordered and decreed, that the above opinion be taken as the judgment of the Court.

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*It is also ordered and decreed, that it be referred to the Commissioner to take the accounts between the complainants and the estate of their late guardian, and the executors of his estate, and that, in taking such accounts, the amounts due on the notes, which have been sustained as proper investments, be entered as credits for the estate, and that the notes be turned over to their trustee, should they desire to receive them. If not, that the executors do proceed to collect them and pay over to their trustee the proceeds as fast as they may be able to collect the same.

It is also ordered and decreed, that the report of the Commissioner, recommending the terms on which the property of the complainants should be settled, and suggesting that William F. Nance is a fit and proper person to be appointed the trustee of each of them, and recommending his appointment upon certain conditions, be confirmed, and become the judgment of this Court, upon W. F. Nance's giving bonds with sureties, as recommended by the Commissioner.

The plaintiffs appealed, and now moved to modify or reform the decree, upon the grounds:

1. Because the testator of the defendants, Frederick Nance, who was the testamentary guardian of the plaintiffs, never did invest their respective estates, as it was his duty to do, by putting them into a state of security; but mixed up their said estate with his own, and treated their funds as his own, and loaned them out as his own, and in his own name; and, therefore, in equity, should be liable for all losses occasioned thereby; and His Honor erred in not so deciding.

2. Because said testator did not invest the funds of his said wards in safe securities, and report the same to the Court, as required by law; and His Honor erred in not so deciding.

3. Because the Chancellor erred in deciding that a number of notes found in his possession at his death, marked "Laura and Mary's notes," was sufficient evidence that they were investments made for them; which, if evidence for any purpose, would go to show that he had set apart that portion of his own notes, payable to himself, out of which he expected to collect enough to satisfy the demands of his wards; and His Honor erred in not so deciding.

4. Because if their said guardian did have the right to loan out their funds, taking notes payable to himself, without any marks showing said notes belonged to them, or

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which they could claim in case of his insolvency, he should have done so only on mortgage of real estate unencumbered, and then only to the extent of two-thirds of the value thereof, which was not done with relation to any of the notes now set up as investments for them, except in the case of

William P. Butler, with S. Christie, Elbert Bland and J. A. Bland as the sureties thereto, for the sum of ten thousand dollars; and His Honor erred in deciding that the plaintiffs should take said note as a good investment of their funds.

5. Because the defendants' testator was the guardian of these two plaintiffs, separately and distinctly, and he should not be exonerated by calling certain notes, "Laura and Mary's notes," as it was his duty to have invested them separately, so that each one could have known, at any time, in what her estate was invested; for, although the two cases of the plaintiffs have been tried together, for convenience, they are separate and distinct; and His Honor erred in not so deciding.

6. Because the two sealed notes decided to be proper investments by his Honor, to wit: One given by C. B. Griffin, with S. G. Waller and Thomas Spearman as the sureties thereto, for \$416.53, and one given by G. M. Winn, with Upton W. Winn and William Mills, Jr., for \$784.04, should not be credited to the account of the guardian as an investment, because, although the said notes were properly received by the guardian as a part of his wards' estate, and at that time good, it was his duty to have kept them good; and His Honor erred in not so deciding.

7. Because one of the notes admitted as an investment by His Honor, that of James D. Nance and Silas Johnstone, for the sum of \$2,136.31, was without security, and His Honor erred in supposing that one of the makers was principal, and the other surety, when, in fact, the money was lent to both as joint principals for a joint purpose; but, even if Silas Johnstone had been surety, the note was not secured as required by law and the practice of the Courts of Equity—it never having been reported according to law.

8. Because the sealed note of William East, with B. S. James and Samuel East as sureties, for \$2,500, which is payable to F. Nance or bearer—admitted as an investment by His Honor—cannot be sufficiently identified as a part of the estate of either of the plaintiffs, according to the rules and practice of the Courts of Equity—it never having been reported according to law; and, further, because the solvency of the parties, at the time the note was given, has not sufficiently been proved.

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*9. Because the note of William P. Butler, with S. Christie, Elbert Bland and J. A. Bland, for \$10,000, was not, in fact, an investment, and has not been so proved, of so much of the estate of the plaintiffs, or either of them, and that the defendants should not have received credit therefor; and, further, because it has been discovered, since the trial of these causes, that the mortgage given to secure the payment of the said note was inoperative and unavailing as a security, the

property embraced in said mortgage being, under the lien of judgments, older than the mortgage, for the satisfaction of which judgments the land embraced in the mortgage has been sold, showing negligence on the part of the guardian, Frederick Nance, to the interest of his wards, even if said note had been an investment and regularly reported as such.

The defendants also appealed, and now moved this Court to modify the decree, on the grounds:

1. Because His Honor erred in not allowing the estate of F. Nance, deceased, credit for the notes of L. L. Young and W. F. Nance as proper investments of the complainants' funds, as the proof establishes the facts, that the complainants' funds were invested in said notes, and that the said notes were perfectly good when taken, and one of them, L. L. Young's, is now good.

2. Because His Honor erred in not allowing the estate of F. Nance credit for the stock in the Greenville and Columbia Railroad Company, as the proof establishes the fact that the said F. Nance received said stock from the estate of complainants' father in a division of his stock in said company, and it was agreed in this case that the complainants should receive this stock as that much of their estate.

3. Because His Honor erred in not allowing the estate of F. Nance, deceased, credit for the amount of the note on W. P. Butler, S. Christie, J. A. Bland and F. Nance, for \$5,000, as the evidence shows clearly that this note was perfectly good when taken, and that the funds of the complainants were invested in it.

Fair, for plaintiffs.

Jones, Simpson, for defendants.

Oct. 9, 1869. The opinion of the Court was delivered by

WILLARD, A. J. The bills seek to charge the representatives of F. Nance, testamentary guardian of the complainants, with

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certain *trust funds held by him in that character. The representatives of F. Nance seek to discharge his estate by showing certain investments of that fund, claimed to have been properly and judiciously made, which have been lost, as is alleged, by casualties, not implicating the guardian in fault.

The decree establishes certain of these alleged investments, holding them to have been judicious, and disallows others.

The first, second and third grounds of complainants' appeal bring to notice the evidence tending to show that the guardian had kept the funds of his wards invested separately from his private funds, denying its sufficiency. The complainants appear to have fallen into the error of considering the Chancellor as having based his decision, as to the sustained investments, wholly upon the fact

that, after the decease of the guardian, the securities in question were found in a parcel by themselves, enveloped, and marked on the envelope, "Notes belonging to me as guardian of L. E. and M. W. Nance. (Signed) F. Nance." This position is advanced by the complainants' third ground of appeal. The Chancellor, in upholding these investments, based his conclusions, not exclusively upon the testimony indicated by the third ground of complainants' appeal, but as well upon additional testimony, and he is not open to the charge of having laid undue or exclusive weight upon the evidence furnished by the envelope of the package of securities. The additional fact that some of the securities enclosed in that envelope were disallowed as investments, shows that his decision did not depend wholly on the mode in which such securities were kept. The evidence bearing on the question of investment is, in part, general, and applicable to all the securities found in the envelope, and, in part drawn from the circumstances attending particular investments; and, therefore, can properly be weighed only in its special application to investments respectively.

The first ground of complainants' appeal involves, in addition to the foregoing, a question of law, namely: whether the funds, if invested at all, were put in a "state of security."

This proposition of law is more fully stated in the fourth ground of appeal, and is, in substance, that the guardian should have loaned the trust funds "only on mortgage of real estate unencumbered, and then only to the extent of two-thirds of the value thereof." If this proposition is sound it will be decisive against all the investments claimed, for but one of them was upon real security, and, in that case, the land appears to have been pre-

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viously encumbered, and the *security lost in consequence thereof. This proposition may be viewed in either of two distinct lights: first, as affirming a general rule of law, limiting all investments by guardians and trustees, by way of loan to individuals, to mortgages of real estate of the character contended for; or, second, as affirming that, under the circumstances of this fund, such was the limit of a prudent exercise of the guardian's discretion. The first proposition is one of law purely; the second is a mixed question of law and fact. Is there, in this State, a rule of law requiring real security in all cases of individual loans made by trustees, independent of the circumstances that may surround the trust estate?

In England, it is settled that an investment on personal security alone, whether created by a promissory note or a bond, constitutes a breach of trust, for which the trustee will be personally liable, (Hill on Trustees, 378;) and if he finds the estate coming into his hands to consist wholly, or in part,

of personal obligations, it is his duty to call them in and properly invest the fund. (Ib. 380.)

In this State, while the principles of equity from which the English rule was deduced are recognized and enforced, the rule itself has undergone modifications to suit the circumstances of the country. No case is found localizing the English rule on the subject of personal securities within this State, while it is at the same time true, that, in no case brought to notice has the judgment of the Court rested upon any proposition directly sanctioning such modes of investment. It is true, nevertheless, that a considerable weight of judicial opinion, of both an affirmative and negative character, has been advanced in favor of such securities under suitable limitations. In *Spear v. Spear*, (9 Rich. Eq. 184,) Chancellor Wardlaw says: "We are of opinion that the guardian should change, as soon as practicable, the investment of the funds of his wards into public securities, or bonds secured by lien on real estate, or, at least bonds of third persons, with proper securities."

The bill to which this expression related was, in behalf of the wards, to charge the guardian with moneys loaned to himself, and employed in his mercantile business. This bill was dismissed as prematurely brought, the loan in question having been properly made previous to the guardianship by a former trustee, and time sufficient for changing the investment not having been allowed the guardian after his accession to the guardianship.

If this opinion did not enter into the judgment of the Court, still it is entitled to great

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weight. One prominent reason for this *is, that it was evidently the deliberate sense of the members of the Court, and intended as a guide to the guardian as to his future conduct, which, if followed, would render a formal expression of the judgment of the Court on the question unnecessary. Another reason for attaching peculiar importance to this declaration arises from the fact that it is the duty of trustees, in selecting investments, to have regard to the considerations that influence the practice of the Courts in the case of investments made under their immediate direction.—*Hill on Trustees*, 378. In conforming to this rule the trustee would not be justified in overlooking the daily practice of the Court, or in disregarding expressions of opinion, and confining his attention exclusively to the settled judgments of the Court.

It will be observed that the Court, in *Spear v. Spear*, do not give unqualified approbation to personal securities, nor place them strictly on a par with public and real securities. This is very clearly implied by the use of the expression "at least," and is less distinctly shadowed forth in the use of the expression "proper securities," instead of "good

and sufficient sureties," the latter expression, good and sufficient, being significant of value alone, while the term "proper" carries with it an implication that some degree of technical sufficiency is requisite. What is the true import of the language of the Court will be considered after the general rules applicable to the subject have been noticed.

In *Sweet v. Sweet*, Speers Eq., 309, the application was to remove a guardian for loaning his wards' money to himself. An order was made dismissing the guardian, which was reversed on appeal. Chancellor Wardlaw, in *Spear v. Spear*, doubtless takes the true view of the case of *Sweet v. Sweet*. He says "the point decided in that case was, simply, that it was insufficient reason for the removal of a guardian from his office that he had employed in his own business the funds of his ward."

He adds, "The Court might have proceeded to direct a change of investment." But the decision, in *Sweet v. Sweet*, is far from absolving the guardian from liability for losses in the case of personal investments. The guardian, in his answer, had contended "that he had as good a right to use the money as to lend it out at interest to others; in which last case he could only have realized the interest, and have been responsible for the funds."—p. 319. Chancellor Johnson appears to have taken the same view, for he says: "I do not know, indeed, how the Court can control a guardian in the use he makes of a money fund. It is not usual, particularly in

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the *country, to require a guardian to invest funds of inconsiderable amount in government or other public securities; nor is it always practicable to do it to advantage; and there is no alternative but to lend it on bond. In this form it is always under the control of the guardian, and, in the end, the whole responsibility devolves on him."

The Chancellor appears to have regarded investments in personal securities as, at least, an irregularity, affording imperfect protection to trustees, and hardly less objectionable or insecure than direct loans from the guardian to himself. The most noticeable feature of this decision is, that it grounds the propriety of personal investments on the necessity at times arising from the situation of the particular fund, and not upon any general rule of law giving unqualified approval to that form of security. The criticism on this case, in *Spear v. Spear*, did not touch the general foundation upon which the reasoning of the Chancellor rested, but its application to the case of a loan made by the guardian to himself.

In *Mulligan v. Wallace*, 3 Rich. Eq., 111, the Commissioner in Equity was ordered to invest in personal securities. The question before the Court grew out of the manner in which the Commissioner proceeded to execute this order, and did not concern the pro-

propriety of investments in securities of that class. It is to be presumed that special reasons, or, possibly, the consent of all parties in interest, influenced the terms of the order, so far as it directed the taking of personal securities.

In view of these judicial declarations and action, we cannot hold that the rule of law condemning investments by trustees in personal securities has been fully adopted in this State. In conceding that circumstances may exist justifying such investments, it does not follow that an unnecessary resort to personal securities will be justified. The duty of trustees, in relation to investments, is defined by the objects prompting the creation of the trust, namely: to place the fund in a state of security, and in a condition to yield increase. The resulting duty is to seek, with reasonable diligence and prudence, investments affording both security and increase. These principles are recognized in our own Courts in the following cases: In *Spear v. Spear*, already cited, it is said that it is the duty of a trustee "to put the estate committed to him in a state of security." In *Taveau v. Ball*, (1 McC. Eq., 456,) the duty of executors to invest the funds in their hands was enforced, and their liability for failure to invest within a reasonable time

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recognized. The principle of this decision would apply with still greater force to trustees and guardians; for, while the primary duty of the executor is that of administration, the duty of investing being only subsidiary to it, the primary duty of the trustee and guardian is secure investment. The more difficult question is as to the degree of security requisite. This is to be determined, in part, by settled rules of law, and, in part, through the discretion of the trustee. The Courts have gone no further in the direction of limiting the discretion of trustees than to indicate certain classes of investments as admissible, and to reject others as unsuitable. Within the limits of this imperfectly defined jurisdiction the trustee has been entrusted with a large discretion, and treated with great liberality while acting in good faith and chargeable with no culpable negligence or gross imprudence. In *Spear v. Spear*, and in *Mulligan v. Wallace*, loans made by a trustee to himself were condemned. In *Morton v. Adams*, (1 Strob. Eq., 72,) he was held not to be authorized to lay out the trust funds in the purchase of real estate. It is held in England that the employment of the trust fund in trade or any speculative undertaking, without an express authority, will be treated as a breach of trust.—*Hill on Trustees*, 378. The same doctrine was applied by Chancellor Kent, in *Thompson v. Brown*, 4 Johns. Ch., 619. The effect of authorities of this class is to subject the trustee to liability if he invests trust funds, without special

authority, in either of these objectionable modes.

A class of cases was pressed upon our attention on the argument as maintaining the doctrine that want of good faith and gross negligence were the only grounds on which trustees could be charged, in the event of a loss of trust funds. The true bearing of these cases was misconceived.

Boggs v. Adger, 4 Rich. Eq., 408, is a case strongly illustrative of the grounds on which this proposition of the defendants rests. In that case an attempt was made to charge the guardian with funds lost through investments in stock of the United States Bank. The general question, whether bank stocks, as a class, were suitable security for trust funds, does not appear to have been considered. The prudence of investing in that particular stock was the question brought to the notice of the Court. The question, therefore, was as to the liabilities of trustees for errors of judgment, in cases where they had a right to the exercise of discretion. The rule laid down by Chancellor Wardlaw is, that a trustee is answerable for those losses only which are occasioned by such acts or omis-

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sions *as a prudent man could not do or omit in his own affairs. This rule is referred to the authority of *Taveau v. Ball*, 1 McC., Eq., 464; *Bryan v. Mulligan*, 2 Hill's Eq., 364; *Glover v. Glover*, McM. Eq., 153, and *O'Dell v. Young*, Ib., 155. An examination of these cases will show that the rule, as laid down, was intended to define the responsibility of trustees while acting within the limits of their discretion, and not to give support to the idea that that discretion was unlimited as to the character of investments, and their responsibility measured solely by the purity of their motives and the degree of care exercised in the control of the trust fund. In *Taveau v. Ball* it was held that the executor was justified in selling the produce of a plantation on credit, in conformity to the usages of the country, and was not responsible for a loss arising from the creation of a bad debt, having used due care. The Court say: "When he (the executor) has honestly and faithfully endeavored to acquit himself of his charge, the Court is slow to visit a loss upon him; having, however, always so much regard to the cestui que trust as to prevent negligence and abuse." *Rowth v. Howell*, 3 Ves., 565, and *Powell v. Evans*, 5 Ves., 839, are given as the authoritative sanction of this language. The Court proceeds to draw from these authorities a rule stated as follows: "The executor should manage the funds committed to his care with the same care and diligence that a prudent and cautious man would bestow on his own concerns." The case did not involve a question of investment, but the propriety of employing the ordinary commercial means of disposing of merchandise, the product of the testator's

estate. If anything is wanting to a correct understanding of the language quoted from this case, it will be found in the English authorities, from which it is substantially drawn.

In *Powell v. Evans*, the executor was charged with failing to call in personal securities in which the testator had invested during his lifetime. The Master of the Rolls held that the executor was liable, both on the general ground of having left the funds of infants dependent upon the value of personal securities, and upon special instances of neglect disclosed by the facts of the case. It was, in this case, setting rigid limits to the discretion of trustees as to investments, that language was employed tending to show that the largest liberality, in the case of errors of judgment, is consistent with the interposition of impassable boundaries to the discretion of trustees. The Master of the Rolls says: "The Court is bound to attend with great rigor, on the one hand, to protect persons not

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*capable of supporting their own interests—which was the case of this plaintiff, having been an infant at the time—and, also, with great tenderness to executors, who are called upon to execute often onerous and difficult trusts, and are entitled to great indulgence, unless neglect is fully proved." Again, he says: "No man who ever sat in this Court has been more averse than I to charge executors who intended fairly to discharge their duty, and more cautious not to hold them liable on slight grounds, thereby deterring others from taking upon them such an office." Such expressions cannot be rightly understood when separated from the spirit of justice that prompted the determination of the case. They display tenderness without weakness, the highest ornament of the judicial mind. In tracing these expressions into our own cases we must not lose sight of the true elements of their legal and moral strength.

In *Rowth v. Howell* it was held that the executor was justified in employing the customary means of safely keeping funds in hand; and trust funds having been lost by the failure of the banker, with whom they were deposited, the executor was free from responsibility, not being chargeable with any special want of due care. This was treated as a question of prudence, and was a case appropriate for the application of the rule stated in *Boggs v. Adger*, upon the authority of this case, and *Powell v. Evans*. The lights furnished by these English cases disclose the force of the language of *Boggs v. Adger*.

Bryan v. Mulligan, 2 Hill's Eq., 364, involved the right of an executor to ship merchandise, for sale, to a foreign market. It was, therefore, similar to *Taveau v. Ball*, and the same general result was arrived at, namely: that the executor was authorized to conform to the ordinary commercial

usages in disposing of merchandise. He was, properly, held not to be chargeable with the consequences of an error of judgment in the selection of the best market for the sale of the produce, which resulted in a loss to the fund.

In *Glover v. Glover*, a question of negligence in the collection of debts was presented, and the executor charged on the ground that he knew that the debtor was in failing circumstances and failed to act accordingly. In *Odell v. Young* the liability of a guardian for the solvency of securities taken for a debt due to the ward was considered. In both of the cases last cited the questions were treated as turning on negligence, and expressions similar to those quoted above from *Powell v. Evans* are employed.

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*Thus it appears that the rule laid down in *Boggs v. Adger* was drawn exclusively from cases involving questions either of error of judgment or of negligence, and had no reference to the more general question whether the rules of law precluded certain investments as altogether unsuited to the nature of the trusts to which the fund was devoted.

The next case to be noticed, in connection with the general proposition advanced by the defendants under consideration, is *Hext v. Porcher*, (1 Strob. Eq., 170.) The question in this case, as well as in *Cooper v. Day*, (1 Rich. Eq., 26.) intimately connected with it, was, whether the trustee was liable for failing to record a deed of trust lands. In the former case it was held that he had committed a justifiable mistake, while in the latter he was charged with culpable negligence. The expressions employed in *Hext v. Porcher*, to illustrate the protection afforded to trustees acting within the limits of a fair discretion, remind us of the language of *Powell v. Evans*, and are to be understood under the same limitations. The question, whether the discretion of trustees as to investments was limited, was not either directly or indirectly before the Court, and its language cannot, with fairness, be extended to cover the doctrine advanced by the defendants.

The result of the cases in our own Courts, properly understood in their relation to the general principles of law determining the duties and responsibilities of guardians and trustees in case of investments of trust funds, prevailing in England as well as in this State, may be stated as follows: The trustee will be held responsible for losses of trust funds through loans to private persons, unless securities are taken collateral to such loans. Such securities should primarily consist of mortgages of unencumbered real estate of a value sufficient to guaranty the debt against all contingencies liable to occur, or capable of being foreseen. Bonds of individuals should not be taken in lieu of

real securities, unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured. When personal securities are taken in lieu of real, it will devolve upon the trustee to make the necessity and propriety of such investments appear upon an accounting with the *cestui que trust*.

The foregoing observations do not apply to loans made on public securities, nor to cases where the investment is, in neither form nor substance, a loan.

The deductions are in harmony with the

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objects intended to be secured by the creation of trusts designed to create and apply an income. Trustees are not called upon to obtain, for the funds in their hands, a greater rate of increase than that which is afforded by the most secure investments of the country. If they seek to enhance the product of the fund by assuming speculative risks, they do it at their peril. If they take securities of an inferior class, while better can be obtained, without any profit therefor to the *cestui que trust*, they clearly disregard the plainest dictates of duty.

In applying the foregoing principles to the present case, it should be observed that the Chancellor has decreed that certain investments in personal securities are judicious, and, unless ground is found for reversing that conclusion, it must be regarded that, as to such investments, the circumstances surrounding the trust fund justified the taking of that class of securities. It remains, therefore, only to consider the special matters brought up by the appeals.

The proposition brought up by complainants' sixth ground of appeal is, that the guardian should be charged for not keeping good certain securities originally good. The complainants have not laid a sufficient foundation in fact to charge the trustee with negligence in connection with the deterioration of the value of those securities, and no ground exists for reversing the conclusions of the Chancellor on this point.

The objection, in complainants' seventh ground of appeal, to the sealed note of J. D. Nance and S. Johnstone, that Johnstone signed as principal, and not as surety, is not sustained by the testimony of Johnstone; the only reasonable inference from which establishes the opposite conclusion.

In regard to the East note, referred to in complainants' eighth ground of appeal, the proposition is, that the identification of this note as part of the wards' estate fails: first, because it was not reported as such by the guardian; second, because the solvency of the parties, at the time the note was given, was not sufficiently proven. The failure to report the security is not, in itself, conclusive; it is only a circumstance to be weighed among others. The conclusions of the Chancellor are not open to objection for

the reasons stated in this ground of appeal. There certainly was evidence from which the conclusion might be drawn that this note was taken as an investment, and also that it was well secured when taken.

The ninth ground of appeal relates to the Butler note for \$10,000. The evidence sufficiently sustains the conclusions of the de-

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cree, *that this note was, in point of fact, an investment of the trust fund. The objection that the mortgage taken to secure collaterally this note was "inoperative and unavailing as a security," in consequence of the property having been previously incumbered, and that such security became lost through such previous incumbrance, would have been in point, had that mortgage constituted the only security for the loan; but the fact is, that personal securities were given, as in the other investments considered, and the mortgage appears to have been added thereto, for what it might prove to be worth. The charge of negligence against the trustee, in reference to this investment, is not sufficiently made out.

Having disposed of the important legal question involved in the complainants' appeal, and having examined the special objections to the decree, based on the allowance of certain investments, the matter of the first five grounds of the complainants' appeal is substantially disposed of, with the exception of the proposition advanced by the fifth ground. This proposition is not very distinctly presented, but amounts to a claim that investments made by the trustee for the joint account of the two wards, without distinguishing their several interests in the same, are for this reason to be disallowed. We know of no principle from which such a conclusion can be deduced. If the estate has sustained a loss for any such reason, and that loss can be traced to culpable negligence on the part of the trustee, such a state of facts should be presented directly; it cannot be made out argumentatively in absence of such a statement.

Defendants' first ground of appeal involves the proposition that investments made without sureties are good. This proposition, we have seen, is unsound.

Defendants' second ground of appeal affirms the fact that the proofs established the fact that the guardian received certain stock of the Greenville and Columbia Railroad Company from the estate of complainants' father, on a division of his stock in said company. "It was agreed, in this case, that the complainants should receive the stock as that much of their estate." We do not find evidence that would warrant us in holding that the Chancellor was bound, from the facts before him, to arrive at such a conclusion. We see no ground of disturbing his findings in this part of defendants' appeal.

Defendants' third ground of appeal rests on the proposition that the guardian may become a surety on a loan of trust funds. The

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*same reasons which, as we have seen, prevent him from lending to himself, precludes him from lending on his own collateral obligation. By whatever means the note became placed in the amount of the trust funds, whether by original investment or as an appropriation made by the guardian out of the other trust funds held by him, or from his personal estate, the transaction is equally open to the objection on which the Chancellor based this part of his decree.

The appeals will be dismissed.

MOSES, C. J., concurred.

I S. C. 227

Ex parte MARY S. MONTEITH.

(Columbia. April Term, 1869.)

[Equity ⚡446.]

Bill to foreclose a mortgage of land given to secure the payment of a bond which was usurious. No defence was made, and, the bill being taken as confessed, a decree of foreclosure, in the usual form, based on a report of the Commissioner, setting forth the amount due on the bond, according to its terms, was made: *Held*, That a bill of review would not lie to correct the supposed error in the decree.

[Ed. Note.—Cited in *Hardin v. Trimmier*, 27 S. C. 116, 120, 3 S. E. 46.

For other cases, see *Equity*, Cent. Dig. §§ 1079-1090; Dec. Dig. ⚡446.]

[Usury ⚡99.]

A party cannot avail himself of the defence of usury under the Act of 1830, unless he brings the matter, by pleading, to the view of the Court.

[Ed. Note.—Cited in *Loan & Exchange Bank v. Miller*, 39 S. C. 175, 193, 197, 17 S. E. 592; *New England Mtg. Security Co. v. Baxley*, 44 S. C. 90, 21 S. E. 444, 885.

For other cases, see *Usury*, Cent. Dig. §§ 219-234; Dec. Dig. ⚡99.]

[Equity ⚡443.]

Where one loses his suit by his own neglect, he cannot be aided by a bill of review.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1076; Dec. Dig. ⚡443.]

Before Lesesne, Ch., at Richland, June, 1868.

This was a petition for leave to file a bill of review, or bill in the nature of a bill of review. In addition to the facts of the case, as stated in the decree of the Circuit Court, it is only necessary to add that the petitioner, when the bill was filed against her, consulted counsel learned in the law, who advised her that she could make no valid defence to the suit, and that, in consequence of this advice, given in mistake of law, and upon which she confidently relied, she did not appear, and allowed the bill to be taken pro confesso against her.

The decree of His Honor the Chancellor is as follows:

Lesesne, Ch. This is a petition for leave to file a bill of review, or bill in the nature of a bill of review, in a cause of the Columbia Building and Loan Association v. The

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Executrix of Galloway Mon*teith. And the ground of the application is alleged error in law in the decree in said cause.

It is not certain that in this State a bill of review will lie on such a ground. The point arose in the case of *Manigault v. Deas*, (Bail. Eq., 296,) in 1831, and the Court used this strong language: "The fifth question requires neither argument nor illustration. In the case of *Perkins v. Lang*, reported in a note, 1 McC. Ch., 30, it was decided that a bill of review will lie only where new matter has been discovered since the decree, and of which the party could not have had the benefit in the first instance, making a new case, and one proper for equity jurisdiction. In the case of *Haskell v. Raoul*, 1 McC. Ch., 30, the Court of Appeals decided that a bill of review will not lie for error in law apparent on the face of the decree. This is a point regarded as settled, and both policy and the safety of suitors require that it should not be open for argument."—3 Rich. Eq. 541. But in the case of *Smith v. Hunt*, decided twenty years after, the Court, without expressly overruling the former decision, or even noticing it, say, that bills of review will lie on account of error in law apparent on the face of the decree, as well as for newly discovered testimony.

But, supposing the ground to be a good one, does it exist in this case? What is meant by error apparent on the face of the decree? It does not mean merely erroneous judgment. It rather means a mistake, or omission, or misstatement as to a rule of law, or legal principle, or statutory enactment.—17 Ves., 178. Thus, in *Perry v. Phelps*, Lord Eldon says: "There is a distinction between error in the decree and error apparent: error apparent does not apply to a merely erroneous judgment." And, by way of illustration, he adds: "The cases of error apparent are of this sort—an infant not having a day to show cause." The error must be obvious, so as to be perceived as soon as brought to the attention of a jurist.

In the case in hand, Galloway Monteith gave a bond and mortgage to the plaintiff for a loan. A bill was filed against his executrix, the present petitioner, and a decree of foreclosure obtained at June Term, 1860, under which the mortgaged property was sold, in October, 1860, and the sale reported and confirmed, and the cause marked on the docket "ended," at June Term, 1862. The petitioner made no defence in the cause, but allowed an order, pro confesso, to be entered

against her; and the decree was based on a report of the Commissioner, setting forth the amount due on the bond, according to its

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tenor and import. At the same Term *(June, 1860,) a cause of the same plaintiff v. William Bollinger was heard. The cause of action was a bond, in precisely the same terms as Monteith's, and a mortgage to secure it. This cause was defended, the defence being that the contract was usurious. An elaborate and learned judgment was delivered by the presiding Chancellor, in which the defence was fully considered and solemnly overruled. Bollinger appealed; and, in December, 1861, the Court of Appeals decided that the contract was usurious, reversed the Circuit decree, and dismissed the bill. Thereupon, but not until the 15th of June, 1867, the plaintiff filed this petition, and the alleged error of law in the Circuit decree is, that the Chancellor held that the contract was not usurious.

The Court of Appeals has decided that he made a mistake, and it must, therefore, be conceded that he did. But it only amounted to "erroneous judgment." Until the Court of Appeals spoke, no jurist would have said that there was error in law apparent on the face of the decree, in the sense in which that expression should be understood. Suppose Bollinger, instead of appealing in his case, had filed a petition for a bill of review, and alleged error in law apparent on the face of the decree. It is quite certain that it would not have been listened to. But I do not see anything to distinguish that case from the present.

It is deeply to be regretted that the petitioner did not pursue the course which would have saved her from the loss she has suffered. But the Court is constrained to refuse the prayer of the petition.

The petitioner appealed, on the grounds:

First. Because it is respectfully submitted that there was error apparent on the face of the decree in the case of the Columbia Building and Loan Association against this petitioner, for which a bill of review will be granted.

Second. Because the petitioner was prevented from appealing from the said decree, under a mistake of law, and by advice of counsel.

Third. Because the claim of the Columbia Building and Loan Association was founded in usury, was against the policy of the law, and ought to be set aside.

Fourth. Because such claims as that of the Columbia Building and Loan Association against the petitioner had, before that time, been generally, if not universally, regarded as legal, and the opinion of the Court in the case of Bollinger is in the nature of after-discovered testimony, for which a bill of review will lie.

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*Fifth. Because the strictness of the rules in regard to bills of review is necessary to prevent perjury, and that such rules are adopted for that purpose; whereas, it is respectfully submitted that in the present case perjury is impossible—the entire evidence being in the record of the case, and in the opinion in the case against Bollinger.

Sixth. Because it is respectfully submitted that a great wrong has been done to the petitioner by the decree against her for the Building and Loan Association, and that there is no wrong without a remedy.

Seventh. Because all the facts are admitted to be true, and that, therefore, no wrong will be done to the Building and Loan Association by granting leave to file a bill of review.

Fickling & Pope, for appellants.

First ground:

1st Point. Formerly a bill of review would lie for error in decree.—Postell v. Postell, 1 Des., 173; Brailsford v. Heyward, 2 Des., 34; Ramsay v. Deas, *Ibid*, 239; Rutledge v. Greenwood, *Ibid*, 412; Webb v. Bollinger, *Ibid*, 507.

2. Bill would lie for same causes as allowed in England.—Haskell v. Raoul, 1 McC., 22. As to time.—Riddlehoover v. Kinard, 1 Hill, 378. For what causes.—See Jeannerette v. Radford, Rich. Eq. Cas., 469.

3. Will now lie for error in decree.—A. A., 6 Stat., 411; see A. A., 7 Stat., 258, § 3.

4. This is case of error apparent.—Hunt v. Smith, 3 Rich. Eq., 466.

Second ground:

1st Point. There was mistake of law which will be relieved against.—Garner v. Garner, 1 Des., 437; Eggleston v. Keith, 2 Des., 141; McCrae v. Hollis, 4 Des., 122; Lowndes v. Chisolm, 2 McC. Ch., 455; Hopkins v. Mazyck, 1 Hill's Ch., 242; Gist v. Gist, Bailey's Eq., 343. See, also, Gilchrist v. Martin, Bailey's Eq., 492; Laurence v. Beaubien, 2 Bail., 623, and cases there cited.

Third ground:

1st Point. Usury.—Columbia Building and Loan Association v. Bollinger, 12 Rich. Eq., 124.

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*Sixth ground:

1st Point. Because the decree was founded in fraud and misrepresentation.—Caldwell v. Giles, 2 Hill's Ch., 548; Reid v. Clark, Speer's Eq., 319.

Oct. 9, 1869. The opinion of the Court was delivered by

MOSES, C. J. It is not necessary to consider, under the petition, whether a bill of review, or a bill in the nature of a bill of review, will be entertained in this State for error in law apparent on the face of the decree.

It is sufficient, for the disposition of the

motion which assumes such jurisdiction, for this Court to show that the ground on which it is claimed does not exist in the case, and that, on familiar rules, in regard both to the principles and practice of equity, it cannot be granted.

The bill was filed for the foreclosure of a mortgage of certain real estate, given to the plaintiffs by the testator of the petitioner, to secure the payment of several bonds executed to them by him.

No appearance was entered, or defence submitted, and there was nothing before the Court but the case as made by the bill and exhibits.

The petitioner cannot complain if it is conceded on her behalf that the bonds were usurious on their face. Her allegation is, that there was error in law apparent in the decree, by reason of that fact.

The bond, under the Act of 1830, (6 Stat. at Large, 409.) was not void. If the petitioner (then the defendant) desired to avail herself of the plea of usury, and thus reduce the recovery to the principal sum loaned or advanced, she should have so framed her defence as to have brought that question to the view and decision of the Court.

The Chancellor is not bound to set up a plea for a party who neglects or declines to do it for himself. Where, then, is the error in law apparent on the face of the decree under the case as made?

In *Trulock v. Robey*, 15 Simons, 38 E. C. R., 279, it is said that, in support of a bill of review for error in a decree, the pleadings cannot be referred to. Suppose, however, we extend the rule here, and permit the petitioner to bring the pleadings to the view of the Court, how will it aid her in the purpose she now seeks?

Extrinsic evidence cannot be introduced, nor will the circumstance that, on a bond of

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like character to which the defence of *usury was in due form made, relief was granted, be of avail to show that there was error of law in the decree in the case against her.

There is, however, another objection which is fatal to the party. It is admitted that she subjected herself to a decree pro confesso, and it is claimed that, had she presented her defence, the result would have been, as in the case of *Bollinger ads. the same plaintiffs* [Columbia Bldg. & Loan Ass'n]. (12 Rich. Eq., 124 [78 Am. Dec. 463]) a decree in her favor.

Where one loses his suit by his own neglect, he cannot be aided by a bill of review.—*McMickens, Exr's, v. Perin and al.*, 22 How., 282 [16 L. Ed. 259]. This is founded on a well recognized principle. A party must not stand off, risk the chance of litigation, and, if, perchance, the result be against him, seek a review of a judgment to which his laches has contributed, and which a regular course of defence might have averted.

We have anxiously examined the case, to ascertain if anything could be found to authorize the relief sought. While, with the Chancellor below, we regret that the petitioner did not pursue the course which might have saved her from loss, we are obliged to dismiss the motion.

WILLARD, A. J., concurred.

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*GEORGE BROWN v. SARAH CURETON,
and SARAH CURETON v. GEORGE
BROWN.

(Columbia. April Term, 1869.)

[Wills \S 525.]

Testator, after a specific bequest of negroes, and a direction that the rest of his negroes be divided, by appraisers, into four lots, as nearly equal as may be, one, including certain named negroes, to be set apart to his son D., and the other three to be taken and drawn for by his other children and some grandchildren, provided a fund to be applied by his executors "in equalizing the lots of negroes which his children and grandchildren would take." The division was made on the 26th December, 1862: *Held*, That those whose lots were valued at less than others were entitled to have the lots equalized out of the fund provided by the will for that purpose; that their rights, in this respect, were not affected by the emancipation which afterwards took place; and that this was not a case of vendor and vendee coming within the provision of the Constitution of 1868 in reference to contracts for the purchase of slaves.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1138; Dec. Dig. \S 525.]

[Wills \S 736.]

Held, further, That those whose lots were of the highest valuation were not liable to account to others for the excess in the value of their lots.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1875–1887; Dec. Dig. \S 736.]

Before Johnson, Ch., at Newberry, September, 1867.

The decree of His Honor the Chancellor is as follows:

Johnson, Ch. On the 7th day of August, 1860, Daniel T. Cureton executed his last will and testament, and died on the 16th day of July, 1862, leaving the same unrevoked. Drayton T. Cureton and George Brown, the son and son-in-law of the testator, were appointed the executors of his will, and, soon after his death, proved the same, and assumed upon themselves its execution.

In the second clause of the will, the testator devised to his son, Drayton T. Cureton, a tract of land supposed to contain about twelve hundred acres, in consideration of services rendered by him. In the third clause he bequeathed to his said son, nine negro slaves and a mule, as an equivalent for property, before that time, advanced to his other children.

In the fourth clause he directed that all the rest of his negroes should be valued and

divided by five disinterested persons, to be appointed by the Ordinary of the District, "into four lots, as nearly equal as may be practicable, keeping families as much together as may be possible." In the division he directed that London and wife, and their four children, should be included in the lot to be set apart to Drayton T. Cureton at a valuation, and directed that the other three lots should be drawn for as follows, to wit: One lot by his daughter, Lucinda H. Brown, one other lot by his son, James Cureton, and the remaining lot by his grandson, James D. Sheely, for himself and three sisters, Elizabeth C. Sheely, Eve Ann L. Dominick, wife of An-

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drew Dominick, and Sarah C. *Sheely, who has since intermarried with Joseph L. Harmon. And he directed that the lot that should be drawn for them should be divided into four lots, as nearly equal in value as might be practicable, one of which he gave to each of his four grandchildren.

In the sixth clause he directed that the whole residue of his estate, which consisted, principally, of a tract of land, containing four hundred and eighty-six and one-half acres, stock of all kinds, plantation implements, furniture and provisions, should be sold by his executors "at such time and on such terms as they might think most advantageous" to his estate. And that the net proceeds of such sales, after the payment of his debts, and the amount collected on his choses in action, and the cash on hand, should be applied in equalizing the lots of negroes which his children and grandchildren would take under the fourth clause, and that the balance should be divided into four shares: one for Drayton T. Cureton, one for Lucinda A. Brown, one for James Cureton, and out of the remaining one he gave six thousand dollars to George Brown, in trust, for the sole and separate use of his daughter, Sarah H. Hawkins, during her life, and after her death to her issue, and the balance of the share he gave to her four children, to wit: James D. Sheely, and his three sisters.

On the 18th day of December, 1862, the executors sold all the property which they were required by the will to sell. The personal property was sold on a credit till the first of January, 1864. The land was sold on a credit of one and two years, with interest from the day of sale. The whole sales amounted to \$14,375.48. James Cureton purchased the tract of land for \$5,800—a few dollars more than its appraised value—and personal property amounting in value to \$941.00; and, to secure the payments for the land, he gave his two sealed notes for two thousand nine hundred dollars each, with sureties; and, on the 7th of January, 1863, paid for his purchases of personal property, and fifty-nine dollars on one of the notes given for the purchase money of the land. And Drayton T. Cureton purchased personal property which amounted

in value to \$5,776.57, for which he gave his bond, with sureties, to the Ordinary, as required by law.

On the 26th day of December, 1862, E. P. Lake, Ordinary of the District, appointed five disinterested persons, in accordance with the directions of the will, who, after having been sworn, divided the negroes into four lots, and set apart one of them to Drayton T. Cureton, and the others were drawn for by

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the parties who were entitled to draw for the same; and by their return it appears that the lots drawn by Mrs. Brown and James D. Sheely, for himself and sisters, were each valued at \$8,500; that the lot drawn by James Cureton was valued at \$7,800; and that the lot set apart to Drayton T. Cureton was valued at \$7,350. This division was completed, and the return signed, on the 26th day of December, 1862; but, at the request of Drayton T. Cureton, who was managing the plantation, the lot of Mrs. Brown, and perhaps others, was not taken off until some day early in the following month. After the division was made the question was asked by the parties who did it, if it made any difference if the lots were not exactly equal, and the only reply that was made was by Drayton T. Cureton, who said that if his lot was worth less he did not care, but that he did not want it worth more, as he had more negroes than anything else; and it is now sought to set aside the division, because the lots were not equal, and because the above expression was used by one of the parties after the division had been completed. The opinion of the Court is, that the division was made in accordance with the terms of the will, and that the expression used by Drayton T. Cureton in no way affected it. It is also insisted, by the legatees who received the lots of negroes having the highest valuation, that in the division, under the sixth clause of the will, they should not be required to account for any excess in value over their own shares, on the ground, that they did not receive the negroes in their possession until after they were set free by the proclamation of President Lincoln; and, further, that it would be requiring them to pay the purchase money for negro slaves. The division was complete and final before the proclamation of President Lincoln went into operation, and if I believed that, as the law now stands, parties could not be required to pay the obligations given by them for the purchase money of negro slaves, yet I would hold, in this case, that the terms of the will must be carried out, and that the parties must account to others for any excess in the value of their lots, though, by a liberal construction of the Ordinance of the Convention, I think such excess in value may be reduced, if the evidence will show that the prices fixed upon the negroes were affected by the inflated condition of the currency. Objection was made that the land

did not sell for as much as it ought to have done, from the fact that it was known that James Cureton wished to purchase it. But there was no evidence showing that there was anything unfair about it, or that it did not sell for its full value.

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*About the time of the sale a copartnership was entered into between Drayton T. Cureton and James Cureton, to carry on the business of planting on the lands which they had acquired from the estate of their late father, with the negroes and other property which they had received under his will and by purchase at the sale, but on what terms the Court was not informed. Under the agreement James Cureton entered upon the lands, and took possession of all the property, and continued to manage it, and to receive the rents and profits from the same, until the 5th day of February, 1864, when Drayton T. Cureton died, after having first executed his will, by which he bequeathed to James D. Sheely one thousand dollars, and to Elizabeth C. Sheely and Caroline Sheely five hundred dollars each, and devised and bequeathed all the residue of his estate to James Cureton, and appointed him executor of the same. He proved the will, and qualified as the executor of the same, and continued in the possession of all the property of his testator's estate until the 29th day of January, 1866, when he died intestate, leaving his widow, Sarah Cureton, and various children, as his heirs-at-law; and, soon after his death, his widow administered upon his estate, and sold the whole of the personal property which he had in his possession at the time of his death, without distinguishing as to which of the two estates it belonged, for cash in gold, and soon afterwards removed to the State of Georgia, without making any provision for the payment of the purchases made by her intestate, and by Drayton T. Cureton, at the sale of the property belonging to the estate of their father, or for other debts due by their estates, and without making any settlement with E. P. Lake, who had taken out letters of administration de bonis non, with the will annexed, on the estate of Drayton T. Cureton. The first of the above stated bills covers all the matters sought to be determined by the second, and many others; and for that reason there will be no separate orders made in them.

Sarah H. Hawkins, and Eve Ann T. Dominick and husband, Andrew Dominick, ought to have been made parties in the first of the above stated bills; and, before a final settlement of the whole case can be had, it is probable that the land belonging to the estate of James Cureton will have to be sold, and perhaps that of the estate of Drayton T. Cureton; and, in either event, the other heirs-at-law of James Cureton will have to be made parties. It is ordered, that the complainant have leave to amend his bill, and

make such new parties as he may be advised.

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It is insisted in the bill, that *James Cureton, by continuing in the possession of the whole estate of Drayton T. Cureton after his death, assented to the legacies given by his will, and that his estate is therefore liable for the same, and also for all the debts due by the estate of the said Drayton; but, taking the times and the circumstances into consideration, I do not think that the position ought to be sustained.

It is ordered and decreed, that the above opinion be taken as the judgment of the Court.

It is also ordered and decreed, that the accounts of the complainant, as executor of Daniel T. Cureton, be referred to the Commissioner, and that he report the extent to which he acted jointly with his executor during his lifetime.

It is also ordered and decreed, that Sarah Cureton, as the administratrix of the estate of James Cureton, do account for his administration of the estate of Drayton T. Cureton, and for Drayton T. Cureton's administration of the estate of Daniel T. Cureton, and for such of the property of Drayton T. Cureton as went into her possession; and, also, that she do account for her administration of the estate of James Cureton.

It is also ordered and decreed, that E. P. Lake do account for his administration of the estate of Drayton T. Cureton.

It is also ordered and decreed, that the Commissioner be at liberty to report such special matter as, in his judgment, may be necessary to settle all the matters connected with the different estates.

It is also ordered and decreed, that the Commissioner do reduce all claims, either for or against the said estates or parties to the said bills, which, under the provisions of the Ordinance of the Convention, ought to be reduced.

And it is also ordered and decreed, that further orders may be taken at the foot of this decree.

The plaintiff, George Brown, appealed, on the grounds:

1. Because His Honor erred in deciding that James Cureton's estate was not liable for the debts and legacies of Drayton Cureton, of whose will he was sole executor and residuary legatee, and who had taken possession of his whole estate, and used it as his own, and was in possession of it at the time of his death; and the personal property of which was sold by the defendant, after his death, as administratrix.

2. Because His Honor erred in deciding that the legatees under the will of Daniel T. Cureton receiving lots of negroes of the

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great*est value, to wit: Lucinda Brown and the Sheely children, should be held to account for the overplus to James and Drayton

Cureton, who received lots of negroes of a less value.

3. Because His Honor erred in deciding that the legatees whose lots of negroes were most valuable should pay over the overplus of their shares to the other legatees whose shares were less—which is in violation of that part of the Constitution of this State which declares that contracts whose consideration was the purchase of slaves should not be collected.

4. Because the decree of His Honor, in other particulars, is contrary to law and equity.

Fair, for appellant.

Oct. 9, 1869. The opinion of the Court was delivered by

WILLARD, A. J. The principal question raised by the complainant's appeal arises upon the construction of certain clauses of the will of Daniel T. Cureton, the testator of George Brown, the complainant in the first case named above. The testator, after making certain dispositions, unimportant to the present question, directs that all the rest of his negroes should be valued and divided by five disinterested parties, to be named by the Ordinary of the District, into four lots, as nearly equal as might be practicable, keeping families together as much as might be possible. He directed that certain specified slaves should be included, at a valuation, in the lot set apart to Drayton T., one of his sons, and that the three other remaining lots should be drawn: one by his son, James, one by his daughter, Lucinda, and one by his grandson, J. D. Sheely, for himself and his sisters—the lot going to grandchildren to be equally divided among them. He further directs that the residue of his estate be sold, and, after payment of debts, the proceeds be applied: first, to equalizing the lots which his children and grandchildren would take under the clauses before referred to, and the balance to be disposed of under subsequent provisions of the will.

The slaves were divided accordingly, but the lots were of unequal value. The question presented is, whether the directions of the will, as to the proceeds of the estate devoted to the equalization of the lots, can be carried into effect by paying to those having the lots of least value a sum sufficient to equalize them on the basis of the valuation ascertained at the time of division. The decree ascertains that the provisions of the

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will, in regard to the apportionment of the slaves, were carried out, and, there being no appeal from that determination, it must stand as a fact in the case. This fact is of importance, for, if the provisions of the will, directing an apportionment, had been found incapable of enforcement, the subsequent dispositions depending, as to their

utility, upon the execution of such antecedent directions, would have failed. But, on the contrary, the very case has arisen that was in the contemplation of the deviser. But it is said that circumstances have occurred not contemplated by the testator, namely: the slaves have become emancipated in the hands of the distributees. The loss of the slaves was the result of a fortuitous event that occurred after the distributees had come into possession of them, under the terms of the will. The intent of the testator, as to equalization, must be tested by the events existing at the time of the apportionment. Then it was that the distributees of the least valuable lots had a right to call for the execution of the equalization clauses in their behalf. It is true the bounty of the testator proved less valuable than he probably anticipated, but not through events that arrested the execution of his declared will and intent.

The clause of the Constitution of this State declaring void contracts, the consideration of which was for the purchase of slaves, has been cited as interfering with the clauses of the will under consideration. This case cannot be brought within that provision, as it is not sought to enforce any contract of that character. The relations of vendor and vendee, inseparable from the idea of such a contract, do not exist in the present case.

The decree, however, goes too far in directing that "the parties must account to others for any excess in the value of their lots." In the present state of the case, all that is appropriate is, that the dispositions made by the will, as to the application of the residue of the estate to the equalization of the lots, should be carried out through the accountings ordered and the proper orders to be made hereafter thereon.

We think that the decree is misapprehended by the first ground of the appeal; but, as the question of the extent of the liability of the estate of James Cureton may well be deferred until the various accounts are complete, the decree will be modified by reserving that question accordingly.

It is ordered, adjudged and decreed, that so much of the decree appealed from as orders that the parties must account to oth-

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ers for *an excess in the value of their lots, and as to so much of said decree as determines that James Cureton, by continuing in the possession of the whole estate of Drayton T. Cureton after his death, did not assent to the legacies given by his will, and that his estate is not liable for the same, nor for the debts due by the estate of said Drayton, the said decree be, and hereby is, modified in such manner as to reserve the consideration of said questions until the accounts are taken which were ordered by said decree.

It is further ordered and decreed, that so much of the sixth clause of the will of Dan-

iel T. Cureton as directs that certain funds be applied in equalizing the lots of negroes which his children and grandchildren would take, under the fourth clause, be established, and that this cause be remanded to the Circuit Court for such proceedings and final decree, upon the principles herein settled, as may be meet and proper, and for the determination of the questions hereinbefore reserved, should they arise; and said decree is, in all other respects, affirmed.

MOSES, C. J., concurred.

I S. C. *241

*JAMES COSGROVE, Plaintiff in Error, v.
RICHARD M. BUTLER, Defendant
in Error.

(Columbia. April Term, 1869.)

[*Appeal and Error* ⇨173.]

Action of trover commenced in December, 1865, on a cause of action which arose between December 19, 1860, and April 29, 1865. Action tried January, 1868, and verdict for plaintiff. Defendant appealed to Court of Appeals, and appeal dismissed. Neither in Court below, nor in Court of Appeals, did defendant claim the benefit of Military Orders, Nos. 10 and 164, staying proceedings in such cases; but, in October, 1868, after said orders had been abrogated, he applied to have the judgment vacated, on the ground that, under the operation of those orders, it was void. Application refused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. ⇨173.]

A Justice of the Supreme Court has no authority, at Chambers, to set aside a judgment of the Court of Common Pleas—*semble*.

[*War* ⇨31.]

The Military Orders, known as Orders Nos. 10 and 164, were mere regulations of the procedure of the Courts—staying their action in a certain class of cases—and did not operate to oust them of their jurisdiction.

[Ed. Note.—For other cases, see *War*, Cent. Dig. § 213; Dec. Dig. ⇨31.]

[*Judgment* ⇨359.]

A judgment will not be vacated for a mere irregularity, which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him.

[Ed. Note.—Cited in *State v. Norton*, 69 S. C. 459, 48 S. E. 464.

For other cases, see *Judgment*, Cent. Dig. § 697; Dec. Dig. ⇨359.]

[*War* ⇨31.]

A judgment which could have been avoided for irregularity under Military Orders, Nos. 10 and 164, will not be set aside after those orders have been abrogated.

[Ed. Note.—For other cases, see *War*, Cent. Dig. § 213; Dec. Dig. ⇨31.]

Before Willard, A. J., at Chambers, Charleston, October, 1868.

The facts of this case are stated in the judgment of the Supreme Court.

Corbin, for plaintiff in error.

Phillips, contra.

Dec. 21, 1869. The opinion of the Court was delivered by

C. D. MELTON, Esq., sitting in the case, by appointment of His Excellency the Governor.

This case comes up on writ of error to the Court of Common Pleas for Charleston, and presents this state of facts:

James Cosgrove, (plaintiff in error,) in December, 1865, was sued in an action of trover, in the Court of Common Pleas for Charleston, by Richard M. Butler, (defendant in error,) and at January Term, 1868, of that Court, the case was tried and a verdict rendered for the plaintiff in the action. From this verdict an appeal was taken, by the defendant, to the Court of Appeals, and a motion was there made for a new trial, which was refused.

The cause of action arose between the 19th December, 1860, and the 29th April, 1865, and was, therefore, within the operation of the General Orders, Numbers 10 and 164,

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from Headquarters, *Second Military District, dated, respectively, April 11 and December 31, 1867, which stayed proceedings on causes of action which arose within that period. But it appears, from the brief now submitted, that neither on the trial below nor in the Court of Appeals was there interposed, by plea or otherwise, any objection to the exercise, by the Court, of its jurisdiction of the cause.

In October, 1868, after the appeal had been dismissed, the defendant in the action, by petition, impleaded the plaintiff, before Mr. Associate Justice Willard, at Chambers, and prayed that the judgment rendered against him should be vacated, for the reason that, the cause of action being within the operation of the General Orders, Numbers 10 and 164, jurisdiction thereof was thereby expressly prohibited to the Court, and its judgment was, therefore, "utterly null and void."

The relief prayed for by the petition was refused by Mr. Justice Willard, and the case is now here for review.

It is not perceived where lies the authority of a Justice of the Supreme Court, on a motion at Chambers, to grant the relief prayed for. Such power is not, in terms, or by any necessary implication, conferred by the Act of 1868, which defines his special powers.

But, regarding the petition as a proper motion before a proper tribunal, the error of the ruling does not appear.

It is conceded to the argument of the counsel for the plaintiff in error, that if a Court shall assume to adjudge a cause of which the law does not give it cognizance, its judgment is a nullity; that such want of jurisdiction cannot be cured by consent of parties, much less by the mere failure to object; that a party aggrieved by such a judg-

ment may have it vacated, notwithstanding he may have pleaded to the action; and that of this right he may avail himself at any stage of the cause, before or after judgment.

But these principles apply only to cases where there is an absolute want of jurisdiction in the Court—a want in the very law of its organization. Such was not the condition of the case now called in question. The Court of Common Pleas which rendered the judgment had jurisdiction of the subject-matter of the suit, and the parties were properly before it. The action had been commenced prior to the promulgation of General Orders, No. 10, and was a proceeding “pending” at the date of General Orders, No. 164. These orders operated no otherwise than as a mere regulation of the procedure of the Courts, declaring a rule for

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the practice of the Courts—staying their action in a given class of cases which were properly within their jurisdiction. They operated in no respect to divest the Courts of their jurisdiction of any causes then already on their dockets; nor did they declare the Courts incompetent to pronounce judgment in the class of cases to which the orders referred.

It is considered, therefore, that there was no ground upon which to declare the judgment void for want of jurisdiction in the Court.

Regarded as establishing a rule or regulation of procedure, the General Orders had no higher force than pertains to other rules of procedure established for the government of the Courts in the administration of justice. A failure in observance falls within the definition of an irregularity—“the doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the Court, ought or ought not to be done.”—*Bouv. Law Dic.* Whether, in a given case, the existence of irregularity vitiates a judgment, must depend upon the character of the irregularity, and the circumstances under which it occurred. It is not necessarily the duty of the Court, during the progress of a cause, to take note of departures from the regularity of procedure. If such departures be not excepted to, the Court may consider objection to them as waived. And it may be asserted, as a general rule, that where there is no want of jurisdiction, and the parties are properly before the Court, its judgment will be binding, even although affected by irregularity which would have defeated the proceeding if objection had been timely and properly made.

The plaintiff in error does not complain of any prejudice because of the irregularity in this case. He does not say that, relying upon the inherent efficacy of the General Orders to stay the prosecution of the suit against him, he failed to attend, or otherwise omitted to avail himself of anything necessary to his defence. On the contrary, he was present, and participated in the trial: and when judgment went against him, himself removed the cause to the Appeal Court, without, at any time, interposing, either by plea or motion, the objection which he now presents.

The case has its analogies in every-day practice. Upon certain causes of action suits are required by the statute of limitations to be brought within a limited period, “and not after.”

There is, in such cases, an express statutory prohibition of a suit thus barred equally as imperative as of suits embraced within the General Orders. And yet it has never

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been considered, if a defendant in such an action fails to plead the protection of the statute, and judgment be given against him, that the Court was without jurisdiction, and its judgment either void or voidable. So, again, in actions against an executor or administrator, brought within the nine months during which they are protected from suit. The language of the Act (5 Stat., 112, § 27,) is imperative that any action shall not be commenced within the privileged period. Yet, if it be commenced, notwithstanding the prohibition, it is not the province of the Court to take notice of the irregularity of its own motion; there is no want of jurisdiction; and, if judgment be rendered without objection made, it is a valid judgment.

There is, however, another consideration which appears to the Court, in itself conclusive of the question. If it were conceded that, at the time the judgment was rendered, it was voidable, because of the irregularity now complained of, and would have been vacated on motion then made, that voidability, springing, as it did, from the General Orders, continued only so long as those Orders had the force of law. Their abrogation preceded this application for the protection they were intended to afford; and advantage cannot be taken from their provisions, now that they have ceased to be of force.

The judgment dismissing the petition is affirmed.

MOSES, C. J., concurred.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER AND DECEMBER TERM, 1869.

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

I S. C. *245

*THOMAS C. JETER and Another, Plaintiffs
in Error, v. GEO. B. TUCKER, Defendant
in Error.

(Columbia. Nov. and Dec. Term, 1869.)

[*Bills and Notes* ⚡538.]

Debt on sealed note. Pleas: (1) Non est factum; (2) That the note was obtained by fraud, imposition, and undue influence, and was without consideration. Issues joined under both pleas. At the trial, plaintiff proved the factum of the note, and defendant gave evidence to sustain the allegations of the second plea. The Judge instructed the jury "that the whole law of the case was embraced in the second plea." *Held*, That in this there was, under the circumstances, no error.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1901; Dec. Dig. ⚡538.]

[*Trial* ⚡253.]

Some of the evidence given by the defendant tended to show that the mind of the maker of the note was not sound when the note was given. The Judge instructed the jury that "the note was valid and conclusive, unless the mind of the maker of the note was unsound." *Held*, That in this there was error, as the jury might have found the note void for fraud, even though the mind of the maker was sound, and the instruction confined the range of their enquiry to the latter point only.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 617; Dec. Dig. ⚡253.]

[*Bills and Notes* ⚡493.]

In an action at law on a sealed note given by a principal to her agent during the continuance of the agency, and expressed on its face to be "for value received in managing and supervising my farm for the last thirteen years," the plaintiff may rest his case on proof of the execution of the note. He is not bound, because fraud, undue influence, and want of consideration have been specially pleaded, to go further, and prove that a settlement was made between the parties when the note was given.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1662; Dec. Dig. ⚡493.]

[*Evidence* ⚡474.]

Subscribing witnesses to a will are allowed to give their opinions as to the soundness of mind of the testator when the will was executed; but this rule does not apply to other instruments, especially to those which do not require subscribing witnesses.

[Ed. Note.—Cited in *Kaufman v. Caughman*, 49 S. C. 168, 27 S. E. 16, 61 Am. St. Rep. 808.

For other cases, see *Evidence*, Cent. Dig. §§ 2196-2219; Dec. Dig. ⚡474.]

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*Before Thomas, J., at Union, April Term, 1869.

This case was brought up by writ of error from the Circuit Court for the County of Union—the defendants below, Thomas C. Jeter and Mary Jeter, administrators of Fanny Tucker, deceased, being plaintiffs in error.

The action was debt, and the declaration contained two counts. The first was upon a sealed note, or single bill, alleged to have been given on the 23d March, 1853, by the intestate, Fanny Tucker, to the plaintiff below, for \$6,500, payable three days after date; and the second for wages due by the intestate to the plaintiff, as her overseer, and for attending to her business from 1853 to 1857, both inclusive, at \$500 per annum—the whole amount demanded under this count being \$2,500.

Pleas: (1) Non est factum; and, (2) A special plea in confession and avoidance, as follows: "And the said Thomas C. Jeter and Mary, his wife, as administrators of Fanny Tucker, their intestate, come and defend the wrong and injury, when, and so-forth, and say that they ought not to be charged with the supposed writing obligatory, because they say that the said supposed writing obligatory was obtained by the said plaintiff of their in-

testate, the said Fanny Tucker, by fraud, imposition, and undue influence, and without any consideration, as must appear in this: that the said plaintiff had been employed as the agent, trustee, manager, and general superintendent of their said intestate for thirteen years, during all which time the said plaintiff sold and disposed of all the crops made on the plantation or plantations of intestate, and received the proceeds for the same; and still he, the said plaintiff, took the sealed note now in suit in full for the whole amount that could have been due the said plaintiff for his services during all the time he had acted as the agent, manager and trustee for their intestate, without having rendered any account for all the crops made on the plantations of the intestate, and accounting to their intestate for the proceeds of the said crops, as he should have done. And this the said defendants are ready to verify; wherefore they pray if they ought to be charged with the said debt by virtue of the said supposed writing obligatory."

The brief contained copies of the sealed note, the release, or certificate, hereafter mentioned, the special plea, the notice of the grounds of exception to the rulings of the Circuit Judge, the Judge's report, and the notes of evidence; but it contained no bill of exceptions.

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*It was proved that the single bill was lost, but a copy was produced, and the execution of the original, as stated in the first count of the declaration, was proved by W. M. Foster and L. F. Yoder, who were subscribing witnesses thereto. The consideration was declared on its face to be "for value received in managing and supervising my farm for the last thirteen years," and it bore interest from the 1st February, 1853.

An instrument under the hand and seal of the intestate, bearing the same date with the note, was, also, proved and given in evidence by the plaintiff. It certified that the intestate had "no claims against George B. Tucker for house rent or board, or for any crops which have passed through his hands during the last thirteen years of his supervising my interests; but that the same have been applied to my own purposes, to my entire satisfaction, up to this date." W. M. Foster and L. F. Yoder were, also, subscribing witnesses to this instrument, which, in the brief, was called a release.

The facts admitted, or proved, on both sides, were, that the intestate was the mother of the plaintiff; that she was a widow, and about seventy years of age in 1853; and that she died intestate in December, 1857; that she owned a plantation in Union District, where she resided, and over thirty slaves; that the plaintiff also owned a plantation, some miles distant from his mother's, and some slaves; that in 1840 he went to reside with his mother, taking his wife and several

children with him; and that he and they continued to reside with her until her death; and that, during this period, he acted as the agent of his mother and general manager of all her business; and that sometimes he employed overseers for her, but, during most of the time, he acted in that capacity himself.

For the plaintiff the two subscribing witnesses to the note and release, two physicians, and several other witnesses, were examined. Their evidence tended to prove that the plaintiff attended faithfully and well to the business of the intestate; that her property increased rapidly under his management; that his services were worth \$500 per annum, besides the board of himself and family; that the mind of the intestate was good, and entirely sound at the time the note was given, and that it became weak about a year before her death, and that she could not be controlled or influenced by the plaintiff. The two subscribing witnesses and the physicians were allowed to give their opinions as to the soundness of her mind.

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*Several witnesses were also examined for the defendants, and their evidence tended to prove that the mind of the intestate was unsound when the note was given, and that it continued so until her death; that the services of the plaintiff, as agent and manager of the intestate's business, were not worth \$500 a year, and that she could easily be influenced by him.

The jury found for the plaintiff \$11,000.

The defendants gave notice of their intention to sue out a writ of error, and assigned therein grounds of error, as follows:

1. Because, in the instructions of the presiding Judge to the jury on the law, there was error in stating to them that the whole law of the case was embraced within the defendant's second plea.

2. Because there was error in the presiding Judge in charging on the facts of the case in the following particulars, to wit: That the note sued on, and the accompanying release, were valid and conclusive of the whole matter, unless the old lady's mind was unsound.

3. Although there was no question of insanity or other mental disease involved in the case, the presiding Judge, nevertheless, instructed the jury that the opinions of the subscribing witnesses to the note and the medical witnesses should be alone received as testimony.

4. Because the presiding Judge refused to charge the jury that, in order to rebut the presumption of undue influence which attaches to transactions of this character between principal and agent, the burden rested upon the agent to show, either that his agency had terminated, or that he had fully accounted with his principal for all the funds

that had passed through his hands during the existence of his agency.

5. Because the presiding Judge refused to charge the jury that, if they were satisfied that the plaintiff was agent of respondent's intestate, the burden of proof lay with plaintiff to show a settlement at the date of the note and release.

The report of His Honor the presiding Judge is as follows:

This action was brought upon a note and account, the items of which are set forth hereafter in a copy of the bill of particulars. The pleas were: The general issue, and a special plea, drawn many years ago, and which is appended to this report. The release spoken of in the second ground above set forth is also annexed.

There was much testimony, upon both

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sides, as to the failure in *mind of the old lady, and the influence which plaintiff had over her.

Defendant's counsel took the position set forth in the fifth ground, but I charged the jury that the law was set forth in the second plea of defendants, and refused to charge as they desired. There was no attempt made to prove any mistake, error, or suppression veri, or suggestio falsi in the settlement.

I did charge the jury as stated in the second ground, but not as set forth in the third and fourth grounds. I only refused one instruction, and that is set forth correctly in the fifth ground. In the third ground, the instructions were, that subscribing witnesses and medical persons alone could speak as to their opinions, and that the other witnesses could only testify as to facts upon which they, the jury, were to form their opinion.

Munro, for plaintiff in error.

The rule as to opinions of witnesses is confined to cases of insanity, and to last wills and testaments. There was no necessity for witnesses to the note and release.—Green, Ev., § 440; Drew v. Clark, 1 Add., 275; S. C., 1 Wms. on Ex'ors, 25, 33.

An agent contracting with his principal, during the continuance of the agency, contracts at arm's length, and the onus of proof is upon the agent.—Hill on Trusts, 161, 162; Lord Selsea v. Rhodes, 1 Bligh, 1; Butler v. Haskell, 4 Des., 151; Miles v. Erwin, 1 McCord, Ch.: 1 Story Eq. Juris., §§ 204, 17, 19, 20, 310, 311.

Unsoundness of mind was not the only defence to the note and release in question.

The whole law of the case was not embraced within the defendant's second plea.

Shand, same side.

George B. Tucker was agent for his mother, and, therefore, a trustee.—Dunlap's Paley on Agency, 10 n. i., and 11; Hill on Trustees, 1; Story on Agency, § 9.

There is a vast difference between relationship terminated and relationship subsist-

ing. Where agency is subsisting all bounties from principals to agents are necessarily void.—Hylton v. Hylton, 2 Ves., 547; Gibson v. Jeyes, 6 Ves., 278; Hatch v. Hatch, 9 Ves., 292; Wood v. Downes, 18 Ves., 126; Montesquieu v. Sandys, 18 Ves., 313; Gale v. Wells, 12 Barb., 81; Huguenin v. Baseley, 14 Ves., Jr., 299; Butler v. Haskell, 4 Des.;

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DeBardelben v. *Beekman, 1 Des., 346; Story on Agency, §§ 9 and 210; Wyrzt v. Thyrnes, 2 Hill, 171; Wright v. Prond, 13 Ves., 137; Harris v. Tremeneheere, 15 Ves., 40; Hunter v. Alkins, 3 Mil. & K., 139.

There is an analogy of notes taken to property purchased.—Poag v. Poag, 1 Hill, 285; Wade v. Lobdell, 4 Cush., 510.

The matters at issue are not beyond the jurisdiction of a Court of Law. The plea of fraud will always receive the attention of a Law Court.—Lowry v. Pinson, 2 Bail., 229; Smith v. Henry, 2 Bail., 118; 2 Bail., 128 and 205; 2 Kent, 483, n. b.; Watson v. Pickett, 2 Mill, 222; 3 Bl. Com., 431; 2 Starkie's Evidence, Part 4, 586; Supplement to the U. S. Digest, Title "Fraud," Nos. 261-266 and 287-290; Evans v. Edmonds, 76 Eng. C. L. Rep., 777; Manning v. Cox, 17 Eng. C. L. Rep., 87.

Fraud is a question of law, and not a question of fact for the jury.—Smith v. Henry, 2 Bail., 118; DeBardelben v. Beekman, 1 Des., 346; 2 Kent Com., 518-532; 2 Starkie's Evidence, Part 4, 616, 617.

If the testimony disclosed badges of fraud, (of which there can scarcely be a question,) the Judge should have instructed the jury that, unless explained, the note and release were thereby avoided.—Smith v. Henry, 2 Bail., 118, n.

Unsoundness of mind was not the only defence.

Bobo, Arthur and Steedman, for defendant in error.

If the presiding Judge had charged the jury "that the note sued on, and the accompanying release, were valid and conclusive of the whole matter, unless Mrs. Fanny Tucker's mind was unsound," there would have been no error, since, under the circumstances of this case, the issue was narrowed down to the question of the legal capacity of Mrs. T. to bind herself by her acts at the date of the note and release.

1st. There was no proof of mistake or fraud, and, in Courts of law, fraud will not be presumed.—Kinloch v. Palmer, 1 Mill. Con. R., 216; Munro v. Gardner, 1 Mill. Con. R., 328; Butler v. Haskell, 4 DeS. Rep., 682.

2d. There were no circumstances in the transaction from which fraud could have been presumed, even if it would have been proper to submit a question of presumptive fraud to the jury.

There was no gross inadequacy of consideration, and mere inadequacy, (if this had been established,) in the absence of fraud, is

no ground for setting aside a contract.—*Whitfield v. McLeod*, 2 Bay, 360.

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*There was no proof of undue influence, or of any influence, exerted to procure the execution of the note and receipt.—*Farr v. Thompson*, Cheves R., 37; *Means v. Means*, 6 Rich. Law R., 21; *Lide v. Lide*, 2 Brev., 404.

The receipt is evidence of an accounting between the principal and agent, and the legal representatives of the principal were bound by her admission of a settlement between them, in the absence of proof of mistake or fraud, unless there was legal incapacity to bind herself by her admissions at the date of the receipt.—*Hendrickson v. Miller*, 1 McC., 296; *Edwards v. Ford*, 2 Bail., 461; *Dodd v. Wilson*, 1 Tread., 448.

Subscribing witnesses are called to attest not only the fact of the signing, but also the legal capacity of the maker at the time of the execution of the instrument.—*Heyward v. Hazard*, 1 Bay, 335.

Medical men are allowed to give their opinion of mental soundness.—*Phil. Ev.*, 290.

Plaintiff was not bound to go behind Mrs. Tucker's receipt until there was proof of mistake or fraud.—*Hardwick v. Vernon*, 4 Ves., 411; 1 Story Eq. J., §§ 204, 220.

This was not a case of great advantage gained by one standing in a fiduciary relation to another.—*Butler v. Haskell*, 4 DeS., 684, 703.

Nor a purchase by trustee from c. q. t.; nor a gift or bounty to one standing in a confidential relation.—*Hill on Trustees*, 157, 161.

Nor was the receipt a confirmation of a transaction originally void or impeachable.—*Durant v. Manes*, 2 Rich., Eq., 404; *Butler v. Haskell*, 4 DeS., 710.

March 12, 1870. The opinion of the Court was delivered by

MOSES, C. J. It is difficult to understand, with precision, from the suggestion of errors as stated in the brief, and the report of the Judge in regard to it, the points of the charge to which error is assigned.

While the first plea only puts in issue the execution of the sealed note sued on, the comprehensive language employed in the second, filed without objection as to form, would make the defence tendered thereby want of consideration for the instrument, and fraud, imposition and undue influence in obtaining it.

Evident latitude appears to have been extended in the introduction of testimony, and hence, probably, the confusion between the apprehension of the counsel and the report

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of the Judge as to what he did charge as the law of the case. This Court, however, must be governed by his report.

The first and second exceptions will be considered together.

The first, "because there was error in the presiding Judge in saying to the jury that the whole law of the case was embraced in the defendant's second plea."

We cannot perceive how the plaintiffs (here) could have been prejudiced by such ruling, for the effect of it was only to direct the attention of the jury, after proof of the factum of the note, to the issue made by the pleadings. Standing alone, after the mass of evidence which had been introduced on both sides, we do not see that it is properly the subject of objection.

The second exception is, however, in our view, well taken, and if the remarks of the Judge complained of in the first were followed by the ruling set forth in the second, we can readily understand how the jury might have been misled by supposing that they were restricted alone to an inquiry as to the mental soundness of the intestate.

The instruction to the jury, "that the note and release were valid and conclusive, unless the mind of the old lady was unsound," precluded and prohibited them from responding to the issue made under the second plea, unless the Judge intended to intimate that no fraud, imposition or undue influence was established by the evidence. This would have been expressing his opinion on the facts, which, by law, he is not permitted to do, and we are not to suppose that he so intended.

The jury might have concluded she was of sound mind, and yet it was in their legitimate province, if so persuaded by the testimony, to conclude that the note had been obtained by means which the law would not sanction or uphold. Fraud, imposition or undue influence would vitiate an instrument executed by a person whose soundness of mind had never been questioned.

It was for the jury to decide whether the evidence satisfied them that the note was procured through either of the agencies averred in the plea. If there were badges of fraud disclosed by the proof, with proper explanations as to what the law considered their effect, it was for the jury to pass upon them. There might be presented in a case such unexplained acts, circumstances or incidents as would justify the Judge in holding that, in law, they amounted per se to fraud. If, however, they were complicated or contradictory, it was for the jury to draw their conclusion, and apply the law as they received it from the Bench.

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*The instruction of the Court, as set forth in the second exception, was error, and we adjudge the said exception to be well taken.

The fifth ground assigns as error "the refusal of the Judge to charge that if the jury were satisfied that the plaintiff (below) was agent of defendant's intestate, the burthen

of proof lay with the plaintiff to show a settlement at the date of the note and release," and this, we hold, is not well founded. An agent is one so necessary in the business and transactions of mankind, involving, with his principal, a relation of such implicit confidence, and imposing therefrom a position of such commanding influence, that the guards and securities with which the Courts of Equity surround those whose rights and interests are subject to some trust, either express or constructive, to some extent attach to a person who is empowered by another to act for him, either generally or in a particular matter. These Courts enforce what has been not inaptly called "a technical morality;" and, where an advantage has been gained by a breach of confidence, interfere by acting directly on the instrument, and grant relief by avoiding it. In general, they throw the burthen on him who claims the gift, or bounty, or benefit, to show the perfect fairness of the transaction. Unreasonable advantages are not upheld, unless it is apparent that the utmost good faith has been exercised where the confidence has been reposed.

Notwithstanding the application by equity of the principles which it thus administers to transactions between agent and principal, it has not carried the doctrine to the extent of requiring the agent, where a written acknowledgment of a sum due and owing to him has been made by the principal, to show the good faith and honesty of the transaction, before it has been in some way assailed by proof.

It holds a different rule as to the burthen of proof, where obligations purporting to be for value received are the subject of its inquiry.

Though the agent may be considered as a trustee, and his acts viewed with jealousy, yet he will be entitled to credit for notes of his principal, payable to himself during the agency, without showing their consideration, unless there be evidence to impugn them.—*Poag v. Poag*, 1 Hill Eq. 285; *Lever v. Lever*, 2 Hill Eq., 158; *Wardlaw v. Gray*, Dud. Eq., 85.

In *Poag v. Poag*, Harper, J., in delivering the opinion of the Court, says: "A note given is evidence of an account settled, and a balance acknowledged. In such a case as

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the present, when the principal *is shown to be a weak man, hardly capable of transacting his business, such transactions are regarded with jealousy, as in the instance of a guardian settling with his ward just after he comes of age; and slight evidence will be sufficient to throw the burden of proof on the agent."

If such is the exception in Equity, how stands the matter in the Court of Law, as applicable to the present case? The note is not only under seal, which, of itself, imports

a consideration, but it expresses on the face to be for value received. According to the rules of pleading there prevailing, when the plaintiff proves its execution he has done all they require, and the onus is cast on the defendant to avoid it by such testimony as may be admissible under its plea, to which the plaintiff has the right to reply. The action is brought to enforce the contract, according to the terms of it; and yet it is insisted that, after proving it, which would entitle the plaintiff to a verdict, if the case rested there, he is not only to assume a further burthen, but one which the course of the pleadings throws on the defendant.

It does not appear to the Court how, under the state of the pleadings, the plaintiffs in error can raise any question touching the effect of the release. No set-off was pleaded, or notice of discount given by them. If the note was held valid by the jury, the defendants below could not reduce the amount to which the plaintiff there was entitled, by showing any indebtedness to their intestate for money received on her account or otherwise. It might have been used as a circumstance, the weight of which was to be estimated by the jury, connected with the other testimony under the special plea, but could be of no avail in reducing the amount claimed under the note, if the proof established its validity.

We are not impressed with the error assigned in the fifth exception.

Although the presiding Judge reports that he did not charge the jury as stated in the third exception, to wit: "That the opinions of the subscribing witnesses to the note and the medical witnesses should be alone received as testimony;" yet he says "that his instructions were that subscribing witnesses and medical persons alone could speak as to their opinions, and that the other witnesses could only testify as to facts upon which the jury were to form their opinion."

The opinions of the subscribing witnesses to a will are allowed where the question involves the soundness of the mind of the testa-

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*tor at the time of the execution of the will.—1 Green, Ev., § 440. They are as watchers, designed by the law "to ascertain and judge of his capacity." The very nature of the act in which they participate, to make the instrument complete as to form, directs and leads their attention to his mental condition. The rule has never been extended to other instruments, and certainly not to those whose valid execution does not require a subscribing witness. Experts, too, are allowed to give their opinion in the particular matters as to which they are supposed to be skilled; but those who are not presumed to have acquired, by study or practice, any higher claim to knowledge than the unlearned or inexperienced, though they may testify to facts from which they may deduce and

express an opinion, yet such mere opinion is not, of itself, entitled to acknowledgment or respect, and is only appreciated and accepted by the jury if the conclusion is the same to which they would arrive from the influence of the facts disclosed.—See *Seibles v. Blackwell*, 1 McM., 56.

The ruling thus made, under the exception referred to, is not sustained by this Court.

It is ordered, that the judgment be set aside, and the cause remanded to the Circuit Court, with instructions to issue a *venire facias de novo*.

WILLARD, A. J., concurred.

I S. C. *256

*VINCENT BALDWIN, Plaintiff in Error, v.
ELIZABETH COOLEY and Others,
Defendants in Error.

(Columbia. Nov. and Dec. Term, 1869.)

[*Ejectment* ⚡7; *Prohibition* ⚡10.]

A. died in 1864, seized of several tracts of land, and leaving a will by which he authorized his executor to sell his lands. In October, 1868, the Sheriff sold and conveyed to B., under a judgment and execution against A., one of said tracts of land, which was then, and for some time previously had been, in the actual possession of two of A.'s heirs: *Held*, That a Magistrate had no jurisdiction, under the Act of 1866 "to provide an expeditious mode of ejecting trespassers," to issue a warrant, on the application of B., to eject such heirs; and that prohibition was the proper remedy to restrain him.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 12-15; Dec. Dig. ⚡7; *Prohibition*, Cent. Dig. §§ 37-56; Dec. Dig. ⚡10.]

[*Ejectment* ⚡2.]

The Act of 1866 creates a new jurisdiction, and provides a summary mode of procedure to obtain possession of lands, and should, therefore, be construed strictly.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 3; Dec. Dig. ⚡2.]

[*Ejectment* ⚡19.]

A Magistrate has no jurisdiction, under the Act, except in cases where the trespass complained of is an entry without the consent of the then owner of the land.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 65-73; Dec. Dig. ⚡19.]

[*Powers* ⚡25; *Wills* ⚡693.]

A mere power conferred upon the executor by the will to sell land does not prevent the title and right of possession from descending to the heir.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. § 73; Dec. Dig. ⚡25; *Wills*, Cent. Dig. § 1660; Dec. Dig. ⚡693.]

[*Prohibition* ⚡19.]

A writ of prohibition should issue, upon a suggestion, in the name of the State on the relation of some one, but where the want of jurisdiction was clear the Supreme Court refused to set aside such a writ, issued by the Circuit Court, upon a suggestion, in the name of the parties aggrieved.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 68; Dec. Dig. ⚡19.]

[*Prohibition* ⚡10.]

[The writ of prohibition will issue only in cases of usurpation of power or jurisdiction by an inferior court.]

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 37; Dec. Dig. ⚡10.]

Before ORR, J., at Anderson, Spring Term, 1869.

This was a writ of error to remove into this Court the record in a certain petition for a writ of prohibition, wherein Elizabeth Cooley and Jordan Green, and Mary, his wife, defendants in error, were petitioners, and Vincent Baldwin, plaintiff in error, and others, were respondents.

The facts of the case, as they appeared at the hearing of the petition, were, that Hiram Cooley died in the year 1864; that, at the time of his death, he was seized of several tracts of land, one of them lying in Anderson County, and containing some two hundred and forty-eight acres; that he left a will, whereby he appointed B. F. Mauldin executor, and thereby empowered him to sell his lands; that the petitioners, Elizabeth and Mary, were children, and heirs of the testator; that they and their co-petitioner, Jordan Green, entered into possession of the said tract of land, lying in Anderson County, late in the year 1865, or early in 1866, and had remained, ever since, in possession of the same; that G. W. Sullivan had a judgment, by confession, against the testator, for several thousand dollars, which had been entered in the year 1856; that said judgment was unsatisfied; and that, under

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execution issued thereon, the said tract of land was sold by the Sheriff of Anderson County, in October, 1868, and purchased by Vincent Baldwin, plaintiff in error, at the price of \$1,305; and that the Sheriff had executed to him a deed of conveyance thereof.

In December, 1868, Baldwin applied to Warren D. Wilkes, Esquire, a Magistrate of Anderson County, for a warrant to eject the petitioners from the said tract of land, and proceedings were, accordingly, instituted under the Act of 1866 "to provide an expeditious mode of ejecting trespassers."—13 Stat., 408. The Magistrate, holding that he had jurisdiction under the Act, issued a warrant to eject the petitioners; and, thereupon, this petition was filed in the name of the petitioners themselves, setting forth the facts, and praying for a writ of prohibition to restrain the execution of the warrant.

His Honor granted the writ, and made a report of the case, which was accepted as a bill of exceptions, and is as follows:

"In October, 1868, Vincent Baldwin purchased, at Sheriff's sale, a tract of land of 248 acres, in Anderson District, as the property of Hiram Cooley, deceased, at the suit of G. W. Sullivan. He paid for the same thirteen hundred and five dollars. The judg-

ment against Cooley was obtained, by confession, in 1856. Cooley died in 1864, testate, leaving B. F. Mauldin his executor. His personal property was sold by the executor, and it was supposed that the proceeds would pay his debts and leave a considerable sum for his legatees. The supposition proved erroneous, and Sullivan had his execution levied upon the land aforesaid, and saleday in October it was sold. The petitioners, Elizabeth Cooley and Mary Green, the wife of Jordan Green, are the daughters and some of the heirs-at-law of Hiram Cooley. In the fall or winter of 1865, these heirs entered into possession of the tract of land aforesaid, upon the special request of the executor, and have continued in possession, under that permission, up to the present time. It does not appear that the executor ever revoked the permission given, or gave notice to the parties to quit. The petitioners, being heirs-at-law of Hiram Cooley, were, likewise, rightfully entitled to enter into possession of his real estate; and the fee being cast upon them, at least until the executor disposed of the same conformably to the terms of the will, can they be considered as trespassers in occupying the premises? In either point of view, then, whether the petitioners entered under the authority of the executor of Hiram

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Cooley, and were never notified by him to quit, or whether they entered as heirs-at-law, can their possession be regarded as tortious?

The Magistrate, in this case, has proceeded against the petitioners under the Act of 1866, (13 Stat. at Large, 408,) entitled "An Act to provide an expeditious mode of ejecting trespassers." It declares that if any person shall have gone into, or shall hereafter go into, possession of any lands or tenements of another, without his consent, or without warrant of law, it shall be lawful, &c., to oust him, &c. It is, however, manifest in this case, that the petitioners, against whom the warrant of ejectment has been issued by Magistrate Wilkes, went into possession of the premises by the invitation and request of the executor, who had the power, under the will of Hiram Cooley, to sell the same or assent to the devise; and if that was not sufficient, then they were heirs-at-law of Hiram Cooley, and the fee in the real estate of Cooley descended to them, as heirs, until the executor sold the same, or until he assented to the devise of the estate in question.

They were not, then, trespassers—having entered into possession lawfully. They did not enter against "the consent" of the party having the fee, and without "warrant of law;" hence the Act of 1866 is not applicable to such a case. That Act was intended to apply to persons who entered upon the occupation of houses or lands without the consent of the owner or the authority of law.

If parties were in possession lawfully, by the consent of the owner or by lawful authority, the Act does not, nor was it intended to, reach such cases. It was to reach open, flagrant trespassers. To test this case: suppose Hiram Cooley was alive, and occupying the premises purchased by Baldwin, at Sheriff's sale, as his property, could this summary remedy be resorted to to oust him of his possession? The practice in this State has been uniform, that a party holding possession of real estate, sold at Sheriff's sale, can be ousted only by an action of trespass to try title. In such action, the defendant cannot controvert the title, judgment, or sale to the plaintiff. In this case, if Mr. Baldwin had brought his action of trespass to try titles, the petitioners could not set up their possession or title as a defence against the same. The recitation made by the Magistrate himself shows that the facts upon which he predicated jurisdiction in this case are not supported by the evidence. He says, in his notice to Cooley, Green and Green, that they had gone into possession of said land, and the tenements thereon, without his

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consent, &c. *These petitioners were in possession, and lawful possession, of the premises, for three years before Baldwin had any shadow of claim to the premises. How, then, can he say they had gone into possession, &c., without his consent? The conclusion I have reached, therefore, is, that the possession of the petitioners is lawful, not tortious; that the Act of 1866 is wholly inapplicable to the case; that the defendant in this case has his remedy against the petitioners, in his action of trespass to try titles, if he holds the legal title to the lands in question of the late Hiram Cooley.

I have as little doubt that the writ of prohibition may be issued by any of the Judges of this State, whenever an inferior Court, in handling matters clearly within its cognizance, transgresses the bounds prescribed to it by law.—*State v. Ridgell*, 2 Bail., 500. This authority would seem to be conclusive; but it is more complete, even, when the prohibition is sought against the order or decree of a subordinate Court, which errs on a question of jurisdiction.—*State v. Hopkins*, Dud., 101. The Magistrate, in this case, had no jurisdiction of the case, and his judgment and warrant of ejectment are illegal.

It is, therefore, ordered and adjudged, that the writ of prohibition in this case can be issued, and that all civil officers of the State be prohibited from executing the said warrant of ejectment issued by W. D. Wilkes, Esq., ordering the petitioners, Elizabeth Cooley, Jordan Green and wife, Mary Green, to be dispossessed from the houses, lands, tenements, &c., described in said proceedings.

The causes of error assigned by the plaintiff in error are as follows:

1. Because it is respectfully submitted

that His Honor James L. Orr, who ordered the writ of prohibition in this case to issue, erred in holding that the said Elizabeth Cooley, Jordan Green and wife, Mary Green, were not trespassers on said Baldwin's land, and that the Magistrate, (Wilkes,) under the Act of 1866, had no jurisdiction to eject them from said land.

2. Because His Honor erred in granting a writ of prohibition at the private suit of individuals, when, if grantable at all, it should have been in the name of the State, by the relation of the parties seeking it, and with the approval of the Attorney General, or the Solicitor of the Circuit wherein the cause arose.

3. Because the judgment of His Honor,

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for the reasons stated, *as well as others, was contrary to law and justice, and should be reversed.

Sullivan, for plaintiff in error.

Murray, contra.

March 12, 1870. The opinion of the Court was delivered by

MOSES, C. J. In the construction of a statute instituting a new course of proceeding, or affecting materially the mode by which the right to the possession of property, whether real or personal, is to be asserted, it is a safe and admitted rule that its provisions are not to be extended beyond the purpose clearly intended by its terms.

In the examination of all statutes, the principles of the common law are to be duly regarded and respected; and if the language renders plain the omission which they are intended to supply, they must be restricted in their application to the intention made manifest by the words.

The Act of 1866, (13 Stat. at Large, 408,) under which the respondents claim to proceed, creates a new jurisdiction—a summary course of procedure—and should, therefore, be construed strictly.—Dwarris on Statutes, 757.

It conferred on Magistrates a power theretofore unknown in this State, and interfered materially with all the rights which, by law, attached to the possession or occupancy of lands. A party seeking its aid must bring himself within more than a mere equity to its benefit, by showing that he is within the meaning and intention of the Act, by those rules of interpretation prescribed as the only medium by which statutes are to be construed.

The purpose of the Act was to provide an expeditious mode of ejecting trespassers. It not only defines who are to be so regarded under it, but the persons as against whom the trespass is to be committed. Not only is the possession to be of land of another, but the entry must be without the consent of him who, at the time of such entry, had

the right to assent to it, or without warrant of law. When the two incidents of entry and want of consent of the then owner combine, the jurisdiction of the Magistrate attaches, for, if there be such consent, there is "warrant of law."

When the relators, Cooley and Green, entered on the land, in whom was the title vested, and whose right did they thereby violate? In other words, as against whom did their entry constitute a trespass? Their father died seized and possessed of it. They were either on the land at the time of his death,

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or, soon after that *event, they entered upon it. By the will of the father, direction was given to his executors to sell and dispose of his real estate.

On the death of the father, and at the very moment of the sale by the Sheriff and the purchase by Baldwin, they were, in fact, the owners, in fee, of the land. Advice to executors to sell, vests the fee in the heirs of the testator until the sale.—Haskell et al., v. House, 1 Tr. Con. Rep., 106; King ads. Ferguson, 2 N. & McC., 588; Executors of Ware v. Murph. Rice, 55 [33 Am. Dec. 97]; Thomson and Smith, v. Gaillard, 3 Rich., 418 [45 Am. Dec. 778].

The change in the character of their possession, which resulted from the execution of the Sheriff's title to Baldwin, the purchaser, while it may subject them to an action of trespass to try title, can not render them amenable to the terms of a statute which expressly refers to an entry on lands without the consent of the owner, or without warrant of law.

This Court has no doubt that the remedy resorted to by the relators was well taken. An appeal is not provided by the Act, and, unless the writ which issued was the proper process, the relators were without adequate and effective remedy. Where an inferior tribunal proceeds to act under a false and mistaken assumption of jurisdiction, it needs no reference to authority to shew that prohibition is the proper remedy.

It is, also, assigned as error, that the writ issued at the suit of an individual, when it should have issued in that of the State and the Solicitor of the Circuit.

It is true that, in England, all prerogative writs issue from the King's Bench, and the name of the King is employed by the party at whose relation it is sought. In this State it is styled in the name of the State on the relation of some person who thereby makes himself a party to the proceedings. It is not necessary, and certainly has not been usual, for it to contain, also, the name of the Attorney General or a Solicitor of the Circuit. In this regard it differs from the practice as to quo warranto.

It was irregular to submit the suggestion in the name of a private person: but for such a mere irregularity, in no way affect-

ing the merits of the application, we are not disposed to set aside the writ, when the parties against whom it is directed have usurped a jurisdiction to which it is clear they had no pretence of right.

The judgment of the Court below is affirmed.

WILLARD, A. J., concurred.

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I S. C. *262

*SIMPSON BOBO, Plaintiff in Error, v. H. L. GOSS, Defendant in Error.

(Columbia. Nov. and Dec. Term, 1869.)

[*Payment* ⚡42.]

Debt on sealed note for \$600, dated November 30, 1863, and payable, with interest, "in gold, six months after the present war with the United States is ended." Pleas: Nil debet; depreciation of consideration; payment and discount. At the trial, in April, 1869, evidence was introduced to show that the consideration of the note was a loan of \$600 in notes of a Cotton Loan Association, incorporated under the Act of 1861; that such notes were of no value at the time of the trial, and that they were worth 50 per cent. more than Confederate money at the date of the note. The presiding Judge ruled that the case came within the proviso of Sec. 4 of the Ordinance of 1865, and charged the jury "that they must reduce the amount of the note to the standard of Confederate money at its date." Verdict for plaintiff for \$200. Held, That there was error in the charge to the jury, and case remanded, with instructions to issue a venire facias de novo.

[Ed. Note.—Cited in *Harmon v. Wallace*, 2 S. C. 212; *Smith v. Prothro*, Id., 375; *Halfacre v. Whaley*, 4 S. C. 178.

For other cases, see *Payment*, Cent. Dig. § 121; Dec. Dig. ⚡42.]

[*Payment* ⚡42.]

The intent of the proviso was to make it competent to show, by evidence, that, in using the word "dollars," parties had reference to the existing currency at the date of the contract; and where that is shown, it is error to instruct the jury what verdict to find. They should be left free to find such verdict as, in their judgment, will "effect substantial justice between the parties."

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 121; Dec. Dig. ⚡42.]

[*Payment* ⚡12, 14.]

An express written contract to pay so many dollars "in gold" is not within the proviso, and can be discharged by payment only in gold coin, according to the terms of the contract.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 42, 93; Dec. Dig. ⚡12, 14.]

Before Thomas, J., at Union, April Term, 1869.

The opinion of the Supreme Court, delivered by the Chief Justice, contains as full a statement of the case as the brief furnishes, and to that statement it is only necessary to add that the jury found for the plaintiff \$200.

Bobo, for plaintiff in error.

Wallace & McKissick, contra.

March 29, 1870. The opinion of the Court was delivered by

MOSES, C. J. This was a writ of error to the Circuit Court for the District of Union.

The plaintiff sued the defendant as one of the makers of a sealed note, of which the following is a copy:

"We, or either of us, promise to pay to Simpson Bobo, or order, six hundred dollars, to be paid in gold six months after the present war with the United States is ended, with interest from the fifteenth of December last, to be added to the principal annually, and bear interest until paid. Witness our hands and seals, November 30, 1863."

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*The pleas were: Nil debet; depreciation of consideration; payment and discount. No testimony was offered, either to the plea of payment, or that of set-off.

From what we can gather from the report of the presiding Judge, it appears that evidence was introduced to show that the consideration of the note was the loan of bills of the Cotton Loan Association, amounting to the principal sum expressed in the note; that the said company was incorporated by the State, and, under its charter, its issue was restricted to a basis founded on cotton subscribed, not to exceed the rate of six cents per pound; the said notes to be redeemable in gold six months after the removal of the blockade, (Acts of 1861, p. 45); that, although they were of no value at the time of trial, they were, at the date of the note, worth fifty per cent. more than Confederate money.

The Judge held that the contract came within the purview of the proviso of the fourth Section of the Ordinance of the Convention of September, 1865, entitled "An Ordinance to declare in force the Constitution and laws heretofore in force in this State, and the acts, official, public and private, done, and appointments and elections made, under authority of the same;" and charged the jury that they must reduce the amount appearing by the face of the note to be due, to the standard of the value of Confederate money at its date.

Conceding that the Ordinance had any application to the contract, as made between the parties, the Judge assumed the right to determine its "value," when, by the terms of the Ordinance, the case being on the law side of the Court, "a verdict" was to be "rendered" which should "effect substantial justice between the parties." The end was to be attained by the introduction of "testimony showing the true value and real character of the consideration." The conclusion was to be drawn by the jury from the facts proved; but they were precluded from considering the effect of them by the instruction of the Court, "that they must reduce the amount of the note to the standard of Con-

federate money at its date." Thus leaving nothing for them to pass upon but the execution of the instrument.

The purpose of the Ordinance, by the proviso referred to, was to allow parties to contracts entered into between 1st January, 1862, and 15th May, 1865, during which periods war existed between certain confederated States of the Union and the United States, the opportunity of showing, where the

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term dollar was used by them, *that it was not intended to designate or refer to the coin denomination, but to the only currency then circulating within the said confederated States representing dollars, to wit: the notes and bills issued by the said States.

In the case of Rutland v. Copes, 15 Rich., 84, the Court of Errors held that the said Ordinance was not in conflict with so much of the 10th Section of the 1st Article of the Constitution of the United States as prohibits a State from passing any law impairing the obligation of contracts.

The Supreme Court of the United States, in the late case of Thorington v. Smith, 8 Wall., 1 [19 L. Ed. 361], in which the opinion was delivered by the Chief Justice, held that evidence could be received to prove that a promise, expressed to be for the payment of dollars, was, in fact, made for the payment of any other than lawful dollars of the United States; and, in effect, adopts the language of the Ordinance, that such testimony must be received, in order that justice may be done between the "parties."

How could the maker of the note claim that the plaintiff was only entitled to the payment of so much, in gold or United States currency, as would represent the amount due upon the note, and promised by him to be paid, reduced to the value of Confederate money at its date, when the consideration of the contract, was not Confederate money, but was the loan of bills of an incorporated company, issued on a basis of cotton at six cents per pound at the time, pledged for their redemption? Such money could not have entered into the elements of the transaction.

In what we have so far said, we have regarded the note as if expressed to be payable in dollars. Even if the Ordinance intended to operate on an undertaking to pay so many dollars in gold, yet, as its declared purpose was to secure "such verdict or decree as will effect substantial justice between the parties," any verdict, finding less than the true amount for which they had expressly stipulated, would fall far short of that measure of "substantial justice" which they had established for themselves, and by which they had agreed to be regulated by the very language of their contract. As if to preclude all doubt as to their intention that the amount assumed by the note was not to be satisfied in the only currency then circulating

in the State they expressly set forth that when due it was to be paid in gold.

A refusal to pay in gold would be a breach of the agreement, and the defendant must be

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held to the performance of his under*taking, unless he can relieve himself by some defence other than that implied by his plea, to which, alone, any testimony was offered.

The cases of Bronson, Ex'r., v. Rodes, 7 Wallace, 229 [19 L. Ed. 141], and Butler v. Horwitz, 7 Wall. 258 [19 L. Ed. 149], to which reference has been made by the plaintiff's counsel, do no more than hold that, where the intent and understanding of the parties, when they enter into a contract, are ascertained, it must be enforced according to such intent and understanding; and as, in the said cases, all the circumstances attending the execution of the obligations sought to be enforced, established, beyond dispute, that they were to be paid in gold, satisfaction could not be compelled in legal tender notes, or anything but gold.

It is ordered that the judgment be set aside, and the cause remanded to the Circuit Court, with instructions to issue a venire facias de novo.

WILLARD, A. J., concurred.

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*J. B. EDWARDS and Others v. JOHN W. SARTOR and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[Equity \hookrightarrow 147.]

D. purchased from W. a tract of land on credit, and gave bond, with J., H. and F. as sureties therein, and a mortgage of the premises to secure the payment of the purchase money. D. became insolvent, and J. and F. agreed with W. to pay the debt, and take from him an assignment of the mortgage as indemnity. F. paid one-half the debt and got possession of the mortgage and the land. J. being unable, with his own means, to pay the other half, made separate agreements, in writing, with C. and S., by which he procured the necessary funds and paid it; the agreements being that, if J. should fail to return the funds loaned him by C. and S., respectively, W., who knew of and assented to the arrangements, should assign to each of them a proportion of the mortgage lien, equal to the amount advanced by him. J. failed to return the funds, and became insolvent: *Held*, That a bill in equity, filed by C., and the administrators of S., who had since died, against D., F., J., and the administrator of W., who had also died, setting forth the facts as herein stated, and praying the benefit of the mortgage lien, a sale of the mortgaged premises, &c., was not demurrable by D., J., and the administrator of W., for multifariousness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 340: Dec. Dig. \hookrightarrow 147.]

[Equity \hookrightarrow 105.]

Parties having an interest in common in the subject-matter of a suit in equity may be

joined as plaintiffs, though each acquired his interest by a separate and distinct contract.

[Ed. Note.—Cited in *Sheppard v. Green*, 48 S. C. 174, 26 S. E. 224.]

For other cases, see *Equity*, Cent. Dig. § 269; Dec. Dig. ☞105.]

[*Equity* ☞147.]

Upon questions of multifariousness it is impossible to lay down any rule which will apply to all cases. There is more danger of doing injustice from a want than from a redundancy of parties. Every case must depend on its own circumstances, and the Court must exercise a sound discretion upon the subject.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 340; Dec. Dig. ☞147.]

Before Thomas, J., at Union, November Term, 1869.

Bill in Equity exhibited by J. B. Edwards and F. C. Sanders, administrators of John Sanders, deceased, and C. C. Sartor, plaintiffs, against J. W. Sartor, D. R. Sartor, F. H. Bates, and W. Munro, administrator of W. J. Keenan, deceased, defendants. The bill alleged that, on the 13th December, 1864, D. R. Sartor purchased from W. J. Keenan a tract of land in Union County (describing it) at the price of \$20,000; that, to secure the payment of the purchase money, he gave to Keenan his bond, with J. W. Sartor, W. H. Sartor, and F. H. Bates as sureties thereon, and a mortgage of the premises; that it was ascertained, shortly afterwards, that D. R. Sartor was insolvent, and thereupon J. W. Sartor and Bates agreed with Keenan to pay him the debt, on his making to them an assignment of the mortgage, as indemnity, to which he readily assented, and which plaintiffs supposed was done, though they have not been allowed to see the mortgage; that Bates paid one-half the bond, and is supposed to be in possession thereof, and of the mortgage and assignment; that John W. Sartor, not having sufficient means of his own to pay the other half, borrowed, on the

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6th of August, 1866, from John Sanders, twenty bales of cotton, under a written agreement to return the same, "or, failing to do so, that Keenan should assign to Sanders so much of the mortgage aforesaid as would be equal to the twenty bales of cotton;" and that, on the 22d of the same month and year, he, John W. Sartor, borrowed from the plaintiff, C. C. Sartor, twenty-three other bales of cotton, under an agreement, in writing, "to return the same in twelve months, or, if" the lender "preferred it, to assign to him an amount in the land purchased of W. J. Keenan, equal to the value of said cotton at forty cents per pound;" that both lots of cotton were loaned to John W. Sartor, to aid him in paying said debt; that he and Bates did pay the same, and that the agreements aforesaid were made with the knowledge, and at the request, of Keenan; that very soon thereafter he, Keenan, left the State, and died in 1867; that J. W. Sartor has failed

to return said cotton, or pay for the same, and that he is insolvent, and unable to pay; that Bates is in possession of the said tract of land; and that D. R. Sartor failed, in 1866, and removed to the West, abandoning the said land. The prayer of the bill was, among other things, that the mortgage be foreclosed, and that the land be sold, and the proceeds applied to satisfy the demands of the plaintiffs.

The bill was taken pro confesso against the defendant, Bates; and the three other defendants, J. W. Sartor, D. R. Sartor and W. Munro, each filed a separate demurrer for multifariousness, and for want of privity between the plaintiffs and himself.

His Honor the Circuit Judge sustained the demurrers, on the ground of multifariousness, and dismissed the bill.

March 12, 1870. The opinion of the Court was delivered by

MOSES, C. J. The bill filed in the Circuit Court for Union was taken pro confesso against Farr H. Bates, Daniel R. Sartor, John W. Sartor and William Munro, administrator of Wm. J. Keenan, severally demur: First, for want of privity and conformity of interest between the plaintiffs. Secondly, that the bill is exhibited against the defendants for several distinct and independent matters and causes, which have no relation to each other. The Judge below sustained the demurrer, and dismissed the bill.

It is not to be questioned that, while the Courts of Law strictly enforce the rules of pleading which they have prescribed, Courts of Equity, although they administer relief without so close an adherence to the system of procedure which they have adopted, still

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require those seeking their aid to conform to an established practice, which is regarded proper and necessary for the due administration of their principles.

They exhibit, however, less firmness in enforcing their rules than the Courts of Law, allowing convenience and expediency, to a very great extent, to govern their application where too rigid an enforcement would destroy the very purpose they were intended to promote.

In general, these Courts will not permit a claim for distinct matters to be preferred by plaintiffs against one or more defendants, or, in the same cause, the union of several defendants, some of whom are disconnected with a large portion of the claim made by the bill. When this appears, it is obnoxious to the charge of multifariousness. The conflict with the rule must be apparent, on the examination of the bill, or the Court will not regard the objection within the influence of the principle which it enforces by dismissing the cause.

This whole subject was fully, and at

length, reviewed by that great master of equity learning, Chancellor Kent, in the case of *Brinkerhoff v. Brown*, 6 John. Ch., 139. After a close examination of all the decisions in point, he has simplified, with so much exactness and precision, the result which they afford, that it only remains to apply his conclusion to the facts as they present themselves in a case. At page 156, he lays down the governing principle in these words: "That a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect of the case may be distinct."

Applying this rule, first to the plaintiff here, who, in the language of the Chief Baron, in *Wood v. The Duke of Northumberland*, Anst., 469, though "unconnected parties may be joined in one suit where there was a common interest centering in the point in issue in the cause," and then to the defendants, and what is the case made by the bill? Daniel R. Sartor, in 1864, purchased a tract of land from Wm. J. Keenan. He gave his bond for the purchase money, with John W. Sartor, W. H. Sartor and Farr H. Bates as sureties, and executed a mortgage, to the vendor, of the premises bought. Soon after the transaction, J. W. Sartor and Farr H. Bates, ascertaining the insolvency of the said D. R. Sartor, agreed with Keenan that they would pay the bond, upon his assigning the mortgage to them. Bates, thereupon, paid up

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one-half, procured the assignment, as the plaintiffs aver, and took possession of the land, which he still holds, receiving the rents and profits. John W. Sartor, who agreed to pay his half in cotton, not having enough, borrowed, on August 6th, 1866, of John Sanders, the intestate of the plaintiffs, Edwards and Sanders, certain bales of cotton, agreeing that, if they should not be returned at the time fixed, the said Keenan, by the authority of the said J. W. Sartor, should assign to the said John Sanders an amount of the mortgage equal to the value of the cotton so borrowed. On the 22d day of the same month, a like agreement (except as to quantity) was entered into with the other plaintiff, Christopher C. Sartor. The contracts were not only made with the knowledge and approval of Keenan, but were reduced to writing by him; and to the execution of the last referred to, he was a subscribing witness. He received full payment of the debt from Bates and John W. Sartor, on the condition that he would give them the security which he held through his mortgage, which the plaintiffs suppose he did. Keenan left the State and died. Munro, the defendant, administered on his estate. John W. Sartor did not return the cotton, and is insolvent. Daniel R. Sartor failed, and removed beyond the limits of South Carolina, and the

plaintiffs are without remedy, unless the land is subjected to their demands. They pray that Bates may be required to produce the mortgage, that it may be foreclosed, that plaintiffs may be subrogated to the rights of the original mortgagee, and their demands satisfied from the proceeds of the sale of the land.

The mortgage is the subject-matter of the bill, which is brought to establish the rights which the respective plaintiffs have under it. If the representatives of Sanders had filed their bill, claiming the separate interest of their intestate under the mortgage, no final adjudication could have been had, unless the other plaintiff, Christopher C. Sartor, who, also, claimed under the same instrument, had been a party defendant. A complete disposition of the rights of either, under the mortgage, could not have been effected without bringing all the persons interested in it before the Court. If there had been no assignment by Keenan, the surety, Bates, and those who, at the request of the other sureties, paid to him the debt, with a promise of the assignment of the mortgage, could, in equity, have set it up for their benefit. The mortgage enured to the interest of the sureties and those who stood in their place in relation to the original transaction.

It is a general rule in equity "that all per-

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sons should be before the Court whose interests may be affected by the proposed decree, or whose concurrence is necessary to a complete arrangement. It is only requisite that the interests of the plaintiffs are consistent, that all the plaintiffs shall support one side, and all the defendants the other side of the question in issue."—Adams, 312.

The object of a Court of Equity is to do full justice, that future litigation be avoided, and, hence, the expression of Lord Chancellor Talbott, in *Knight v. Knight*, 3 P. Wms., 333, "that Courts of Equity, in all cases, delight to do complete justice—and not by halves."

As is said by Chancellor Kent, in the case already referred to, "there is another consideration to show that a demurrer of this kind should be cautiously received, and that is, the difficulty and the peril attending the selection, by the plaintiffs, of proper parties. The inconvenience, on the whole, is much greater from the want than from the redundancy of parties."

We have said that the rules of the Court of Equity, as to pleadings, are not as inflexible as those of the common law Courts. In *Oliver v. Piatt*, 3 How., 333 [11 L. Ed. 622], it was held, "if entire justice cannot so conveniently be done, against the same defendants, without uniting different subjects, they may be united in a bill."

Mr. Justice McLean, in delivering the opinion of the Court, in *Fitch v. Creighton*, 24 How., 163 [16 L. Ed. 596], remarks: Lord

Cottingham, in *Campbell v. Mackey*, 1 Mylne & Craig, 603, said: "To lay down any rule, applicable universally, or to say what constitutes multifariousness, is, upon the authorities, utterly impossible. Every case must depend on its own circumstances, and as these are as diversified as the names of the parties, the Court must exercise a sound discretion on the subject."

The conclusion which we have reached is sustained by *Williams et al. v. Neel et al.*, 10 Rich. Eq., 338 [73 Am. Dec. 94]; *McElwee v. Massey & Foster*, 10 Rich. Eq., 377; and *Barkley v. Barkley*, 14 Rich. Eq., 12.

The motion is granted, the order sustaining the demurrer overruled, and the case remanded to the Circuit Court.

WILLARD, A. J., concurred.

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*J. A. CROTWELL v. JANE BOOZER
and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Judicial Sales* ⇨51.]

Real estate of decedent was sold by the Commissioner, in October, 1868, under a decree of the Court of Equity, made in April of the same year. The purchaser complied with the terms of sale, and, after a report of the sale was made, but before its confirmation, he applied for an attachment against the widow of decedent, who was a party defendant, and who was in possession of the premises sold, to compel her to surrender the possession to him: *Held*, That attachment could not issue before confirmation of the report.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 95; Dec. Dig. ⇨51.]

[*Homestead* ⇨150.]

The widow's ground for refusing to surrender the possession was, that she claimed a homestead in the premises, under military orders and the Constitution of 1868; and the Chancellor who made the decree for sale had refused, at the time he made it, to decide whether the widow was entitled to a homestead, holding that, under the terms of the military order, that question could only be determined on the coming in of the report of sale: *Held*, That the proper time to determine that question was when the report came up for confirmation.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 299; Dec. Dig. ⇨150.]

[*Executors and Administrators* ⇨375.]

Appeal sustained upon a ground not formally taken by appellant, but substantially appearing in the proceedings.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1537; Dec. Dig. ⇨375.]

Before Johnson, Ch., at Chambers, November, 1868.

This was an appeal by Jane Boozer, a defendant, against an order for a writ of attachment for contempt.

To the statement of the case contained in the opinion of the Court, it is only deemed necessary to add that the decree for sale

was made April, 1868; that the sale was on the 5th October, 1868, at the price of \$2,040; and that the Commissioner, in his report, stated that the purchaser, James Y. Harris, had complied with the terms of sale.

Fair, for appellant.

Baxter, contra.

March 12, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The complainant, as administrator of the estate of T. G. Boozer, deceased, has filed his bill for the sale of the real estate of the intestate, and for an injunction. The defendant, the widow of the intestate, was made a party, and claimed a homestead out of the real estate of which sale was sought, under the provisions of a military order made by Gen. Sickles, while commanding the Second Military District, embracing the State of South Carolina. Upon the hearing, the Chancellor decreed a sale of the premises in question, holding that the claim of the defendant to a homestead could not, under the terms of the military order, be determined, except upon the coming in of the report of the officer who is required to make

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the sale. The premises were accordingly sold, and the report of sale made, bearing date October 10th, 1868. No notice is taken of the claim of the defendant in this report.

It does not appear that any order was made confirming the sale; but, on the 17th day of October, 1868, notice was given to the defendant, Jane, to yield possession of the premises in question to the purchaser; and, on the 17th of November then next ensuing, an order to show cause was made why defendant should not be attached for contempt, in refusing to give possession to the purchaser. In answer to this order to show cause, defendant interposed, among other matters, her claim to be allowed a homestead, both under the military order in question, and under the provision of the Constitution of the State adopted subsequently to the hearing of the case. The defence was overruled, and an attachment ordered to issue, unless she relinquished possession by a day fixed for that purpose.

From this order the defendant, Jane Boozer, now appeals. The proper time for determining the right of the defendant to a homestead, under the decree in the cause, was on the motion to confirm the sale upon the coming in of the report of sale. It does not appear that an order of confirmation was made. Under the circumstances of the case, we cannot assume that such an order was made, for it would be equivalent to assuming that the Chancellor had determined her right to a homestead against her, upon an order not brought before us by appeal, and she would thus be excluded from all right to submit her claims to this Court.

Until the sale was confirmed, an attachment could not issue for failing to surrender the premises. The defendant's answer to the order to show cause, and her grounds of appeal, do not artificially present this objection to the order of attachment; but they, at all events, bring to notice the undetermined claims of the defendant as an obstacle to the issuing of the attachment. This, under the liberal construction we are bound to allow to the statement of her claims, is a substantial, if not a formal, compliance with the conditions entitling her to a hearing in this Court.

The order of attachment must be set aside, and the case remanded to the Circuit Court, with liberty to the complainant to move for a confirmation of the sale: upon which motion the defendant, Jane Boozer, will be entitled to be heard as to her claims for a homestead exemption.

MOSES, C. J., concurred.

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*E. SUBER, Plaintiff in Error, v. G. PULLIN, Defendant in Error.

(Columbia. Nov. and Dec. Term, 1869.)

[*Assumpsit, Action of* ¶6.]

P. agreed, in writing, to sell to S. certain heavy articles of iron and stone, and send them to a certain station, from whence they were to be hauled by S. to the place where they were to be erected, and then P. was to take charge of the articles and have them erected, "if the foundation is completed when delivered." P. sent the articles to the station, and gave notice thereof to S., but he failed to haul them off, or to have the foundation made: *Held*, That P. could recover from S. the damages he had sustained, under the common counts.

[*Ed. Note.*—For other cases, see *Assumpsit, Action of*, Cent. Dig. §§ 27-36; Dec. Dig. ¶6.]

[*Assumpsit, Action of* ¶5; *Contracts* ¶4.]

Where there is a special contract existing, and in full force, a recovery for a breach thereof cannot be had under the common counts. Aliter, if the contract has been rescinded or abandoned, by mutual consent or by the act of the defendant, and the plaintiff is entitled to compensation for part performance.

[*Ed. Note.*—For other cases, see *Assumpsit, Action of*, Cent. Dig. §§ 15, 17; Dec. Dig. ¶5; *Contracts*, Cent. Dig. § 5; Dec. Dig. ¶4.]

[*Contracts* ¶272.]

A rescission or abandonment may be shown by the acts or omissions of a party. Express words or direct notice is not necessary.

[*Ed. Note.*—For other cases, see *Contracts*, Cent. Dig. § 1192; Dec. Dig. ¶272.]

[*Frauds, Statute of* ¶83.]

Where work and labor is to be performed on goods by the vendor, before delivery, the contract of sale is not within the 17th Section of the Statute of Frauds.

[*Ed. Note.*—For other cases, see *Frauds, Statute of*, Cent. Dig. § 152; Dec. Dig. ¶83.]

Before Orr, J., at Newberry, October, Extra Term, 1869.

This case was brought up by writ of error from the Circuit Court for Newberry County. E. Suber, the defendant below, being the plaintiff in error.

The action was assumpsit, and the declaration contained only the common counts in indebitatus assumpsit for goods and chattels sold and delivered, work and labor done, money paid, and money had and received.

No bill of exceptions was filed, and the case was heard on a report of his Honor the presiding Judge, which is as follows:

"This was an action of assumpsit for goods sold and delivered by plaintiff to the defendant. The following special contract in writing was proved:

"Captain Ephraim Suber bought of G. Pullin iron railing, No. 67, and three sets of white marble gravestones, (two sets three feet by 1 foot eight inches, and one three feet by one foot): to be sent to Hope Station, and all expenses paid there; and said Pullin is to take charge of setting the same, if the foundation is completed when delivered. They find the laborers, and haul it. Price for the above, five hundred and fifty dollars. Size of lot, forty-five feet by forty-five. Dated Glymphville, March 13, 1859.

(Signed)

"Ephraim Suber."

"It was proven that the railing and tomb-

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stones were boxed and shipped to Hope Station; that they were received; and that the defendant had notice of their arrival. The plaintiff testified that he called on three occasions—in June, July and August, or September, 1859—to set up railing and monuments, but the foundations had not been prepared by defendant, nor any of the articles hauled from the depot to the family graveyard. The defendant never did receive the articles. When the plaintiff closed his evidence, the defendant moved for a non-suit, on the ground that, if the special contract was relied on to establish defendant's liability, performance by plaintiff of his part of the contract should be averred and proved, or plaintiff's willingness to perform, and that he was prevented by defendant; and that, if the special contract was waived, and the common counts only were relied on, to charge the defendant with the goods sold and delivered, that the contract was invalid, under the 17th Section of the Statute of Frauds.

"The transcript will show the various counts in plaintiff's declaration. There is no separate count on the special contract, though the items are set forth in one or more of the counts; nor is there any averment of performance or willingness to perform his part of the contract, and that he was prevented by plaintiff. There was, however, proof that he went to the house of defendant to put up the work, as stipulated in the written contract offered in evidence. I overruled the motion for a non-suit with some

hesitation. The defendant offered evidence, but it is not necessary to report the same for elucidating the question made in the case. The jury found a verdict for plaintiff for \$302.27."

The error assigned by the plaintiff in error is as follows:

That His Honor the presiding Judge erred in not granting the motion for a non-suit made by the defendant, on the trial of this case, on the grounds taken to wit:

1. That the plaintiff did not declare on the special contract in writing relied on and proved at the trial, and aver performance of, or willingness on plaintiff's part to perform, what was promised by him in said contract, and because, if the special contract was waived, the contract was within the 17th Section of the Statute of Frauds.

2. That, upon the contract proved, the plaintiff was not entitled to go to the jury upon the counts contained in his declaration.

Garlington & Suber, for plaintiffs in error.

The plaintiff in the action below declared

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on the common counts *in assumpsit upon an executed contract, whereas, the contract proved on the trial was a special agreement in writing, and executory in its character.

1. The plaintiff having proved the special agreement, could not recover on the common counts, because the consideration of the special contract was executory.—1 Chitty Pl., 340, 10th Am. Ed.; *Idem*, 304.

The contract must be stated according to its legal effect.—*Idem*, 320.

A misstatement of the contract will subject the plaintiff to a non-suit.—*Idem*, 307, 298.

2. In order to maintain the count for goods sold and delivered to the defendant, it was essential that the goods should have been delivered to, and accepted by, him, which was not shown in the case below.—*Idem*, 345, 347, 359; Chitty on Contracts, 374, 384, 441, 6th Am. Ed.

The declaration should have been framed specially on the written contract for not accepting the goods, or for refusing to complete the bargain.—*Idem*, 347; *Parnel v. Wilson*, Dudley, 372.

3. To support the count for work, and labor, and materials, the plaintiff must have completely performed the work contracted for, and, if not, it was necessary that he should have declared specially if the defendant had wrongfully prevented him from performing the work.—1 Chitty Pl., 348.

4. The defendant in error should have averred in his declaration performance of his part of what was required of him by the contract, as proved, or his excuse for non-performance; whereas, his declaration contained no such averment.—1 Chitty Pl., 320 to 327; *Lester v. Jewett*, 11 N. Y., 453, (1854); *Dana v. King*, 2 Pick., 156; *Johnson v. Wy-*

gart, 11 Wend., 48; *Dakin & Bacon v. Williams & Seward*, 11 Wend., 69; *Pordage v. Cole*, 1 Saund. R., 320; *Notes*, 18 Johnson, 451; 1 Saund. Pl. and Ex., 115; *Craig v. Pride*, 2 Spear, 121.

5. If the special agreement in writing be waived, and not relied upon, the contract is invalid under the 17th Section Statute of Frauds.

Jones, for defendants in error.

1. It is not necessary to declare specially on demand for work, and labor, and materials, or for merchandise, when the plaintiff has performed his part, and the considera-

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tion is money, and time for *its payment has passed.—1 Chit. Pl., 381, 382 and 317; 4 East, 147; 9 East, 498; 13 East, 97; 9 Peters, 566; 7 Cranch, 303; *Buller's Nisi Prius*, 139, 140; *Hayward v. Kain*, 1 Moody & Malkin, 311; *Lummingdale v. Livingston*, 10 John. R., 36; *Felton v. Dickenson*, 10 Mass., 287, 290; *Payson v. Whitcomb*, 15 Pick., 212; *Sublett v. McLin*, 10 Hemphill, 181; *Dermett v. Jones*, 2 Wallace Rep., 1; *Hyde v. Laverse*, 1 Cranch, 408; *Maupin v. Ric*, 2 Cranch, 38; *Brockett v. Hammond*, 2 Cranch, 56; *Pareish v. U. S.*, 1 Nott & H., 357; 4 Bos. & Pul. Rep., 351; 6 East, 564; 2 Saunders, 350, Note A; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Fitsg. Rep.*, 303; *Chesapeake Canal Co. v. Knap*, 9 Peters, 541; *Repsico v. Bontz*, 3 Cranch, 425; 2 Smith's Leading Cases, 21-34; *Laden v. Seymour*, 24 Wend., 62; *Newman v. McGregor*, 5 Ham., (o) 351; *Porter v. Talcott*, 1 Cowan, 378-386; *Baker v. Covey*, 19 Pick., 496; *Coles v. Holmes*, 2 Spear, 360; 4 Rob. Prac., 496. 7 and 8.

2. It is not necessary to declare specially on demands for work, and labor, or merchandise, when the contract has been put an end to, or the defendant refuses or neglects to do his part.—*Raymond v. Bearnard*, 12 John. R., 276; *Jones v. Barkly*, 2 Dougl., 694; *Franklin v. Leach*, 5 Cowan, 506; *Sugden on Vendors*, 10 Ed., 374; *Laird v. Prince*, 7 M. and Wels., 474; *Craig v. Pride*, 2 Spear, 121; *Hill v. Barrett*, 14 B. Monroe, 8; *Persens v. Hart*, 11 Wheaton, 237; *Ames v. LeRue*, 2 McLean, 216; *Wethers v. Reynolds*, 2 B. & Ad., 882; *Blanche v. Colburn*, 8 Bing., 14; *Franklin v. Miller*, 4 Adol. and Ellis, 599; *Towers v. Barrett*, 1 Term Rep., 36; *Rye v. Stubbs*, 1 Hill's L., 384; *Algeo v. Algeo*, 10 Serg. & R., 235; *Moulton v. Trash*, 9 Metcalf, 577; *Hogland v. Moore*, 2 Blackford, 167; *Lockwood v. Barnes*, 3 Hill N. Y., 129; *Stephens' Nisi Prius*, 299 and 300; *Streeter v. Horlock*, 1 Bing., 37; *Leeds v. Brenows*, 12 East, 1; *Poulter v. Killingbeck*, 3 Bos. & Puller, 197; *Gorden v. Martin*, *Fitsg.*, 302.

3. It was not necessary that plaintiff should have made an actual delivery to defendant, but only a constructive delivery, to enable him to sustain indebitatus assumpsit.—1 Stephens' Nisi Prius, 293; *Smith v.*

Chase, 2 Barn. & Ald., 753; Nicholle v. Plume, 1 Car. & P., 272.

4. The contract in this case is not within the 17th Sec. of Stat. Frauds, because the goods were not ready for delivery, but some labor had to be bestowed on them.—Gadsden v. Lance, 1 McMullen Eq., 91; Towers v. Osborne, Str., 506; Clayton v. Andrews, 4 Bur.,

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*2101; Grover v. Buck, 2 Maul & Sel., 178; Bird v. Muhlinbrunk, 1 Rich., 199; Winship v. Buzzard, 9 Rich., 103; Cason v. Chuley, 6 Georgia R., 554; Cummings v. Dennett, 26 Maine, 401; Spencer v. Cone, 1 Metcalf, 283; Malteron v. Westcott, 13 Verm., 261; Allen v. Davis, 20 Conn. R., 38.

March 12, 1870. The opinion of the Court was delivered by

MOSES, C. J. It is assigned that there was error, on the part of the Judge below, in holding that a recovery could not be had under the common counts, because the parties had entered into a special contract. It is settled, beyond controversy, that where there is a special contract existing and in full force, a resort for the breach of it cannot be had to the common counts.—1 Chit. Pl., 342; Power v. Wells, Cowp., 818; Weston v. Downes, Doug., 23; Raymond et al. v. Bearnard, 12 Johns., 274; Clark v. Smith, 14 Johns., 326. It proceeds upon the plain and well recognized principle that, if there is an express promise still existing, the party is precluded from a remedy founded on an implied one.

The terms of a special contract express the conditions and provisions which the parties have prescribed for themselves. The implied obligation, which arises from the consideration, is substituted by the law in the absence of an agreement which declares the intent of those who are to be, respectively, bound by its terms. Where, therefore, one undertakes either to do specific work, or deliver goods, he is held to his assumption according to the true meaning of his contract, and this is to be ascertained by an action on the agreement itself.

If, however, it has been rescinded, either by mutual consent or by the act of one of the parties, and a right to compensation has accrued to the other of them by reason of part performance, such right may be enforced through the common counts. It is not to be understood that a rescission of the contract can only be effected by words, or direct notice, indicative of that purpose; but any act, by the one or the other, which necessarily prevents the performance of the mutual undertaking, will amount to an abandonment. Wherever the conduct of either can be viewed in no other aspect than as a relinquishment of the contract, it is to be regarded as rescinded, and the party against whom the breach has thus been made may avail himself of the common counts. The remedy is accorded to him because he has been pre-

vented from completing his undertaking by the direct interposition of the other party.

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*To sustain these positions reference may be had to what is said by Buller, J., in *Towers v. Barret*, 1 T. R., 136; to *Gillett v. Maynard*, 5 Johns., 86; *Dubois v. Delaware and Hudson Canal Company*, 4 Wen., 285; and to our own cases of *Rye v. Stubbs*, 1 Hill, 384; *Martin v. Howel*, 2 Tr. Con. Rep., 750; *Stent v. Hunt*, 3 Hill, 223; *Bradshaw v. Bran-*

an, 5 Rich., 466. By the agreement, the defendant was the purchaser from plaintiff of certain iron railing and tombstones, which he was to send to Hope Station, and pay the expenses therefor. The defendant was to haul the materials to the place of erection, but the plaintiff was to set up the same, if the foundation was completed when the articles were delivered. The price to be paid by the defendant for the materials, and setting them up, was \$550.

The evidence proved that the stones and iron railing were sent by the plaintiff to the station, and notice thereof given to the defendant; that the plaintiff, after this, called on him several times to remove the articles to the graveyard, and prepare the foundation, with neither of which requests did he comply. Under these facts, it is clear that his neglect or refusal prevented the plaintiff from completing the contract, on his part, according to its intent; and, unless he can recover in this form, he would be without remedy for the value of the materials he furnished, and the work and labor he bestowed to place them in the condition essential to the purposes for which they were required by the defendant. His failure to perform the agreement, on his part, which was necessary to the complete fulfillment of all the stipulations required of the plaintiff under it, amounted to an abandonment of the contract by the defendant.

He contends, too, that if the special contract was waived, the plaintiff cannot recover, by reason of the 17th Section of the Statute of Frauds.

It might be sufficient to say that the verdict could be sustained on the demand for work and labor, and this would prevent the objection growing out of the statute.

The contract was in writing, and was offered in evidence as a standard by which the measure of damages was to be regarded. If it had existed only in parol, the exception would not have been well taken. The prominent articles to be furnished by the plaintiff were gravestones, of stated dimensions. He was to inscribe upon them at least the name and the date of the birth and death of the several deceased to whose memory they were to be dedicated.

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*They were not tombstones at the time of the agreement, and work and labor were to

be bestowed upon the marble by the vendor to constitute them the articles demanded by the defendant. The work and labor are to be regarded as indispensable parts of the contract.

The whole subject is fully considered in the case of *Bird v. Muhlinbrink*, 1 Rich., 199 [44 Am. Dec. 247], which holds such an agreement not within the Statute of Frauds.

The judgment of the Court below is affirmed.

WILLARD, A. J., concurred.

1 S. C. 279

ALETHIA ALLEN and Another, by Next Friend, v. CHARLES L. GAILLARD and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Guardian and Ward* ⇨56.]

Investments by a guardian of his wards' funds, at about eighty-five cents on the dollar, in bonds of the Greenville and Columbia Railroad Company, unsecured by mortgage on the road, or otherwise, not sustained.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 257; Dec. Dig. ⇨56.]

[*Trusts* ⇨217.]

The bonds of a railroad corporation are personal securities, in contradistinction to public or real securities, and can only be upheld as proper subjects for the investment of trust funds, under special circumstances, which ought to be made to appear by the trustee.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 307; Dec. Dig. ⇨217.]

[*Guardian and Ward* ⇨53.]

That the bonds in question were sought after, at the time the investments were made, by prudent and sagacious men; that no investment at that time was regarded as more safe and judicious; that they bore 7 per cent. interest, payable semi-annually, and were a favorite investment with capitalists; that their coupons were taken by the merchants as so much money; that the guardian acted in entire good faith, and purchased, at the same time, other bonds of the same kind for himself; and that three or four hundred thousand dollars of them were held by citizens of the District: *Held*, Not to justify the investments.

[Ed. Note.—Cited in *Singleton v. Lowndes*, 9 S. C. 490.

For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. ⇨53.]

[This case is also cited in *Stallins v. Barrett*, 26 S. C. 477, 2 S. C. 483, as to multifariousness.]

Before Carroll, Ch., at Anderson, June, 1868.

The bill in this case was for an account by the defendant, Charles L. Gaillard, as guardian of the plaintiffs, and the only question considered and decided by the Court was, whether certain investments of the estates of his wards, made by the defendant, in the years 1859 and 1860, in bonds of the Greenville and Columbia Railroad Company, at

eighty-five cents, or thereabouts, on the dollar, were legal.

His Honor the Chancellor, having considered the evidence, and held that the investments were actually made, proceeded with his decree as follows:

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*Carroll, Ch. Another question remains to be considered. If, in fact, the alleged investments were actually made, then it is objected that the bonds in question were not public but private, and merely personal securities, and were not so well secured and certain as to authorize a trustee to invest in them. In *Spear v. Spear*, 9 Rich. Eq., 188, it is observed by the Chancellor, that there is no special mode of investing his wards' funds prescribed to a guardian by any statute or rule of Court in this State. What is afterwards said by the Court, in the same case, respecting the investment of the funds of the infant parties, was addressed to their guardian, and was not the announcement of any rule of universal or general application. The personal liability of a trustee, in any particular case, is to be determined by the enquiry, whether there is evidence of faithful endeavors, on his part, to fulfill his duty. "To require from a trustee more than common sagacity and diligence is against policy."

From these principles is deduced the rule that a trustee is answerable for those losses only which are occasioned by such acts or omissions as a prudent man would not do or omit in his own affairs.—*Boggs v. Adger*, 4 Rich. Eq., 410; *Hext v. Porcher*, 1 Strob. Eq., 171-2. In the case cited, of *Boggs v. Adger*, the loss arose from the investment of the infant's estate in the stock of the Bank of the United States, and the guardian was held excused. By order of this Court, in *Monk v. Pinckney*, 9 Rich. Eq., 279, an executor was directed to invest the moneys in his hands, being the residue of his testator's estate, in stocks of the banks of the City of Charleston. In the lower division of this State, and prior to the recent war, it is a matter of notoriety that trust funds were commonly invested in stocks of the Charleston banks, and bonds of the South Carolina Railroad Company.

The bonds of the Greenville and Columbia Railroad Company, purchased by Dr. Gaillard for his wards, were not secured by lien upon the road, and were known as the "non-mortgage bonds." There had been other bonds of that company previously issued, to amount of some \$800,000, secured by mortgage of the road. But the company had expended three millions of dollars in building their road, and their bond debt, at that time, was but \$1,500,000. When first issued, the non-mortgage bonds sold for less than those secured by mortgage, but afterwards there was very little difference in their price. A witness testified that, upon one occasion,

he exchanged two of the mortgage bonds with General Harrison for two of the non-mortgage bonds of like amount, and "exchanged

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at *par." In 1859 and 1860 these bonds—the non-mortgage bonds—were sought after as investments by prudent and sagacious men. "No investment at that time was regarded as more safe and judicious. They were a favorite investment with capitalists; bore seven per cent. interest, payable semi-annually. Their coupons were taken by the merchants as so much money," and "three or four hundred thousand dollars of them were held by citizens of that District."

That Dr. Gaillard acted in perfect good faith, when investing the moneys of his wards, the plaintiffs, in the bonds referred to, cannot be doubted. It appears, conclusively, and independently of other evidence, by the significant fact that he purchased for himself, and at the same dates, bonds of the same description, and upon the same company, to more than double the amount that he had purchased for his wards. He cannot be held responsible for the loss resulting from the investment in question, and it is so adjudged and decreed.

It is further ordered, that an account be taken of the estates of the plaintiffs, respectively received by, or come to the hands of, their guardian, the defendant, C. L. Gaillard, and of all and singular his transactions in respect of the same; and that, as to his investments upon their account in the bonds of the Greenville and Columbia Railroad Company, herein above mentioned, he be discharged upon surrender and delivery of those bonds to the person who shall be appointed to succeed him as such guardian.

And it is further ordered, that the Commissioner make inquiry and report as to some fit and proper person to be appointed the guardian of the plaintiffs in the stead of the defendant, Gaillard, and as to the terms of such proposed appointment.

The plaintiffs appealed, and now moved this Court to reverse the decree, on the grounds, among others:

1. Even if the guardian intended to make this investment in second class railroad bonds, never at par, and had complied with all the legal requisites of such investments, yet such depreciated railroad bonds are not a fit and proper subject for the investment, (if made,) and was contrary to the duty of the guardian—illegal and void.

2. Because the proof showed that the bonds were purchased at a discount, and the Chancellor's decree gives the guardian credit for their whole nominal value, thus approving

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and encouraging guar*dians to speculate upon their wards, which is at war with the fundamental principles touching the relations of guardian and ward.

3. It is respectfully submitted that the

Chancellor misconceived the rule in regard to the "faithfulness" of trustees. Mere general good intention is not enough; it must be fidelity in the line of their duty.

McGowan, for appellants.

Whitner, contra.

March 12, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The decision of this case turns upon the question whether the defendant, Gaillard, as guardian of the complainants, made a legal investment of their estate.

The fact of investment was disputed, but need not be considered, as this Court holds that the subject of the investment was not suitable. The guardian claims to have purchased, with the wards' money, bonds of the Greenville and Columbia Railroad Company, at eighty or eighty-five cents on the dollar, being unsecured by mortgage or otherwise, which bonds have since been greatly depreciated.

The bonds of a railroad corporation are personal securities, in contradistinction to public and real securities, and, under the decision of this Court, in *Nance v. Nance*, (Ante., p. 209,) can only be upheld as proper subjects for the investment of trust funds, under special circumstances, which ought to be made to appear by the guardian.

In the present case, all that the guardian urges in support of the investment is the estimation in which the bonds were held at the time the investment was made. These bonds having since depreciated, the wards are prejudicially affected by the failure of the guardian to exact adequate securities.

The bond of a railroad company, unless secured by a mortgage of the property of the company, or otherwise, have but little more than speculative value. Its market value must depend upon the opinion that is entertained as to the extent of future earnings and the character of the management of the road. Such elements of value are too unstable and speculative to form a safe subject for the investment of trust funds.—*Nance v. Nance*. The operation of the rule laid down by the Courts of Equity is to favor

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that class of securities in which the risk is general, depending upon the prosperity of the country at large, and not upon the chances attending the prosperity of any person or corporation.

It is adjudged and decreed, that so much of the decree appealed from as orders that the defendant, C. L. Gaillard, be discharged from responsibility for the investment upon the account of the complainants in the bonds of the Greenville and Columbia Railroad Company, on the surrender and delivery of said bonds to the person who should be appointed to succeed him as guardian, be, and

the same is, wholly reversed and set aside; and it is further adjudged and decreed, that, on the accounting directed by said decree, the said C. L. Gaillard account for the moneys received by him on account of the complainants, with interest, without regard to the alleged investments claimed by said Gaillard to have been made by him as guardian, and that the decree be, in all other respects, affirmed.

MOSES, C. J., concurred.

1 S. C. 283

J. E. ULDRICK and JANE Y., His Wife, v. WM. H. SIMPSON and WM. S. McBRIDE.

(Columbia. Nov. and Dec. Term, 1869.)

[*Executors and Administrators* ⚡126, 128.]

J. and Y. were appointed executors of B., with power to sell a certain tract of land to pay pecuniary legacies. J. alone qualified and acted. He then died, leaving a will, and his executors sold the tract of land to Y., taking his single bill to secure the payment of the purchase money. Y. took possession of the land, and died several years after the sale, leaving the single bill unsatisfied. On bill, by a pecuniary legatee of B., against one of the executors of J., for payment of plaintiff's legacy, it appeared that the only asset of B.'s estate, in the hands of defendant, was the single bill of Y., which had become of doubtful value, if not wholly worthless: *Held*, That the defendant could not defend himself on the ground that the sale of the tract of land to B. was void.

[Ed. Note.—Cited in *Reeves v. Tappan*, 21 S. C. 10.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 525, 532; Dec. Dig. ⚡126, 128.]

Before Carroll, Ch., at Abbeville, June, 1868.

There were two Circuit Court decrees in this case, from which appeals were taken by the defendant, McBride. The first was made by his Honor Chancellor Johnson, in May, 1867, and is as follows:

Johnson, Ch. On the 19th day of January,

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1853, John Bas*kin, the grandfather of the complainant, Jane Uldrick, executed his will, and soon afterward died, leaving the same unrevoked; the eighth and ninth clauses of which are as follows, to wit:

"8th. It is my will and desire that the heirs of my deceased daughter, Margaret Cook's children, namely: John and Jane Cook, I give and bequeath each five dollars for their separate use and benefit. To Jane, Mary and Margaret Cook, I give and bequeath to each six hundred dollars, for their separate use and benefit, with this provision, that the said amount is to be left in trust to my executors, for the benefit of the above named heirs, without reference to any future husband.

"9th. It is my will and desire that the tract of land on which I now live, containing

two hundred and four acres, be sold by my executors; and I do hereby empower my executors to sell and make title for the same to the purchasers; and all the rest, or residue, or balance of my estate, of whatever kind or description, that may not heretofore be willed, with all moneys, &c., be equally divided between Jane Baskin, Jas S. Baskin, Susannah Simpson, Isabella McBride, Jane Harkness, Mary and Martha Baskin.

"All which foregoing shares I give to them, as above stated, forever. And, finally, I do hereby appoint my son, Jas. S. Baskin, Dr. L. Yarbrough, jointly, executors of this, my last will and testament."

Jas. S. Baskin, soon after the death of the testator, had his will proved, and qualified as an executor of the same. L. Yarbrough did not qualify as an executor, nor did he formally renounce the appointment as such.

On the 5th day of October, 1854. James S. Baskin executed his will, and soon afterwards died, leaving the same unrevoked, without having fully discharged the trust conferred by the will of his testator; and in his will he appointed William H. Simpson and William S. McBride, the defendants, executors of the same; both of whom qualified, and entered upon the discharge of the duties thereby imposed. And on the 16th day of September, 1856, they sold and conveyed to Dr. L. Yarbrough the tract of land devised by John Baskin to be sold by his executors, for the sum of sixteen hundred dollars; and, in payment for the same, took his sealed note, or single bill, for the said amount, payable to them, or the bearer thereof, one day after the date of the same, with interest on the same from 1st day of January, 1856.

In the autumn of 1856, William H. Simp-

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son, who attended *mostly to the business, removed to the State of Mississippi; and, before leaving, placed the single bill in the hands of his co-executor, William S. McBride, who now holds the same; and in his answer states that he had never received upon the same but the sum of sixty dollars, which he still holds; though it does appear that Dr. Yarbrough, during his life, was in the habit of paying over to the complainants—the latter of whom is one of the legatees of six hundred dollars, under the 8th clause of the will of John Baskin—the annual interest on the legacy, sometimes in his own name, and sometimes in the name of William S. McBride, as appears by exhibit filed with the answer of the latter.

The bill was filed for the purpose of getting the Court to order that five hundred dollars of the bequest of six hundred should be invested in a tract of land, containing one hundred and six acres, which had been purchased by John E. Uldrick for that amount, and on which he and his family were residing, but which had not been paid for;

and, also, for the purpose of requiring the defendants to account for their management of the said legacy.

The defendant, Wm. S. McBride, in his answer, denies that he intentionally did any act, either as executor or trustee, under the will of John Baskin, and submits that, if he and his co-executor did execute titles to the tract of land devised in his will to be sold, they did it under a mistake of their powers; and that the estate of Dr. L. Yarbrough, which is represented by his widow, Martha Yarbrough, as the administratrix of his estate, is not responsible for the amount due on the single bill, from the fact that the titles to the lands are defective; and, also, that they should not be required, in any event, to pay the whole amount of the said legacy, until it is ascertained whether the estate of Dr. L. Yarbrough is sufficient to satisfy the whole of the note, in due course of administration. It is also submitted, that no fund was provided, by the will of John Baskin, with which to pay the legacy to the complainant, Jane Uldrick.

I think it very clear that, upon any reasonable construction of the will, it was the intention of the testator that the specific bequests should be paid before any division should be made by his executors, under the 9th clause of his will.

If James S. Baskin had sold and conveyed the land, as the only executor who qualified under the will, there could be no doubt but that his conveyance would have been good.—*Iritton et al. v. Lewis et al.*, 8 Rich. Eq., 271. And, if he had died intestate, and

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*the defendant had taken out letters of administration, with the will annexed, upon the estate of John Baskin, I think that, under the provision of the act of 1787, taken in connection with the Statute of '21, Henry 8, c. 4, they might have sold and conveyed the land. But can they call in question the validity of their own deed? I think not.

When executors are appointed to sell and convey lands, a neglect to qualify is prima facie evidence of a refusal to act, and will validate a sale made by the acting executors.—*Robertson v. Gain*, 2 Hump., 367.

So I think Dr. L. Yarbrough may be regarded as having renounced his right to qualify as an executor of the will of John Baskin, especially as he recognized the right of the executors of James S. Baskin to sell under the first will by purchasing from them; and it would come with bad grace from those claiming under him now to interpose the objections.

Under the terms of the 9th clause of the will, directing the proceeds of the sale of the land, and of the other property not specifically disposed of, to be divided amongst the testator's children, I am of the opinion that the defendant, as the executor of the executor of the will of John Baskin, had the legal

right to sell and convey the land, under the power therein conferred, irrespective of Statute 4, Edward 3, c. 47.—*Powell on Devises*, 243; *Williams on Executors*, 629; *Chanet v. Villeponteaux*, 3 McC., 29.

William H. Simpson was not made a party by publication, and, consequently, was not before the Court; and the evidence as to the propriety of the proposed investment, and as to other facts which would enable the Court to make an intelligent decree, are so meagre that I do not deem it advisable to attempt to decide any of the points made, except that provision is made in the will of John Baskin for the payment of the legacy of six hundred dollars, and that the conveyance of the land, by the executors of James S. Baskin, to Dr. L. Yarbrough, is a good and valid conveyance; and, as to these points, it is ordered and decreed, that the above opinion be taken as the judgment of the Court. It is also ordered and decreed, that all the other points of the case be referred back to the Commissioner, to take evidence upon the same; and that he do report thereon, with leave to report any special matter. It is also ordered and decreed, that the complainant, if so advised, may still make William H. Simpson a party, by publication.

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*The second decree is that of His Honor Chancellor Carroll, and is as follows:

Carroll, Ch. All that was disputable, originally, in this cause, seems to have been determined by the decree already pronounced. Whatever is there adjudged, whether of fact or law, cannot, of course, be here reviewed or reversed. The decree referred to determines, in effect, that the defendants, being executors of James S. Baskin, were, in legal contemplation, the executor also of his testator, John Baskin, and were, therefore, competent to execute the power of sale conferred by the will of the latter.

In that decree it is also set forth that, "on the 16th September, 1856, the defendants sold and conveyed to Dr. L. Yarbrough the tract of land devised by John Baskin to be sold by his executors," and that conveyance is adjudged to be "good and valid." But, if the land has been effectually conveyed to the purchaser, Yarbrough, then the defendants have relied for payment of the price solely upon his individual obligation, without personal security, or even a lien upon the property sold. More than that, they have permitted the debt to remain since September, 1856, thus insufficiently secured, making no effort for its collection, and receiving nothing in payment, except portions of the accruing interest. Such acts, on the part of the defendants, must be regarded as inconsistent with ordinary prudence and circumspection.—*Lamb & Lamb, Speers Eq.*, 289 [40 Am. Dec. 618]; *Massey v. Cureton*, Chev. Eq., 181.

The decree of Chancellor Johnson seems

also to adjudge that the pecuniary legacies, under the will of John Baskin, are charged upon his whole estate not specifically disposed of. It is not shown that there was any original deficiency of assets to satisfy them, and, in such case, a legatee seeking payment of his pecuniary bequest is not required to make any other person, except the executors, a party to his bill.—Story Eq. Pl., 203.

Though the purchase money for the land had been paid by Yarbrough at the date of the sale, it would have then been insufficient to satisfy the three pecuniary legacies. It was the plain duty of James S. Baskin to have retained enough of his testator's assets to pay them. If he did not, then it was not less plainly incumbent upon the defendants to reserve a sufficiency for that purpose, out of the assets of James S. Baskin, when they transferred his estate to the husband and trustee of his daughter. If it were necessary to be shown, the fact appears that the de-

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fendants were aware of the *insufficiency of the land to pay those legacies, at the very time that they parted with the entire assets of their immediate testator. The transfer and payment to Young, and the sale to Yarbrough, occurred on the same day, 16th September, 1856, and it can hardly be supposed that the defendants' omission to retain assets enough to supply that deficiency resulted from their having placed an over-estimate upon the value of the land. To the extent of such deficiency the defendants must be held liable, even though they were acquitted of all responsibility, in respect of the land or the proceeds of its sale.

As the sale of the land, and the insufficient security accepted for the purchase money, have been adjudged to be the direct acts of both defendants, both are alike answerable to the plaintiffs for the loss that has resulted. Whether, by reason of McBride's delay in collecting the debt, the primary liability, as between the defendants themselves, should rest upon him, was not discussed at the hearing, and nothing upon that question is here determined.

Yarbrough is dead, and the proof is that his assets will not suffice to pay his specialty debts. As the case is presented, it is considered that the plaintiffs should not be delayed until the defendants have pursued and exhausted their remedies against the estate of Yarbrough for the purchase money of the land. The consequences of their neglect of duty must be visited upon the defendants alone, and they be held immediately and personally responsible to the plaintiffs.

The legacy to the plaintiff, Jane, being for her separate use and benefit, the capital must remain in the custody of the defendants, the executors under the will of her grandfather, unless some other person be appointed her trustee to receive it. By the report of the Commissioner, it appears that the proposed

investment of a portion of the sum thus bequeathed to her will be proper and advantageous. But the deed conveying the land to the plaintiff, J. E. Uldrick, seems to be unskillfully drawn. Some further release or assurance from the vendor, Crawford, may perhaps be necessary to perfect the title. As, also, one of the defendants has removed from the State, it may be found expedient to have another person substituted as trustee. It is, therefore, deemed advisable to leave it to the solicitors of the plaintiffs to propose such order, touching the investment referred to, as may be fit and proper.

It is adjudged and decreed, that the defendants are indebted to the plaintiff, Jane Y. Uldrick, on account of her legacy under the

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*will of her grandfather, John Baskin, in the sum of eight hundred and sixty dollars and sixteen cents, with interest on six hundred dollars from the fifth day of June last.

It is further ordered, that two hundred and sixty dollars and sixteen cents, parcel of the sum last mentioned, being the interest accrued upon such legacy up to the 5th June last, be paid by the defendants to the plaintiff, Jane, upon the joint receipt of herself and husband; and that the plaintiffs have leave to sue out final process to compel such payment.

And it is further ordered, that the plaintiffs have leave to move for such further orders as may be convenient and proper, in respect of the investment of a portion of the plaintiff, Jane Y. Uldrick's said legacy, as proposed in and by their bill.

Let the costs of the suit be paid by the defendants.

The defendant, McBride, appealed, and now moved this Court to reverse the decree of Chancellor Johnson, in the following particulars:

1. That the decree assumes, without proof, and against the statement of the answer, that a deed of conveyance of the land described in the pleadings was executed by William H. Simpson and William S. McBride to L. Yarbrough.

2. That the power conferred by the will to sell and convey real estate of the testator is a personal trust—not an executorial act—and cannot be executed by the executor of an executor; and the judgment of the Chancellor, that a conveyance, by the defendants, of the land of John Baskin is valid and effective, is a misapprehension of the law.

3. That the presumption that L. Yarbrough renounced his office of executor of John Baskin, or the power to sell and convey the real estate in question, is deduced from circumstances that are inconclusive and insufficient.

He also appealed from the decree of Chancellor Carroll, and now moved to reverse the same, in the particulars, and for the reasons following:

1. Because, if it be conceded that the defendants, as executors of Jas. S. Baskin, had the power and authority to sell and convey the real estate of John Baskin, deceased, and did engage to sell the same to Dr. L. Yarbrough without having executed a conveyance, and, also, without having exacted sure-

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ty of him, the land itself, *and the pecuniary means and credit of the vendee, are the amplest security for the purchase money, and it is erroneous and inequitable to hold the defendants personally responsible for it, especially as John Baskin had reposed in the vendor the trust and confidence of nominating him one of his executors.

2. Because the Chancellor has assumed, contrary to the uncontradicted and conclusive evidence on the subject, that the defendants did execute a conveyance of the land in question to Dr. Yarbrough, and makes that assumption the ground of imputing a want of diligence and fidelity to the defendants in regard to the purchase money, which subjects them to personal liability for the same.

3. Because the defendants are held liable for the difference between the price of the land and the amounts of the pecuniary legacies, when it is manifest, from the evidence, that the personal estate of John Baskin was divided amongst his legatees soon after his death, and in the lifetime of James S. Baskin, and that the estate of James S. Baskin was taken out of the hands of the defendants, as his executors, by the decree in a cause in Chancery, formally commenced and prosecuted, and without notice of the pecuniary legacies, or notice that they had not been paid or arranged.

4. Because the decree assumes that the defendant, W. S. McBride, was guilty of neglect in not collecting the amount of the single bill; whereas, he was hindered and prohibited from so doing by "stay laws," the closing of the Courts, and other obstacles produced by the late war; and exacts payment from him, without allowing him time to collect from Yarbrough's administratrix, or consideration of the sufficiency of his estate to pay the amount.

Burt, for appellant.

Thomson & Fair, contra.

March 12, 1870. The opinion of the Court was delivered by

WILLARD, A. J. Jane Y., wife of complainant, J. E. Uldrick, is entitled, under the will of her grandfather, John Baskin, to a legacy of \$600. Complainants have filed their bill against Simpson and McBride, executors of James S. Baskin, sole qualifying executor of John Baskin, for an account and payment of this legacy. The Circuit decree establishes the claim of complainants against the defendant, McBride, individually—the defendant, Simpson, having left the State, and not being brought in to answer the

bill. The decree is based, principally, upon

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two matters of fact: *First, that the defendants, Simpson and McBride, had sold certain real estate, belonging to the testator, to Dr. Yarbrough, and had taken his note therefor; that they made no effort to collect the note, and that it has become of doubtful value, if not wholly worthless; that this real estate, at the time of sale, constituted the only means of paying complainant's legacy, the other assets of the estate of John Baskin having been distributed at the time the real estate was sold; second, that defendants had fully distributed the assets of their immediate testator, J. S. Baskin, without making provision for the payment of complainant's demand.

The defendant, McBride, who alone answered, alleges that there is no sufficient proof of the sale of the land by the defendants; and, also, sets up a want of authority in the defendants to make such a sale. The evidence on which the fact of sale depends is, indeed, slight, but is not overborne by any testimony tending to negate the fact of such sale. We find no ground for disturbing the conclusions of the Chancellor in this respect.

The objection that the defendants had no authority to sell the land, whatever may be its bearing on this case, cannot be made by the defendant, McBride. John Baskin, the original testator, gave, by his will, a power of sale, as to his land in question, to his executors, James S. Baskin and Dr. Yarbrough. The object of the power was to raise assets to satisfy the provisions of his will, among which was the pecuniary legacy to Jane Y. James S. Baskin qualified, but Yarbrough did not. The power of sale was not executed during the lifetime of James S. Baskin, and after his decease, his executors, the defendants, assumed, rightfully or wrongfully, to execute it. The result of this action was, that the lands passed into the possession of Dr. Yarbrough, and, at his decease, became encumbered with the claims of his creditors and representatives. If defendants are permitted to dispute the validity of this sale, complainant, Jane Y., might be left with an expensive and doubtful litigation, her only means of realizing the legacy of her grandfather, while there is no reason to doubt that a faithful execution of the will of John Baskin would have secured the payment of this legacy.

It is unimportant to inquire whether James S. Baskin or the defendants are primarily chargeable with the waste of the assets out of which the complainant's legacy should have been paid, as, in either case, they held the means of satisfying the complainant's demand, and were bound to do so. Having

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failed in the discharge of *this duty, the defendant, McBride, cannot screen himself

from the liability to account, as decreed by the Chancellor.

The decree must be affirmed, and the appeal dismissed.

MOSES, C. J., concurred.

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JOSEPH GOLDEN, Plaintiff in Error, v. THE STATE OF SOUTH CAROLINA,
Defendant in Error.

(Columbia. Nov. and Dec. Term, 1869.)

[*Assault and Battery* ⚡64.]

On the trial of an indictment for assault and battery against an officer of the police force, it is not error for the Judge to refuse to charge the jury that, "if the defendant was engaged in the execution of his duty, and the assault charged was committed in its discharge, then he is excused, and should be found not guilty."

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 90-92; Dec. Dig. ⚡64.]

[*Assault and Battery* ⚡64.]

Nor, where the evidence tends to prove an excess of force used, is it error for him to charge that, "if the defendant, as an officer of police, acted in good faith, without malice, passion, or ill will, but simply with intent to do his duty, and secure 'the prosecutor,' and not to injure him, then he is excused, and should be found not guilty."

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 90-92; Dec. Dig. ⚡64.]

[*Assault and Battery* ⚡64.]

The amount of force which an officer may lawfully use in making an arrest is so much as is necessary to effect his object; and where he is charged with having exceeded that limit, the jury must judge of the necessity, not the officer. If the amount of force used is more than the occasion requires, he is criminally liable for the excess.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 91; Dec. Dig. ⚡64.]

[*Assault and Battery* ⚡49.]

Proof that he did not intend to commit an assault and battery will not excuse an officer, who, in making an arrest, exceeds the limits of his authority by using more force than the occasion called for.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 69; Dec. Dig. ⚡49.]

Before Carpenter, J., at Charleston, June Term, 1869.

This case was brought up by writ of error from the Circuit Court for Charleston County. It was an indictment against the plaintiff in error for an assault and battery, alleged to have been committed upon Christopher H. Suhrstedt. The bill of exceptions states:

"And the State, to maintain and prove the issue on its part, gave evidence tending to prove that the defendant, Joseph Golden, a member of the police force of the city of Charleston, did, on the 25th day of December, 1868, in the city of Charleston, assault one Christopher H. Suhrstedt, of the city of Charleston, and struck him (said

Suhrstedt) several severe blows with his policeman's club, upon the head and arm, by means of which his (said Suhrstedt's) arm was broken.

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"And the defendant, to maintain and prove the issue on his part, gave evidence tending to prove that the defendant is a member of the police force of the city of Charleston, and was, at the time of doing the acts complained of, on duty as such. That he was on King Street, in the city of Charleston, when he saw private McMahon, of the police force, attempting to lead by the bridle, toward the guard house, the horse attached to the wagon of said Christopher H. Suhrstedt, informer in this case; that said Suhrstedt was in the wagon, sitting on the seat, "crazy drunk," and pulling the reins with all his might; that the horse had stopped, and was restless, and swaying about from the effect of the strain upon the reins; that the defendant, seeing the difficulty of getting said Suhrstedt, who was then a prisoner, along, stepped to the wagon, and endeavored to get into it to loose the reins, secure said Suhrstedt, and assist in taking him to the guardhouse; that, as he stepped upon the wagon, the horse swung round towards him, cramping the wagon and catching his leg between the wheel and wagon box, and holding him fast; that, in this position, the defendant called to the said Suhrstedt twice to "loose the reins," so that he could get free from the wagon, but his calls were disregarded; that the defendant then, for the sole purpose of freeing himself from his perilous position, reached over with his club and struck said Suhrstedt a light blow on his arm or hand, whereupon he, said Suhrstedt, loosed one of the reins, and the defendant got free of the wagon wheel and got into the wagon; that the defendant then seized hold of the reins, which were still in the hands of said Suhrstedt, to take them from him; that, at this time, another member of the police force got into the wagon, and he, with the defendant, threw said Suhrstedt, who was still resisting, down in the wagon, and held him there, and thus, with his horse and wagon, took him to the guard house; that no blow was struck said Suhrstedt at all, but the one described, and in the manner described, and only sufficient force used to take him to the guard house; that said Suhrstedt was tried before the Mayor's Court and fined ten dollars; that, during the arrest of said Suhrstedt, the defendant acted in good faith and in the exercise of his office, without malice, passion, or ill will, and without any intention to injure said Suhrstedt in any way; that said defendant has been a member of the police force for three years, and has always sustained the highest character as a discreet and prudent officer; that a slight

blow upon the arm suspended, or a fall upon it, will break it.

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*"The testimony on both sides being closed, the defendant prayed the Court to instruct the jury in the following particulars:

"1. That if the defendant, as an officer of the police force of the city of Charleston, was engaged in the execution of his duty, and the assault charged was committed in their discharge, then he is excused, and should be found not guilty.

"2. That if the defendant, as an officer of the police force of the city of Charleston, used force upon the prosecutor, (Suhrestedt,) to secure him as a prisoner, and used only proper and sufficient force for that purpose, then he is excused, and should be found not guilty.

"3. That if the defendant, as an officer of police, acted in good faith, without malice, passion, or ill will, but simply with intent to do his duty, and secure the prisoner, (Suhrestedt,) and not to injure him, then he is excused, and should be found not guilty."

But the Court rejected the first and third sections of the instructions prayed for by the defendant, and adopted the second, to which refusal to charge the defendant then and there excepted, before the jury withdrew from the bar.

The jury found the defendant guilty, and the Court sentenced him to pay a fine of one hundred dollars, or, in default thereof, to be imprisoned four months.

Corbin, for plaintiff in error.

The question to be considered is: Did the Court err in refusing to charge as requested?

1. It can scarcely be a question that if the defendant, as an officer of police authorized to make arrests, found it necessary to forcibly place his hand upon Suhrestedt, to secure him as a prisoner, this cannot be deemed an assault.

If he "was engaged in the execution of his duty," he must be sustained. He is subject to arrest for not doing his duty.—1 Bish. Crim. Law, §§ 537, 538, 539, and cases cited.

The Court erred in refusing the third request to charge.

There can be no offense in law where none is intended. If the injury to Suhrestedt (the excessive force) was not intended, but accidental, the defendant cannot be guilty.

To constitute a crime, the act and intent must combine.—1 Bish. Crim. Law, §§ 364, 365, 366, and cases cited.

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*Chamberlain, Attorney General, for defendant in error.

1. The Circuit Judge did not err in refusing the first instruction asked for.

(a.) The correct rule of law, as shown by the authorities, may be stated thus: Any person who is authorized to use force may

use so much force as may be necessary to accomplish the legitimate purpose for which such authority is given; and, if he exceeds that limit, he is criminally liable for such excess.

(b.) This instruction was substantially and sufficiently given in the second instruction asked for and granted.

(c.) To constitute the offence of assault, or assault and battery, the force used must be unlawful.

"Any violence which, from the relations of the parties, or otherwise, one has the right to inflict, is not deemed an assault."—2 Bish. Crim. Law, § 58.

This proposition assumes that the person goes no further in the use of force than the law allows: "for when one who, for instance, has the right to inflict physical chastisement on another under him, proceeds with it to an illegal extent, he becomes guilty of an assault. And, generally, when force is authorized, it must not exceed what is necessary, else the excess will be criminal."—2 Bish. Crim. Law, § 58.

(d.) The force employed must be duly proportioned to the necessities of the case.—State v. Quin, 3 Brev., 515.

In the latter case, the motion for a new trial was refused, on the ground that, although the prosecutor gave the first blow, yet this did not justify an enormous battery; nor, indeed, any, beyond the bounds of self-defence. "On both points," say the Court, "there seems to be some doubt as to the facts; it was, therefore, a proper case for the jury: and, although the defendant has not been guilty of a very great offence, he is not entitled to a new trial."

See, also, Hannen v. Edes, 15 Mass., 346. This case went off on a question of pleading; but the doctrine now contended for is constantly assumed, admitted and asserted, that, when the force used is excessive, or out of due proportion to the offence committed or the duty to be performed, the party so exceeding is liable therefor.

To the same effect, vide 1 Russell on Crimes, 755, where the cases in which the use of force may be justified are limited to cases in which the force used is, in manner and extent, "proper in such circumstances."

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*If a parent, in chastising his child, exceed the bounds of moderation, and inflict cruel and merciless punishment, he is a trespasser, and liable to be punished by indictment.—Johnson v. The State, 2 Humph., 283; 1 Hawk. P. C., c. 60, § 23, and the numerous authorities there cited.

Where a woman asked a man, as he was riding along on horseback, why he had been talking about her, and threw a stone and then a stick at him, and he dismounted, and took up a stick and hit her on the head, he was held to be guilty of an assault and battery. "One," say the Court, "committing an

assault, is only justifiable when it is committed in self-defence."—*State v. Gibson*, 10 Iredell, 214.

(e.) As to all violence beyond what is necessary for self-defence, or for the enforcement of some lawful authority, the defendant is liable as the aggressor.—*Bac. Abr.*, Tit. Assault and Battery, C.; *Truscott v. Carpenter*, 1 *Ld. Raym.*, 229; *Williams v. Jones*, *Cas. Temp. Hardw.*, 298; 2 *Str.*, 1049 *S. C.*; *Elliott v. Brown*, 2 *Wend.*, 297.

In *State v. Wood*, 1 *Bay.*, 351, the rule of law is fully stated: "The general rule of law is, that whenever the assault or battery proceeds from the plaintiff's or prosecutor's own fault, as where he gives the first blow, &c., there it is sufficient justification to the defendant. But there must be, however, in all cases, some proportion between the battery given and the first assault; for Lord Holt lays it down as a rule, that the meaning of the plea son assault is, that the defendant struck in his own defence."—*Esp.*, 389.

So that the degree of resistance ought to be in proportion to the nature of the injury offered—that is, that it be sufficient to ward off such injury, and no more; for, the moment a man disarms or puts it out of the power of the aggressor to do him further injury, he ought to desist from using further violence; and if he does commit any further outrage, he, in his turn, then becomes the aggressor. In *Salk.*, 642, a question was, what assault was sufficient to maintain such a plea? Lord Holt said that Wyndham, L., would not allow such a plea if it was an unequal return. His Lordship then says, that, for every assault, he did not think it reasonable that a man should be banged with a cudgel: that a small blow will not justify an enormous beating, &c.; that the meaning of the plea was, that the defendant struck in his own defence.

And of the same opinion were all the Judges on this occasion, and verdict was against the defendant accordingly.

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*(f.) Where there has been a trespass without actual force, the owner of the close, &c., must first request trespassers to depart, before he can justify laying hands on them; and, if they refuse, he can only justify so much force as is necessary to remove them.—2 *Whart. Crim. Law*, § 1256; *Weaver v. Bush*, 8 *T. R.*, 299; 2 *Ro. Abr.*, 548, l. 35, 45; 2 *Salk.*, 641; *Com. v. Mitchell*, 2 *Par.*, 431; *Com. v. Ford*, 5 *Gray*, 475; *Colton v. State*, 4 *Texas*, 260.

When the defendant, as an officer of justice, is charged with assault and battery, it is a good defence to show that he was, at the time, engaged in the execution of his official duties, and that the offence was committed in their discharge.—2 *Whart. Crim. Law*, § 1260; 2 *Ro. Abr.*, 546, (a.)

No greater force, however, can be used than is necessary to effect the immediate object.—

2 *Whart. Crim. Law*, § 1260; *Harrison v. Hodgson*, 10 *B. & C.*, 445.

(g.) The force used must not exceed the necessity of the case.—*Scribner v. Beach*, 4 *Denio*, 450; *Elliott v. Brown*, 2 *Wen.*, 497; *Gates v. Lownsbury*, 2 *John. R.*, 427; *Gregory v. Hill*, 8 *T. R.*, 299; *Baldwin v. Hayden*, 6 *Conn.*, 453; 3 *Bl. Com.*, 3 to 5; *Curtis v. Carson*, 2 *New Hamp.*, 539.

Therefore, when the plaintiff took hold of a rake in the defendant's hands, in order to take it from him, upon which the defendant immediately knocked the plaintiff down with his fist: Held, That the defendant was not justified.—*Scribner v. Beach*, 4 *Denio*, 448.

Conclusion.—Enough has now been said to show conclusively that the rule of law prevailing, both in England, in the various States of the Union, and particularly in South Carolina, limits the force which may be justified to the actual necessities of the immediate case.

In case of self-defence, which is a primary law of human action, only so much force is justifiable in law as may be necessary to ward off actual, imminent or impending danger.

In the execution of official duties, in the maintenance of the public peace, and the enforcement of the laws, the officer will be protected in the use of so much force only as may be necessary for the prudent and effectual discharge of such official duties.

For all excess of force beyond the limits above prescribed, the individual, or the officer, becomes criminally responsible.

The question, whether such bounds are in reality overstepped, is a question of fact for the jury, upon the evidence.

In the present case the defendant had un-

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limited opportunity to *prove the necessity of breaking Suhrstedt's arm, in order to carry him to the guard house, but the jury found that no such necessity existed, and, under the charge of the Court, in accordance with the above cited authorities, returned a verdict of "guilty."

The refusal of the Court below to give the first instruction asked for by the plaintiff in error was not an error of law.

II. The Court below did not err in refusing the second instruction asked for.

(a.) Intent must be inferred from the facts proved. It is impossible to establish the state of a man's mind otherwise than by his actions.

In this, it is not denied that the intent is of the essence of the crime; but, simply, that the only way in which the intent can be shown or proved is, not by a resort to evidence aliunde, but by the acts themselves of the party charged.

The object of the instruction asked for was, to allow the defendant to prove, otherwise than by his acts, the want of a malicious intent.

The rule of law makes the intent deducible only from the facts. It was for the jury to find whether, upon the facts proved, the defendant exceeded the limit allowed by law for the use of force in such cases, and, having so found, the intent was a pure matter of inference therefrom.

(b.) What degree of mischief in the intent, or, in some respects, what form of evil intent must enter into the criminal assault, may not be capable of exact statement; but it seems not to be always necessary that there should be a specific determination to commit an assault, or a battery, or any other crime which, in law, includes an assault.

(c.) In *Keay's case*, 1 Swinton, 543, Lord Cockburn said: "It may appear, on proof, that the panel had no actual intention of injuring the boy. But there may be a constructive intention."

When the stabbing is proved, the law presumes the existence of malice, to rebut which the proof, either on the part of the State or the prisoner, must demonstrate the fact that the stabbing was done under such circumstances as would—had death ensued—have mitigated the offence from murder to manslaughter, or excusable homicide, or left it doubtful whether it was not so done.

2 Whart. Crim. Law, § 1280; Wright v. State, 9 Yerger, 342. It is the *quo animo* which constitutes the assault, and this is matter to be left to the jury.—Selw. N. P.,

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Tit. "Assault and Battery." No *man will be excused from a trespass, unless it be shown to have been caused by inevitable necessity, and entirely without his fault; and this, again, is to be determined by the jury.—Underwood v. Hewson, 1 Str., 595; 2 Blac. R., 896; *Dickenson v. Watson*, Sir P. Jones, 205; Selw. N. P., Tit. "Assault and Battery," 27.

The means of affecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to the jury to demonstrate the intent.—U. S. v. Herbert, 5 Cranch, c. c. 87.

"Knowledge and intent, when material, must be made out by the prosecutor. It is impossible, in most cases, to make them out by direct evidence, unless they have been confessed; but both may be gathered from the conduct of the party, as shown in proof; and, when the tendency of his acts is direct and manifest, he must always be presumed to have designed the result when he acted"—1 Whart. Crim. Law, § 631; *Rex v. Phillips*, 6 East, 464; *Rex v. Jones*, 2 B. & Ad., 611; *State v. Hart*, 4 Ired., 246.

The natural and probable consequences of every act deliberately done are presumed to have been intended by the author.—*Com. v. Drew*, 4 Mass., 391; *People v. Herrick*, 13 Wend., 87; *Com. v. Snelling*, 15 Pick., 337; 2 Russ. on Crimes, 231; 1 Green. on Ev., § 18.

(d.) In *Commonwealth v. Randall*, 4 Gray, 36, we find a case strikingly similar; indeed, almost identical with our present case. In that case, on the trial of an indictment of a schoolmaster for an assault on a pupil, the Judge below refused to instruct the jury that the defendant was criminally liable for punishing a pupil, only when he acted *malis animis*, from vindictive feeling, passion, or ill will, or inflicted more punishment than was necessary to secure obedience, and not for error of opinion or judgment, provided he was governed by an honest purpose to promote the discipline and highest welfare of the school, and the best interests of the child; and instructed them that, in inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offence, the age, size, and apparent powers of endurance of the pupil, and left it to the jury to decide whether the punishment was excessive: Held, That the defendant had no ground of exception.

Bigelow, C. J., delivering the opinion of the Supreme Court, says: "To say the least, the instructions given by the Court below were sufficiently favorable to the defendant. If,

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in inflicting punishment *on his pupil, he went beyond the limit of moderate castigation, and, either in the mode or degree of correction, was guilty of any unreasonable or disproportionate violence or force, he was clearly liable for such excess in a criminal prosecution. It is undoubtedly true that, in order to support an indictment for an assault and battery, it is necessary to show that it was committed *ex intentione*, and that, if the criminal intent is wanting, the offence is not made out. But this intent is always inferred from the unlawful act. The unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion, when the act was designedly committed. It then becomes an assault and battery, because purposely inflicted, without justification or excuse. Whether, under all the facts, the punishment of the pupil is excessive, must be left to the jury."

It is very seldom that cases repeat themselves so exactly as in the case just now cited and the one at bar. And, as we have before seen, *Commonwealth v. Randall* is but the correct conclusion, from all the authorities cited and examined.

(e.) The instructions given by the Court below, viz.: that "if the defendant, as an officer of the police force of the city of Charleston, used force upon the prosecutor, (*Suhrstedt*), to secure him as a prisoner, and used only proper and sufficient force for that purpose, then he is excused, and should be found not guilty," were a compendious statement of the law applicable to the case; and the in-

ference of a malicious intent drawn therefrom by the jury was legitimate and strictly according to law.

The Court below, therefore, did not err in refusing the second instruction asked for by the defendant.

The case is one of very considerable importance.

If the exceptions now taken be sustained by the Court, citizens have little, if any, protection against the violence of those in authority. If the simple fact that the plaintiff was a policeman, and was acting as such when the violence was committed, is sufficient to justify the violence, as is contended in the first instruction asked for, then any degree of violence may, under the same rule of law, be justified, without reference to the necessities of the case.

Or, if the party indicted is allowed to prove intent by any other evidence than the circumstances of the transaction itself, then, upon the same plea, the most outrageous assault for the most trivial causes may be freely perpetrated.

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*Fortunately, law is still the dictate of reason and the result of prudence; and no such results can be feared, if the law, as stated in the instructions given and refused by the Court below, and as now derived from a wide survey of the authorities, shall be reaffirmed and maintained in this Court.

March 23, 1870. The opinion of the Court was delivered by

MOSES, C. J. This case comes up on a writ of error to the Circuit Court of the County of Charleston.

By the record, it appears that the plaintiff had been convicted of assault and battery on one Suhrstedt, and sentence pronounced by the Court.

Before the jury retired, his counsel prayed the presiding Judge to instruct them as follows:

"1st. That if the defendant, (below,) as an officer of the police force of the city of Charleston, was engaged in the execution of his duty, and the assault charged was committed in their discharge, then he is excused, and should be found not guilty.

"2nd. That if the defendant, as an officer of the city of Charleston, used force upon the prosecutor, (Suhrstedt,) to secure him as a prisoner, and used only proper and sufficient force for that purpose, then he is excused, and should be found not guilty.

"3rd. That if the defendant, as an officer of police, acted in good faith, without malice, passion, or ill will, but simply with intent to do his duty, and secure the prisoner, (Suhrstedt,) and not to injure him, then he is excused, and should be found not guilty."

The Judge charged in conformity with the second proposition submitted, and refused as to the first and third. This refusal is assign-

ed as error, and we are to consider the points made by the exceptions.

The doctrine claimed in the first would give a latitude to public officers, in the execution of their duty, which would be dangerous to the public, and subversive of the proper relation which, as conservators of the peace, they should maintain to the community.

If the principle which it implies was recognized in our criminal code, no public officer could be made responsible for the use of force, no matter how unnecessary and unjust, if it were applied while he was engaged in the performance of some duty. Its comprehensive language would remove all restraints upon violence. The standard which the law establishes, to regulate, on the one

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*hand, the duties of public officers, and, on the other, to protect the rights of those against whom they assume to act, would be destroyed, and the will of the party charged with the power to arrest would be substituted as the rule.

If the proposition submitted by the exception should be admitted as the law, all enquiry into the acts of officers, complained of as breaches of the peace, would be precluded on the assumption that they were committed in the execution and discharge of duty.

The "necessity" which the argument for the motion speaks of is to be determined, not by the officer, but by the jury, for, otherwise, the result would be to leave, entirely and exclusively, to the former, the right to determine when it exists. It would be a concession too dangerous to the community to meet the favor of any judicial tribunal.

The Court charged as claimed by the plaintiff in error in his second proposition, and, in so doing, correctly laid down the law. It cannot fail to be observed that it is in conflict with the position which the defendant (below) assumed in his first exception, for while this admits that lawful force is only such as is proper and sufficient for the immediate exigency, that implies the resort to any force, and the propriety of the extent is to be determined alone by the officer.

It is not every resistance that will justify an enormous battery. The force applied must have a due regard to the purpose it is to accomplish. It is allowed, when it may be necessary to overcome, by its interposition, the violence which is opposed to prevent the due exercise of the authority with which the officer is charged. If it proceeds beyond the limit of the necessity which originally permitted its use, it is no justification.

Our own cases of the State v. Wood, 1 Bay., 351, and the State v. Lazarus, 1 Mill's Con. Rep., 34, are in consistency with the doctrine laid down in 2 Bishop on Criminal Law, § 58. The authorities are there cited, and the writer thus concludes: "Finally, the force must be unlawful: any violence, therefore, which, from the relations of the parties, or otherwise, one has the right to inflict on the other,

as in the making of arrests by those lawfully empowered, and in the detaining of persons arrested, is not deemed an assault. This proposition assumes that the person goes no further in the use of force than the law allows; for when one who, for instance, has the right to inflict personal chastisement on another under him, proceeds with it to an

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illegal extent, he becomes guilty of an *assault; and, generally, where the force is authorized, it must not exceed what is necessary, else the excess will be criminal."

The ground next assigned as error is not well founded. Although the intent is of the essence of the crime, yet that is to be inferred by the jury from the acts proved. How could it appear that the defendant (below) "acted in good faith, without malice, passion or ill will, but simply with intent to do his duty, and secure the prisoner, and not to injure him," except from a review of all the circumstances attending the transaction? If this led the jury to conclude that the violence used did not exceed that which was necessary to overcome the resistance opposed, and was, therefore, proper, because, without it, the arrest could not be made, then the act complained of could not be referred either to malice, passion or ill will, but would be justified, by reason of the necessity of force, to effect the purpose required by the law.

It would not avail here to prove that he did not intend to commit an assault; the apparent original intention was to arrest; but if, in making it, he used more force than was sufficient and proper, from this the jury may construe a wrongful intent, at variance with that which is claimed to have existed at the inception.

The subject of intent is well comprised by Bishop, in the second volume of his work on criminal law, at Section 76, in the following language: "The wrong intent is a necessary element in a crime. What degree of mischief in the intent, or in some respects, what form of evil intent must enter into the criminal assault, may not be capable of an exact statement; but it seems not to be always necessary there should be a specific determination to commit an assault or battery, or any other crime which, in law, includes an assault."

The motion is refused.

WILLARD, A. J., concurred.

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*WALTER A. MOOREHEAD and Another v.
A. ORR and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Guardian and Ward* 73.]

The administrator of a deceased guardian has no authority to make investments of the wards' funds: nor can he discharge the general

indebtedness of the guardian to his ward by setting apart certain effects of the guardian's estate for that purpose.

[Ed. Note.—Cited in *Koon v. Munro*, 11 S. C. 153.

For other cases, see *Guardian and Ward*, Cent. Dig. § 322; Dec. Dig. 73.]

[*Guardian and Ward* 126.]

Where a guardian dies indebted to his wards, and they seek to charge real estate, of which he died seized, specifically with their claim, on the ground that he used their funds, in paying for it, other creditors of the guardian are interested, and must be made parties, or called in by order.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 431; Dec. Dig. 126.]

Before Thomas, J., at Union, August Term, 1869.

The bill in this case was filed on 10th April, 1867, by the plaintiffs, against the administrators of William G. Moorehead, deceased, late guardian of the plaintiffs, and the sureties on his guardianship bond, for an account of the estate of the wards which came to the hands of the guardian, and to subject certain real estate, of which he died seized, specifically to the plaintiffs' claim, on the ground that the funds of the plaintiffs had been used by the guardian in paying for the same.

It appeared, from the pleadings and the evidence, that William G. Moorehead died intestate in 1863, and that the wife of the defendant, A. Orr, who was his widow, administered on his estate: that he became the guardian of the plaintiffs in the year 1858, and shortly afterwards received their estates: that he used their funds, and, at the time of his death, was indebted to them for the whole corpus of their estates; that he was the owner of certain notes which he kept for the purpose of meeting the claims of his wards; that, after his death, his administratrix set apart the same notes for the same purpose; that they were afterwards paid to her in Confederate money; and that, in March, 1864, she invested \$3,000, the proceeds of the notes, in 4 per cent. bonds of the Confederate States, for the use of the plaintiffs, who then were, and still are, minors.

Some evidence was given upon the point whether the intestate had used the funds of his wards in the purchase of a plantation, of which he died seized, which it is not deemed necessary to state.

The principal question made in the case was, whether the defendants were entitled to a credit, on the guardianship account, for the \$3,000 invested by the administratrix in Confederate 4 per cent. bonds.

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*The Commissioner of the late Court of Equity, to whom the accounts had been referred by that Court, submitted a report, dated 2d June, 1868, whereby he charged the defendants with the whole amount of the

funds which came to the hands of the intestate as guardian, less certain expenditures made by him, and reported that the amount due Walter A. Moorehead, one of the plaintiffs, on the 1st January, 1868, was \$2,159.89, and that the amount due Violet P. Moorehead, the other plaintiff, on the same day, was \$2,346.34.

The plaintiffs excepted to the report, because the Commissioner failed to declare the land purchased by the intestate specifically liable for the amounts due to them, the same having been paid for with their money.

The defendants also excepted to the report, because the defendants ought to be credited with the \$3,000 invested in Confederate bonds for the use of plaintiffs.

His Honor the presiding Judge overruled the exception of the plaintiffs, and sustained that of the defendants, and made an order "that the defendants have credit for the \$3,000, as claimed by them."

The plaintiffs appealed, and now moved this Court to reverse the decision of the Court below upon both points. The grounds of appeal it is not deemed necessary to state.

Shand, for appellants.

1. Guardian is a trustee.—Spear v. Spear, 9 Rich. Eq., 200.

2. Guardian has no powers which are transmissible to his legal representative.—Brightley's Digest, p. 419, No. 58; Floyd v. Priester, 8 Rich. Eq., 251.

3. The formalities required in the appointment show that guardianship is not the incident of an office.—12 Stat., 47.

II. But, suppose administrator of guardian had such power:

1. She could not (in this case) distinguish the ward's funds.

2. If the guardian used his ward's funds for his own advantage, or for his own purposes, or commingled them with his own, or lost them through neglect to invest, he can be discharged of liability only by payment.—Mumford v. Murray, 6 Johns. Ch., 6; Freeman v. Fairlee, 3 Merl., 41; Hill on Trusts, 376; 2 Story's Eq. Juris., § 1270; 2 Kent, 229, 30; McNeil v. Morrow, Rich. Eq. Cas., 172; Spear v. Spear, 9 Rich. Eq., 199;

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Hart v. Ten Eyck, 2 Johns. *Ch., 108; Utica Ins. Co. v. Lynch, 11 Paige, 520; Lewin on Trusts, 333, et seq.

3. And if decision in Sweet v. Sweet (Sp. Eq., 309) is correct, still nothing could discharge but payment.

III. If Judge is correct, still the Act of 1861 applied only to 8 per cent bonds.

Bobo, contra.

Munro, in reply.

It is the duty of a guardian, immediately upon his appointment, to invest funds for ward; and to use them for his own purposes is a breach of trust.—2 Story, § 1353; Spear

v. Spear, 9 Rich. Eq., 194; Adams' Eq., p. 33, n., § 143.

Having received the funds, the burden is upon the guardian to show a proper investment.—1 Story's Eq. Juris., § 468; Lupton v. White, 15 Ves., Jr., 432.

The Court of Equity, in 1864, would never have permitted an investment of trust funds in 4 per cent. bonds of Confederate States of America.

March 23, 1870. The opinion of the Court was delivered by

WILLARD, A. J. Complainants, infants, by their next friend, have filed their bill against the defendants, Orr and wife, as administrators of W. G. Moorehead, their deceased guardian, for an account of trust funds, and, also, to charge certain real estate, alleged to have been purchased by the guardian with trust moneys, should such charge be found advantageous to them.

W. G. Moorehead became their guardian June 15th, 1859. He received, from time to time, moneys belonging to his wards, and died intestate, in 1863, having made no investment thereof. He was, at the time of his decease, chargeable with having loaned the trust funds to himself, and liable to account for the funds, principal and interest, that had come into his hands as guardian. His administrators seek to discharge this liability by showing that, among the effects of the intestate that came to their hands, were certain notes which the intestate guardian had, during his lifetime, held apart, intending them as a fund to discharge his liability to his wards. That they had received payments in these notes in Confederate currency, and had subsequently invested such currency in

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*Confederate bonds, acting under what they regarded as judicious advice, and in order, as they allege, to save the fund from loss.

The duty of the administrators was to pay the debt due from the intestate's estate to the complainants. This they have not done, unless they can maintain the proposition that they had authority to set apart certain effects of the intestate estate to answer the complainant's demand, and to discharge the residue of that estate from liability on account of such demand; nor, unless they can show the further right to convert such appropriated effects into Confederate securities at the risk of the wards.

To make good either of the propositions last stated, they must have derived, as administrators of the guardian, authority to convert the trust fund by investment or otherwise. No such authority passed to them under the letters of administration. The authority of the guardian, in this respect, was a power based on personal trust and confidence, and cannot arise or result from a right to administer an intestate estate.

The administrators, having no authority

to change the demand as it existed at the decease of the intestate, must be held to account for the fund, as ascertained by the report of the Commissioner.

As it regards the question of the liability of the real estate, under the charge that it was purchased wholly, or in part, with the money of the wards, it does not appear that that question is involved in the case, as it stands before us. Unless there are creditors of the estate of W. G. Moorehead having unsatisfied demands against the effects, the demand of the complainants will be entitled to satisfaction out of the entire estate, real and personal. Should there be creditors of that estate—a fact that does not appear from the case before us—such creditors have an interest and a right to be heard on that question.

Should that question hereafter arise upon an amendment of the complainants' bill, or under an order bringing in the creditors, it will be competent for the Circuit Court to answer it.

It is ordered, adjudged and decreed, that so much of the decree of the Circuit Court as sustains the exceptions of the defendants, and so much thereof as orders that the defendants have credit for the sum of three thousand dollars, as claimed by them, be reversed and set aside.

And it is further adjudged and decreed, that there is due from the defendants, Archibald Orr and Alsamina F., his wife, to the complainant, Walter A. Moorehead, the

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sum of two thousand one hundred and fifty-nine dollars and eighty-nine cents, with interest on so much thereof as was the amount of principal ascertained by the Commissioner to be due on the first day of January, A. D. 1868.

It is further adjudged and decreed, that there is due from the defendants, Archibald Orr and Alsamina F., his wife, to the complainant, Violet P. Moorehead, the sum of two thousand three hundred and forty-six dollars and thirty-four cents, with interest as to so much thereof as was the amount of principal ascertained by the Commissioner to be due on the said first day of January, A. D. 1868.

It is further adjudged and decreed, that the defendants, J. G. McKissick and Jonathan B. Edwards, are liable to the complainants, respectively, upon their bonds, as set forth in the pleadings, to the amounts hereinbefore adjudged to the said complainants, respectively, as against the defendants, Archibald Orr and Alsamina F., his wife; and it is ordered, that the complainants have execution for the sums hereinbefore adjudged to be due against the said defendants, Archibald Orr and Alsamina F., his wife, and the defendants, J. G. McKissick and Jonathan B. Edwards.

And it is further ordered, adjudged and

decreed, that the creditors of the estate of William G. Moorehead be called in, under the direction of the Circuit Court, and that the defendants, Archibald Orr and Alsamina F., his wife, do account for the estate of the said William G. Moorehead, deceased, as to such assets thereof as have come into their hands, or with which they are chargeable, under the direction of the Circuit Court; and if it shall appear that there are no other outstanding demands against the estate of their intestate, that they pay over to the complainants the amounts respectively due them, as hereinbefore adjudged; and if the personal estate of the said William G. Moorehead shall be insufficient to discharge the demands established by this decree, that the real estate of which the said William G. Moorehead died seized be sold under the orders and direction of the Circuit Court, for the satisfaction thereof.

And it is further ordered, adjudged and decreed, that this cause be remanded to the Circuit Court for such orders as may be necessary for the purpose of carrying into effect this decree, and for the determination of all matters not settled by this decree, and also for the adjudication of any questions that may arise hereafter between the complainants and any creditor or creditors of the

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said estate, as to their respective priorities of demand as to the proceeds of the real estate of which the said William G. Moorehead died seized, by reason of the matters charged in the bill of complaint.

MOSES, C. J., concurred.

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JAMES W. WILLIAMS v. HENRY BEARD and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Mortgages* \S 173.]

One who purchases real estate, for valuable consideration without notice, from the mortgagor thereof, acquires a valid title, under the Act of 1843, against a prior mortgagee, whose mortgage is unrecorded at the time of the purchase, and who fails to record it within sixty days, the time allowed by the Act for that purpose; and it makes no difference that the mortgage is recorded after the purchase and before the conveyance from the mortgagor to the purchaser is recorded, or that the latter has not been recorded.

[Ed. Note.—Cited in *Zorn v. Railroad Co.*, 5 S. C. 100; *McNamee & Co. v. Huckabee*, 20 S. C. 196; *King v. Fraser*, 23 S. C. 564; *Carraway v. Carraway*, 27 S. C. 581, 5 S. E. 157.

For other cases, see *Mortgages*, Cent. Dig. \S 421; Dec. Dig. \S 173.]

[*Wills* \S 221.]

The Act of 1843 introduced a direct and important change in the law relative to the recording of mortgages, and is not to be construed as in pari materia with the previous Acts upon the subject of recording.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. \S 539-541; Dec. Dig. \S 221.]

[Wills \hookrightarrow 232.]

To a bill for foreclosure, a purchaser from the mortgagor, who is in possession under his conveyance, may avail himself of the defence of purchase for valuable consideration without notice, notwithstanding the proviso to the Act of 1791, which, in effect, vests the legal title in the mortgagee where the mortgagor is out of possession.

[Ed. Note.—Cited in *Norton v. Lewis*, 3 S. C. 33.

For other cases, see Wills, Cent. Dig. § 562; Dec. Dig. \hookrightarrow 232.]

[Mortgages \hookrightarrow 137.]

In equity a mortgage is treated as a mere security for the payment of the debt, and the equity of redemption as the real and beneficial estate, tantamount to the fee at law.

[Ed. Note.—Cited in *Edwards v. Sanders*, 6 S. C. 334.

For other cases, see Mortgages, Cent. Dig. §§ 1, 270-276; Dec. Dig. \hookrightarrow 137.]

[Mortgages \hookrightarrow 174.]

The purchaser from the mortgagor gave his own promissory note for part of the purchase money, and, after it became due, satisfied it, by transferring to the mortgagor the note of a third person, guaranteed by the purchaser: *Held*, That the circumstance that the note thus transferred was still unpaid, and that the purchaser was liable therefor as guarantor, did not invalidate the defence of purchase for valuable consideration without notice, which the purchaser, in all other respects, had successfully made.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 413; Dec. Dig. \hookrightarrow 174.]

[Appeal and Error \hookrightarrow 1009.]

A party seeking the reversal, on appeal, of a decree in equity upon a question of fact, must satisfy the Appellate Court that the overbearing weight of the evidence is against the decree.

[Ed. Note.—Cited in *Lucken v. Wichman*, 5 S. C. 414; *Thew v. Porcelain Mfg. Co.*, 1d., 422.

For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. \hookrightarrow 1009.]

[Mortgages \hookrightarrow 427.]

To a bill for foreclosure against the mortgagor and various persons to whom he had conveyed different parcels of the land, the alienees of one of those persons are necessary parties. So, also, the heirs of a decedent, to whom, in his lifetime, the mortgagor had bargained another parcel, and to whose widow he had conveyed it, were held to be necessary parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. \hookrightarrow 427.]

Before Carroll, Ch., at Abbeville, June, 1868.

This was a bill by James W. Williams, plaintiff, against Henry Beard, James M. Richardson, Patrick Heffernan, Joel Pinson, John W. Calhoun, Eliza A. Powers, Frances

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Sheppard and Elizabeth *Day, defendants, to foreclose a mortgage of real estate given by the defendant, Beard, to the plaintiff.

In January, 1859, the plaintiff sold to Beard, at public auction, a tract of land, lying in Abbeville District, containing two thousand and fifty acres, more or less, at the price of \$25,000, and, to secure the payment of the purchase money, took his bond, with

four sureties, conditioned for the payment of that sum, in four equal annual installments, with interest, and a mortgage of the tract of land. The bond and mortgage were dated January 26, 1859. On that day, Beard conveyed to the defendant, Pinson, at the price of ———, one hundred and twenty-four and three-fourths acres of the mortgaged land. On the 17th March, 1859, he conveyed to the defendant, Richardson, at the price of \$20,898.50, fourteen hundred and ninety-two and three-fourths acres of the same land. On the 8th April, 1859, he conveyed to the defendant, Calhoun, at the price of \$860, forty-three acres of the same land. On the 19th August, 1862, he sold and conveyed to Patrick Heffernan fifty-seven acres of the mortgaged land, and on the 26th January, 1864, he sold and conveyed forty-seven and three-fourths acres of the mortgaged land to Frances Sheppard.

The evidence also tended to show that other small parcels of the land had been sold off by Beard, leaving him the owner of about one hundred and two acres; that the defendant, Elizabeth Day, had purchased a parcel of it from Calhoun; that Beard contracted with J. W. Powers, deceased, to sell to him part of the land: that Powers took possession, under his agreement, and paid part of the purchase money; and that, after his death, Beard conveyed the part he had agreed to sell to Powers to his widow, the defendant, Eliza A. Powers; and that Patrick Heffernan had conveyed the parcel he had purchased to two of his children.

The plaintiff's mortgage was recorded in the Register of Mesne Conveyance office, for Abbeville District, on the 27th June, 1866, and Beard's deed of conveyance to Richardson was recorded in the same office, on the 20th November, 1866. The other deeds of conveyance had not been recorded.

The defence set up by the purchasers, respectively, was, that they were subsequent purchasers for valuable consideration without notice, and that, as the plaintiff's mortgage had not been recorded within sixty days, they were entitled to the protection given to such purchasers by the provision of the first Section of the Act of 1843, (11 Stat., 256.)

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*The facts relative to the questions, whether the purchase moneys had been paid, and whether the purchasers had notice, are stated in the Circuit decree, and in the judgment of this Court.

The Circuit decree is as follows:

Carroll, Ch. Upon general principles of pleading, the bill may be defended against the objection of multifariousness. It seeks to enforce a lien derived from a single instrument against lands, which at its date, constituted but one estate in severalty. It is a common charge upon their several parcels

of the mortgaged premises, which the bill sets up against the defendants, and they have all a common interest opposed to it.—Story's Eq. Pl. §§ 533, 284 and 285. But the frame of the bill is vindicated by authority directly applicable to the case in hand.—Story's Eq. Pl. § 197; *Miller v. Kershaw*, Bail. Eq., 481 [23 Am. Dec. 183].

Some of the questions discussed at the hearing are not regarded as necessary to be here considered. Neither the plaintiff's mortgage, nor the defendant's (Richardson's) conveyance from Beard, were recorded until after the lapse of more than seven years from their respective dates.

But the mortgage was recorded some months earlier than the deed to Richardson. The deeds from Beard to the other defendants have never been recorded. Each and all of the defendants (exclusive of Beard) contend that they are "subsequent purchasers for valuable consideration without notice," as contemplated by the Act of 1843, and are entitled to its protection. It is replied, on the part of the plaintiffs, that the Acts of 1698 and 1785 have been construed so as to stand together, and that a like interpretation, as far as practicable, should be placed upon the Act of 1843, so that a consistent system of registration may result; that the only repugnance between the Act of 1843 and the two preceding Acts relates to the time within which mortgages are to be recorded; that the provision, in the Act of 1698, that the mortgage or conveyance first recorded shall have priority, is not repealed by the Act of 1843, and that the effect, therefore, of the Act last mentioned is to render an unrecorded mortgage void only as against subsequent purchasers and mortgagees, whose deeds shall have been first recorded. Such does not seem to have been the construction placed upon the Act of 1843, in the recent case of *McKnight v. Gordon*, 13 Rich. Eq., 222 [94 Am. Dec. 164].

It is true that the subject of controversy

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in that case was personal property—a negro slave. But the provision, in the Act of 1698, giving precedence to the bill of sale, or mortgage of negroes first recorded, is, in substance, but a repetition of the provision which it makes as to conveyances and mortgages of land. So, also, in the case referred to, the judgment of the Court has reference only to the legal consequences, under the Act of 1843, which result from the failure to record, in due time, a mortgage of personal property. Yet such consequences are precisely the same as follow the omission to record, within the prescribed time, a mortgage of real estate, and are expressed by that Act in identically the same terms. In determining, therefore, who, under the Act of 1843, are to be deemed subsequent purchasers for valuable consideration without notice, as against a prior mortgage of slaves,

the Court has, also, adjudged who shall be considered such purchasers, as against a prior mortgage of lands.

The plaintiff, McKnight, in the case cited, had never recorded his mortgage. Eighteen months after its date, one of the slaves mortgaged was sold under execution against the mortgagor, and was purchased by the defendant, Gordon, to whom the Sheriff, on the same day, executed a bill of sale. For his defence, Gordon claimed to be a purchaser for a valuable consideration without notice, under the Act of 1843. "The positive rule of law established by this statute," says the Court, "precludes the mortgagee, who had omitted to put his mortgage on record within the time limited, from interposing the estate which he acquired by it, in bar or derogation of the estate or claim for which one, who is within the terms of its protection, has paid. As against such an one, he is, by his own omission to record, estopped from asserting his title." "The answer of the defendant," continues the Court, "denies notice of the mortgage, or of any claim whatever by the plaintiff, to the property therein mentioned, and affirms that he paid the purchase money in good faith, without notice of the plaintiff's claim. No witness contradicts this denial of notice;" and the judgment of the Court is thus announced: "It is considered, upon the case made by the pleadings, that defendant is a purchaser for valuable consideration, without notice of the prior unrecorded mortgage. He fulfills, therefore, in all particulars, the terms of the statute."

The bill of sale which Gordon received from the Sheriff seems never to have been recorded. Yet this circumstance is not even alluded to in the opinion of the Court. Nor is the faintest intimation to be there found that the recording of Gordon's bill of sale,

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*prior to the recording of the mortgage, was deemed an essential prerequisite to his being admitted to the protection which the statute of 1843 affords to subsequent purchasers for valuable consideration without notice.

On the contrary, in the absence of any registration whatever of his bill of sale for the slave, he was, nevertheless, held to have "fulfilled, in all particulars, the terms of the statute."

It is difficult to conceive what practical good could be accomplished by recording a conveyance, so far as prior incumbrances are concerned. The plain purpose of the Act of 1843 was to guard against loss and injury to subsequent creditors or purchasers, from their dealing with the mortgagor, under the delusion that he retained the absolute and unincumbered ownership of the property mortgaged.

Moreover, it is said that the object of recording is to give notice; but, if the party

has actual notice, the purpose is as effectually answered as it can be by notice implied by recording.—*Martin v. Sale*, Bail. Eq., 4. The several purchasers of the mortgaged lands seem to have passed immediately into possession of the parcels sold to them, respectively, by Beard. Where a party is in actual possession of land, the very fact of his possession is deemed sufficient notice to persons claiming as subsequent purchasers or creditors; and surely notice more positive or explicit cannot be required in favor of a prior incumbrancer.—*Massey v. McIlwain*, 2 Hill Eq., 421. But it is unnecessary to refer to the evidence of implied notice to the plaintiff. There is positive and direct proof of actual notice, for "Beard testifies that the plaintiff, Williams, knew of the sales of the land that witness made to the defendants, purchasers from him." It results that the defendants, claiming as subsequent purchasers, for valuable consideration without notice, under the Act of 1843, are not precluded from that defence because of their having omitted to record their respective conveyances prior to the recording of the plaintiff's mortgage.

The defendants, Pinson, Calhoun and Mrs. Sheppard, have paid the entire purchase money of the parcels of land sold to them, respectively, by Beard, and the fact of their doing so is not understood to be disputed. For the land purchased by Richardson he made payment, in part, to Beard, by placing at his disposal, at a stipulated price, certain other lands, which, by Beard's direction, were afterwards sold and conveyed to other purchasers—Beard receiving the proceeds. The residue of the purchase money

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was secured by Richardson executing and delivering to Beard his promissory notes for the same. These notes, amounting, in the aggregate of their principal sums, to some \$11,000, or more, were subsequently paid, partly in money, and, in part, by transferring to Beard notes against other persons. One of the notes so transferred is the "note of ——— Abney, for about \$1,400, the payment of which Richardson guaranteed;" and that note yet remains unpaid, in the possession of Beard. It is objected that, as, by such guaranty, a liability still rests upon Richardson for the amount secured by Abney's note, his debt to Beard for the purchase money of the land must be regarded, to that extent, at least, as still unpaid. Both Beard and Richardson concur in stating explicitly that the notes of Abney and others transferred, and the money paid to Beard, were accepted by him, in full satisfaction of Richardson's notes for the purchase money. Those notes were, therefore, surrendered to Richardson. The parties to that transaction did not design a security merely for Richardson's debt to Beard, but its satisfaction and discharge. Richardson's liability,

under his guaranty, is, in no just sense, a continuation of his original liability under his contract with Beard. That has been extinguished; another debtor has taken his place; and the secondary and contingent liability he had incurred is not for the payment of his original debt to Beard, but for the payment of another debt, arising under another and distinct contract, to which, originally, Beard was an entire stranger. Richardson's debt to Beard, for the purchase money of the land, is considered, therefore, to be fully satisfied and paid.

It is urged by the plaintiff that, upon the case as presented, the defendants, purchasers from Beard, should be held to have had notice of the mortgage before their respective contracts with him had been fully completed by execution of the conveyance and payment of the purchase money. There was no written or printed advertisement of the terms of the sale when Beard became the purchaser of the land. It was sold by the plaintiff at auction, to the highest bidder, and in the presence of some twenty-five or thirty persons. Immediately before the land was exposed to sale, it was announced by the auctioneer, as among the conditions of the sale, that the purchase money should be secured by bond, with adequate personal securities, and a mortgage of the premises. Both bond and mortgage were executed a few days afterwards, and, as it is to be inferred, at the house of the defendant, Beard.

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There was a *report or rumor in the neighborhood that such a mortgage was in existence.

Several witnesses testified that they had heard of it, and some of them frequently, while others deposed that it had never reached them until after the defendants, who had purchased from Beard, had received the deeds and had paid for their respective parcels of the land. The proof of notice, as against the defendants, J. M. Richardson and Mrs. Sheppard, had this extent, no more.

In respect of the defendant, Calhoun, the evidence is the same, with the addition that he was present at Williams' sale of the land to Beard. Calhoun's presence at the sale appears only from his admission of the fact in his answer, and it is there coupled with the averment that he heard nothing of a mortgage of the land upon that occasion. Against the defendant, Pinson, the evidence of notice is much stronger. He, likewise, was present at the sale, though he deposes that he did not arrive upon the ground until near the close of the biddings. When the bond and mortgage to Williams was executed by Beard, at the house of the latter, Pinson was again present, and again failed, as he deposes, to hear any mention of the mortgage whatever.

The friend to whom he applied to become his surety for the purchase money of the land

sold to him by Beard, having asked him if there was not a mortgage upon the premises. Pinson made the same inquiry of Beard, and received for answer that, if he would pay the purchase money, he would get a good title.

As against the defendants, J. M. Richardson and Mrs. Sheppard, the proof of notice is clearly insufficient. Mere reports in circulation, proceeding from strangers or persons not interested in the property, will not be deemed sufficient evidence. "Constructive notice," it is said, "cannot be implied from rumor, however general."—*Dopson v. Harley*, 6 Rich. Eq., (note,) 177; 2 Sug. on Vend., 1040. The additional evidence against the defendant, Calhoun, consists in the mere fact that he was present at the sale of the land to Beard; without more, though the auctioneer may have read aloud the terms of sale from a written paper in his hand, yet, to the bystander, this amounted to no more than a mere verbal announcement. It is by no means improbable that some of the persons present—especially some of those who did not mean to bid—failed to note and apprehend all the terms of sale thus declared. Their failure to do so might well have been occasioned by a momentary interruption, or diversion of their attention from the auc-

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tioneer *while announcing the conditions of the sale. A witness, intelligent, respectable, and entirely disinterested, deposes that, though present at the sale, he heard nothing of the mortgage until after the commencement of this suit. The evidence adduced is not regarded as sufficient to affect the defendant, Calhoun, with notice of the mortgage.

With regard to the defendant, Pinson, there are certainly strong grounds for suspecting that he was aware of the existence of the mortgage, before completing the purchase of the land by payment of the purchase money. But is such knowledge, on his part, established satisfactorily by the proof?

At the outset, it must be borne in mind that the burden of proof is upon the plaintiff. Beard testifies that, in none of his sales, did he mention the existence of the mortgage—that he thought his bond ample security for the purchase money, and wished to make as good sales as possible. This may serve to explain how it was that Pinson, though at the house of Beard when the mortgage was executed, was kept in ignorance of its existence. The several purchasers from Beard could not have relied upon the sufficiency of the sureties upon his bond to Williams as a protection against the mortgage, for, as between the sureties and the mortgage, the latter undoubtedly was the primary security for the debt. Yet those purchasers seem to have paid to Beard a fair and full price for the lands he sold to them. "It seems to me," says Chancellor Harper, "that the considera-

tion paid is a most material fact in determining the question of notice. If the compensation were very inadequate, I think it would raise a fair presumption of notice. If the consideration be a full one, it goes as far to repel it. Indeed, it is not credible that a man should pay a full consideration for a title which he knew to be doubtful or incumbered."—*Thayer v. Davidson*, Bail. Eq., 424. It is said that Beard's evasive reply, when asked if there was not a mortgage upon the land, was enough to put Pinson upon further inquiry, and was, therefore, equivalent to notice. In his testimony, Pinson states that, at that time, he had never heard of a mortgage upon the land; "did not know such a paper was out; never heard of it till after the summer in 1865; Boazman did not say there was a mortgage, but asked witness if there was one." Under such circumstances, Pinson might, perhaps, in good faith, have understood Beard as saying, in effect, that there was no mortgage, since a "good title" could not be made unless the land was conveyed free from all lien and incumbrance.

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Or Pinson, *perhaps, might have understood Beard's reply as merely repelling the inquiry, because it implied a want of proper confidence in himself. It may, at least, be doubted whether Pinson's omission to make further inquiry, under the circumstances, amounted to gross negligence on his part; and a less degree of incautiousness appears to be insufficient to affect a purchaser with notice. In *Jones v. Smith*, 1 Phill., 257, Lord Lyndhurst remarks: "I do not consider this a case of gross negligence, and I am of opinion that the party, having acted bona fide, and having only omitted that caution which a prudent, wary and cautious person might, and probably would, have adopted, is not to be fixed with notice of this instrument." Such seems to be the rule in ordinary cases, where notice is alleged to rebut an equity. But the Court distinguishes between notice for such purpose, and notice to supply the defect of registration. "It is not necessary," says Chancellor Harper, "to refer to the numerous authorities cited in argument, which fully establish what was contended for; that, to supply the want of registration, the notice must be full, explicit, and clearly proved."—*City Council v. Page*, Speers Eq., 212. The evidence of notice to Pinson does not seem to come up to this standard, and it is considered, with hesitancy, however, that he, also, must be regarded as being, within the contemplation of the Act of 1843, a purchaser, for a valuable consideration, without notice of the plaintiff's mortgage.

As the defence set up by the defendant, J. M. Richardson, is sustained, it operates, of course, for the protection of such of his co-defendants as were purchasers from him.

Since Beard's conveyances to the defendant, Patrick Heffernan, of certain parcels

of the mortgaged premises, the latter has executed deeds conveying the same to his children, Elizabeth Day and James L. Heffernan, respectively, neither of whom is a party in this cause. The portion of the mortgaged land now in the occupancy of the defendant, Eliza A. Powers, her husband, John A. Powers, purchased, in his lifetime, from Beard, and, having paid a portion of the purchase money, entered into possession, receiving, however, no deed of conveyance. After the death of J. A. Powers, Beard testifies that "he renewed the contract of sale with the defendant, Eliza A. Powers, his widow," and received from her a further portion of the purchase money. All persons having an interest in the equity of redemption should be made parties to a bill for foreclosure. "If the mortgagor has assigned the equity in the different estates mortgaged to several persons, they must all be brought

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*before the Court as parties, if foreclosure is sought of all the estates." "If the mortgagor has conveyed the mortgaged property in trust, the trustees, as well as the beneficiaries, are necessary parties to such a suit." —Story's Eq. Pl., § 197. One who has entered into a valid contract for the purchase of land is treated in this Court as the equitable owner of the land. He may devise it, as land, before the conveyance is made, and it passes, by descent, to his heirs as land.—1 Story's Eq., § 790; Landrum v. Hatcher, 11 Rich. 57, 58 [70 Am. Dec. 237].

Obviously, the contract of Mrs. Powers with Beard must be considered as being for the common benefit of herself and her children, as statutory heirs of her deceased husband, and her possession of the land must be deemed to be theirs also, as her co-tenants. As to the parcels of the mortgaged premises which Beard conveyed to Patrick Heffernan, and sold to John A. Powers in his lifetime, the suit cannot be entertained, for want of necessary parties; and the children of John A. Powers, and the alienees of Patrick Heffernan, are regarded as such parties. The balance of the mortgaged debt still due and unpaid remains yet to be ascertained, and a report from the Commissioner upon that subject will be necessary.

It is ordered and decreed, that, as to the defendants, James M. Richardson, Elizabeth Day, John W. Calloun, Frances Sheppard and Joel W. Pinson, the bill be dismissed; and that the costs of these defendants be paid by the plaintiff, and be repaid to him by the defendant, Henry Beard.

It is further ordered, that the plaintiff have leave to amend his bill by making additional parties thereto, as he may be advised.

And it is further ordered, that the Commissioner do inquire and report what sum remains due and unpaid upon the mortgage debt herein above referred to.

The complainant appealed, and now moved this Court to reverse the decree, in every particular in which its ruling is against the complainant, on the grounds:

1. Because the mortgagor, having sold the larger part of the land mortgaged, and parted with possession thereof, the Act of 1791, which changes the rule of the common law, vesting the fee in the mortgagee, does not apply; and as to all the lands in the possession of the defendants, other than Henry Beard, on forfeiture of the mortgage, by non-payment of the money secured by it, the legal title and the right of possession were united

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in the complainant, *against which title the pleas of the respective defendants, James M. Richardson, Elizabeth Day, John W. Calloun, Frances Sheppard, and Joel W. Pinson, of "subsequent purchasers for valuable consideration without notice," cannot prevail.

2. Because the plea of purchaser for valuable consideration without notice, was not sustained by proof of payment of the purchase money, and should have been overruled.

3. Because, the proof being clear and uncontradicted that James M. Richardson had transferred to Henry Beard, in part payment of the purchase money, a note on — Abney, for about \$1,400, which was guaranteed by Richardson, and that it is still in the hands of Beard and unpaid, His Honor erred in sustaining his plea.

4. Because His Honor erred in ruling that a subsequent conveyance of land, recorded out of time, was good and effectual against a previous mortgage of the same land, also recorded out of time, but recorded before the subsequent conveyance.

5. Because His Honor erred in ruling that a subsequent conveyance, not recorded, was good against a previous mortgage, recorded out of time.

6. Because the Acts of the General Assembly regulating the registry of papers, to wit: the Acts of 1698, 1785 and 1843, are parts, making, together, a system of registration, and should be construed together; the provisions of each, wherein they are not repealed, should stand, and have full force and effect; and that the provisions of the Act of 1698, "that that sale, conveyance, or mortgage of lands and tenements, except original grants, which shall be first recorded," shall be the first, is still of force, and His Honor erred in ruling the contrary.

7. Because His Honor erred in ruling, in opposition to the great weight of the testimony, that the defendants did not have actual notice of the complainant's mortgage before the payment of the purchase money. This ground of appeal applies to all of the terre tenants of Beard, and especially to Joel W. Pinson.

8. Because the defendant, Eliza A. Powers,

being included in the bill as defendant, merely as a terre tenant of Henry Beard, without seeking to charge the estate of her late husband, or for relief against the same, she, in her possession, should be regarded as the representative of her children who live with her; and His Honor the presiding Judge erred in ruling that her children are necessary parties to the proceeding.

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*9. Because the decree, in other respects, is contrary to law and the equity of the case.

Perrin, Cothran, Jones, for appellants.
Thomson, Fair, contra.

March 23, 1870. The opinion of the Court was delivered by

MOSES, C. J. The plaintiff, James W. Williams, on the 26th day of January, 1859, sold and conveyed a certain tract of land, situated in Abbeville County, consisting of 2,250 acres, more or less, to Henry Beard, one of the defendants, taking from him, for the purchase money, his bond, with sureties, payable in four equal annual installments, and a mortgage of the premises, which mortgage was not recorded until 27th June, 1866.

On March 7, 1859, the said Beard sold and conveyed to James M. Richardson 1,492 $\frac{3}{4}$ acres of the said land. He entered, and has since held possession by himself and son, (except as to some small parcels, which he sold,) paying part of the purchase money in other lands, (transferred, by directions of the said Beard, to third persons, he (Beard) realizing the consideration therefor in securities accepted by the said Beard,) and in his own note for the balance, which was settled in full before January, 1864. The deed was not recorded until the 20th day of November, 1866.

To John W. Calhoun, the said Beard, on the 6th day of April, 1859, sold and conveyed 43 acres of the said land, for \$860, which was paid in March, 1863. The deed was not recorded.

To Joel M. Pinson, the said Beard, in 1859, sold and conveyed 124 $\frac{3}{4}$ acres of the said tract, and received full payment. The deed conveying the same was not recorded.

Elizabeth Day and Frances Sheppard, (whose answers detail facts similar to those set forth by the said Richardson, Calhoun and Pinson,) with the last named defendants, claim that they are subsequent purchasers for valuable consideration without notice, and deny the right of the plaintiff to subject their land, by foreclosure of the mortgage or otherwise, to the payment of the bond of the said Beard, given for the real estate so to him sold and conveyed.

Assuming, for the present, that the defendants bought without notice of the mortgage to Williams, the question is presented, whether a mortgage not recorded within sixty days,

but recorded before subsequent conveyances

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from the mortgagor of the same *land were recorded, has priority over such conveyances, or can prevail against them, even if not recorded.

It would be a matter more of interest and curiosity than of practical utility, to consider, here, the numerous decisions under our registry laws. An examination of them might render it difficult to reconcile the apparent conflict which some of them present, with previous opinions on questions in which there appears to be no dissimilarity. The Courts of this State have certainly held, in regard to instruments executed before the Act of 1843, (which will be hereinafter referred to,) that the registry laws of force in the State are the result of the joint operation of the Act of 1698, (2 Stat., 137,) and the 45th Section of the County Court Act of 1785, (7 Stat., 232,) and have, accordingly, given effect to the conveyance first recorded, without regard to the time, as against creditors and subsequent purchasers for valuable consideration without notice.—*Steele v. Mansell*, 6 Rich., 437.

If we did not consider ourselves bound by the current of authorities which have established this rule—in itself one involving rather a matter of practice and direction than of principle—we might feel at liberty, having in view the Act of 1789, (5 Stat., 127,) which gives legislative construction to the Act of 1785, to hold that it was not to be construed in connection with that of 1698, as if the two were to be understood as one enactment, but that it was intended as a substitute for it, and, by necessary implication, repealed it. So far, therefore, as the cases have established a system where the rule applies, it is not our purpose to weaken or impair its effect.

The question, however, with which we have to deal is, in our judgment, affected by neither of the said Acts, unless we can be persuaded, by the argument, to hold that the Act of 1843, (11 Stat., 256,) was intended by the Legislature to compel no change, and must be construed with reference to the former Acts, only adding another to the structure, which was in no way to destroy the symmetry of the whole.

That Statute, by its first Section, enacts "that no mortgage, or other instrument of writing in the nature of a mortgage, of real estate shall be valid, so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice, unless the same shall be recorded in the office of the Register of Mesne Conveyance for the District wherein such real estate lies within sixty days from the execution thereof."

The second applies to like instruments of personal property, re*quiring, in one particu-

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lar, a registry, also, in the office of Secretary of State; and the third repeals "all Acts, and parts of Acts, in relation to mortgages, repugnant to this Act."

It is contended that, notwithstanding this peremptory language, by which validity is denied to any mortgage, unless recorded within the time prescribed, so far as concerns the rights of subsequent creditors or purchasers for valuable consideration without notice, effect is to be given to the mortgage of the plaintiff, because, under the Act of 1698, "the sale, conveyance, or mortgage first recorded, shall be taken, adjudged, allowed and held good, firm, substantial and lawful in all cases," &c.

Was the Act of 1843 only to operate on that of 1785, by restricting the time within which such instruments were to be recorded, and reducing the limit from six months to sixty days? This we must hold, to give countenance to the position assumed by the plaintiff. If such only had been the intent of the Legislature, its end could more readily have been reached by a plain and express enactment to that effect. The language of the Act is of a different character, and has a wider aim. It declares that no mortgage shall be valid, as against subsequent creditors or purchasers for valuable consideration without notice, unless recorded within sixty days, and repeals all Acts repugnant to it. Does the Act of 1698, on which the plaintiff relies for his support, in its main feature, exhibit no repugnance to that of 1843? The Act of 1698 makes "lawful" the mortgage first recorded; that of 1843 withholds from force or validity any mortgage not recorded within sixty days, as against the rights of creditors or subsequent purchasers for valuable consideration without notice. So far from sustaining the mortgage first recorded, it declares that no mortgage shall be valid, as to, &c., unless recorded within the time prescribed by it. If the said Act was not intended, in view of the previous decisions of the Court, to introduce a direct and important change in the registry system, it would be in vain for the Legislature to express its will beyond the reach of doubt or controversy.

In *Youngblood v. Keadle*, 1 Strob., 130, Wardlaw, J., says: "Our Act of 1843, concerning the recording of mortgages, has so altered the law that many cases are not likely to occur to which the decision now made will be exactly applicable."

In the very case of *Steel v. Mansell*, the same Justice says, at page 447: "Even the Act of 1843 leaves for future discussion difficult questions, concerning mortgages, which

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preceded the date *assigned for its going into operation, and those that may have been recorded after the prescribed time, but before opposing rights occurred."

It is, at least, not a forced conclusion to say, that this eminent jurist saw that a most effectual alteration had been made in the system, by the Act of 1843, but which could have no application to the subject he was considering, because the instrument then before the Court was executed previous to its passage.

The Act of 1843, as we have seen, uses, in reference to mortgages of personal property, the same language (with an immaterial exception) which it employs in relation to those of real estate. The case of *McKnight v. Gordon*, 13 Rich. Eq., 222 [94 Am. Dec. 164], is only distinguishable from the one before us, by the fact that there the mortgage under which the party claimed had never been recorded. The opinion of the Court very clearly intimates the application which it would make of the Act of 1843, if the instrument, though recorded, was not recorded within the limited time. In the course of the full opinion pronounced by the learned Justice Inglis, at page 232, he expresses his judgment on the very point we are considering, when he says: "But the positive rule of law, established by this statute, precludes the mortgagee, who has omitted to put his mortgage on record within the time limited, from interposing the estate which he acquired by it, in bar or derogation of the estate or claim for which one who is within the terms of its protection has paid."

Our judgment concurs with that of the Chancellor below, in refusing to give the effect claimed to the plaintiff's mortgage.

It is submitted, however, by the first ground of appeal, "that the mortgagor, having sold the larger part of the land mortgaged, and parted with the possession thereof, the Act of 1791, (5 Stat., 178,) which changes the rule of the common law, vesting the fee in the mortgagee, does not apply, and, as to all the lands in the possession of the defendants, other than Beard, on forfeiture of the mortgage, by non-payment of the money secured by it, the legal title, and the right of possession, were in the said plaintiff, Williams; against which title the pleas of the respective defendants, Richardson, Day, Calhoun, Sheppard and Pinson, of subsequent purchasers for valuable consideration without notice, cannot avail."

At common law the mortgagee was held seized of the legal estate. In equity, however, he is considered as having a transfer of the property itself, as a security for the debt, and,

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according to the *intention of the parties, a qualified estate and security.—*Story*, J., in *Conard v. Atlantic Insurance Company*, 1 Pet. 441 [7 L. Ed. 189].

In modern times, the doctrine of the Court of Equity, recognizing the mortgagor (until foreclosure) as the actual owner of the land, has, to a certain extent, in reference to the

possession by the mortgagor, been acted upon by the Courts of common law.—1 Coote, 325.

Chancellor Kent, in the 4th volume of his Commentaries, at page 159, says: "The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest; and that, until a decree for foreclosure, the mortgagor continues the real owner of the fee." See, also, 2 Story's Eq., §§ 1015, 1016.

It is contended, however, that, although the Act of 1791 changes the relation which, at common law, exists between the mortgagor and mortgagee, yet that, by reason of the proviso in the second Section, it has no application where "the mortgagor is out of possession;" and, in that contingency, the common law relation prevails.

The construction which our Courts have given to this proviso does change the position of the mortgagor and mortgagee, as to the legal estate, where the former is out of possession.

Where, by reason of the mortgagor being "out of possession," the legal estate is vested in the mortgagee, he can occupy no other or higher position than the mortgagee at common law. All the rights and equities which attach to the one the other is entitled to, and no more; unless some covenant in the instrument restrains him until condition broken, he may enforce his legal rights by a possessory action, or claim the reception of the rents and profits. When, however, he comes into a Court of Equity, for a foreclosure, he does not proceed under his legal title for a recovery of the land, but to enforce the security for his debt; and the relief which he thus seeks he can obtain only by an order for the sale of the property, that the equity of redemption may be barred, and all the rights which attach to both the parties will vest in the purchaser under such sale. "In such a Court the equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law."—4 Kent, 159. And it is this that equity acts upon in a bill for foreclosure.

In what character does this plaintiff come into Court, except as mortgagee, asking that Beard, and the other defendants claiming through him, may be barred of all equity

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of redemption by a sale, *and that the proceeds shall be applied to the debt, as a security for which the mortgage was taken and held?

The third ground charges error in the Court below, in holding that under the testimony, Richardson had paid Beard all the purchase money for the land he conveyed to him; and, especially, because it appears that one of the notes transferred to him by Beard was guaranteed by Richardson.

This circumstance, if the debt for the land was paid, (and the Chancellor so held), can

in no way revive the liability of Richardson for the consideration given for it. There is no obligation resting on him, under his contract, for the purchase—he has fully satisfied it. His guarantee of Abney's note is an independent undertaking; it did not enter into the original elements of the purchase; it was not one of the modes of payment promised. His debt for the land has been met; and, if the plaintiff, Williams, supposes he has the right to follow the note, so guaranteed, in the hands of Beard, and compel its appropriation to his debt, he must pursue his remedy, as he may be advised, under some other form. He makes no such claim under his bill.

The question of payment of valuable consideration, without notice, on a review of the testimony by the Chancellor, has been resolved against the plaintiff.

We have lately had occasion to review the course of the Courts of the last resort in this State in regard to the effect of the judgment of a Chancellor on mere questions of fact; and, following the rule which we find by the cases generally applied, we require the party seeking the reversal of the conviction to which he has thereon arrived, to show that the overbearing weight of the testimony leads to a conclusion different from that which, on consideration of it, he has adopted.

A full and close examination of the facts submitted in this cause has not impressed us with the presence of such preponderating proof, on the other side, as would justify us in interfering with the judgment of the Chancellor in this regard.

The plaintiff surely can complain of nothing but his own laches. For near seven years he neglected to record his mortgage, and this notwithstanding he was well informed as to the various sales made by his grantee—one on the very day, and the principal one within two months of the execution of his own deed. He had knowledge of the possession by the various purchasers from Beard, of the improvements they were mak-

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ing on the premises, and the moneys *arising from the re-sales were paid to him on the bond he held on the contract with Beard. Is it straining conjecture too far to say that, with all this information, he felt safe in his debt, trusting rather to the solvency of the sureties than to his mortgage? The general change in the condition of the people of the State, to which, probably, the sureties to the bond have not been exempt, has prompted him, too late, to place his mortgage in a position which might have made it available, if earlier sought. The consequences of his own default must not be allowed to fall on the heads of innocent purchasers.

We also concur with the Chancellor in the view which he takes as to the parcels of the

mortgaged premises conveyed by Beard to Patrick Heffernan, and sold to John A. Powers, in his lifetime.


The decree is affirmed, and the motion dismissed.

WILLARD, A. J., concurred.


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*SAMUEL MORGAN and Others v. W. J. KEENAN and Others.

(Columbia. Nov. and Dec. Term, 1869.)


[States  17.]


An Act passed by the State, on the 21st December, 1861, entitled "An Act to charter a Cotton Planters' Loan Association," provided, inter alia, that the cotton of the associations (banking corporations based on cotton as their capital) should not be sold until six months after the removal of the then existing blockade of the coast; that their bills should then be redeemed in gold, and should, in the meantime, be received in payment of taxes and other dues to the State; and, also, (conditionally,) of so much of the war tax of the Confederate States as the State had assumed; *Held*, That these provisions did not make the Act null and void, as a measure passed in aid of the war then waged by South Carolina, with other States, against the Government of the United States.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 17-21; Dec. Dig.  17.]


[States  17.]

Laws enacted for the advancement of the social, moral and industrial interests of the people, unconnected with the objects of the war, and not intended for its furtherance or support, were valid, though passed during the war by the Governments of the States composing the Southern Confederacy.

[Ed. Note.—For other cases, see States, Cent. Dig. § 18; Dec. Dig.  17.]


[States  17.]

To render the Act void it should appear that it did, in itself, provide some resource, the tendency of which was, directly or indirectly, to extend to the Confederacy a facility of means by which its ability to carry on the war was increased.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 17-21; Dec. Dig.  17.]

[States  17.]

The question is one not so much as to the construction of the Act in question as to the motive which induced its passage and the end intended to be accomplished; and as these are not apparent in its provisions, though testimony to prove them will not be received, yet history, showing the condition of the State, and the surrounding circumstances at the time, will be considered for that purpose. The inference, however, that such was the motive and the end designed to be accomplished, must be so strong that no other conclusion can be drawn.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 17-21; Dec. Dig.  17.]

Before Thomas, J., at Union, August Term, 1869.

Appeal from the Circuit decree, which is as follows:

Thomas, J. This is a bill filed by the bill-holders against the President and Directors

and Stockholders of the Cotton Planters' Loan Association, of the Fifth Congressional District of South Carolina, incorporated under the Act of the General Assembly of the State of South Carolina, at its annual session for December, 1861.—13 Stat., 45. The bills are in the nature of bank bills issued by this corporation, redeemable in gold six months after the raising of the blockade of our coast, and payable to bearer. They are predicated upon cotton subscribed by the stockholders, in accordance with the Act of incorporation.

The defendants have filed a demurrer to the bill, in which they allege that the bill should be dismissed, because the Act of 1861 "was in furtherance or support of the rebellion against the United States."

The law of the case has been established by the Supreme Court of the United States, in the late case reported in 7 Wallace, 700 [19

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L. Ed. 227], *(The State of Texas v. White and others,) where, on page 733, the rule is clearly laid down "that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of the citizens, and other acts of like nature, must, in general, be considered as invalid and void." The sole question in the case is, whether the Act of 1861 was in furtherance or support of rebellion against the United States.

Section 2 of the Act recites: "That any company, formed under the provisions of this Act, shall continue as a chartered company until the first day of January, one thousand eight hundred and sixty-five: Provided, That no company shall be formed after the removal of the blockade."

Section 4 recites: "And the President and Directors of each and every Association formed under this Act shall be authorized and empowered to sell the cotton subscribed to such Association, at any time six months after said blockade is removed."

The date of the Act shows that it was passed during the period of the war between the Confederate States, a portion of the United States, against the United States, and its reference to the blockade indicates its relation to it. The blockade was intended by the United States as an offensive measure against the Confederate States. The staple of the South was cotton, and to detain it within the limits of the Confederate States, so that it might not procure the sinews of war, of which the Confederate States stood in need, was an object of great importance to the United States. The operation of the blockade was as aggressive or offensive against the interests of the Confederate States as the onward march of the United States armies, or the destruction of the armies and cities of the Confederate States. To counteract the effects of the blockade was a defensive policy of the Confederate States, which they instituted in

divers ways. They established numerous lines of blockade runners, sought the intervention of foreign nations to raise the blockade, and took other steps to avert its operations.

The nature of the Act of 1861, and its wording, indicates that it was intended as a portion of this defensive policy. The cotton being rendered useless, because of its being shut up on the plantations, could be rendered effective, by means of such associations as these predicated bills upon it, and issuing them, so that they might represent so much cotton, to be delivered six months after the blockade was raised. These bills, in a foreign market, it was supposed, would be sought after on account of their superior se-

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curity; and, *after getting into the pockets of the foreign holders, would plead very earnestly for the speedy removal of the blockade. They were the invisible spirits which could pass safely beneath the guns of the Federal cruisers, and animate intervention.

The proviso of Section 2 of the Act indicates that, when the blockade is raised, the necessity of the Act of 1861 shall have passed away; and Section 4 appears to be a rainbow of hope to a world famished for cotton, shewing the time and place when their wants could be satisfied.

Regarding the Act in its internal relation in establishing a currency within the Confederate States, it must, also, be considered as a defensive policy against the war. It is true that the Supreme Court of the United States, in the aforementioned case of *Texas v. White*, does not attempt any exact definitions within which the acts of such a State Government (as that of South Carolina in 1861) must be treated as valid, or invalid. But, at the same time, it indicates that the Act of the State of Texas, in issuing the bonds in question, "was treasonable." Treason, therefore, may be taken as one of the complexities of a void Act. Foster, in his "Treatise," says: "Furnishing rebels, or enemies, money, arms, ammunition, or other necessities, will, *prima facie*, make a man a traitor." And on page 427, Vol. 3, of *The United States v. Aaron Burr*, the distinguished Chief Justice says: "If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States, and subverting their government, the point must be weighed very deliberately before a Judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases who never saw the army, but who, knowing its object, and leaguering himself with the rebels, supplied that army with provisions." If this be so, how much more treasonable is the act of making and securing the currency than that of merely disbursing it.

In the case of *Evans et al. v. City of Richmond*, Chief Justice Chase has taken clear

ground than the opinion of the Supreme Court: "This was an action to recover the amount of certain small notes issued by the city of Richmond, in April, 1861, in violation of the charter of the city, but which were afterwards legalized by the General Assembly of Virginia." The Court said: "These notes, when they were first issued, were void; whatever validity they can claim must be under the Act of the Legislature in 1861. The Supreme Court, in the case of *Texas v. White*,

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decided that *the Acts of the State Governments in the South, during the war, were only to be recognized when they were for the purpose of regulating private rights, such as marriage, descent, distribution of property, and such like cases. But whenever these Governments—which are undoubtedly to be considered Governments *de facto* as to the territory of the States, whose capital they occupied, and over whose territory they claimed and exercised dominion—have done acts tending to support the rebellion against the United States, then no such acts, nor any consequences from them, are to be recognized by this Court. The Act of 1861, by the Legislature of Virginia, appearing clearly to be an Act in aid of the rebellion, could confer no right which can be recognized by this Court. The notes in question being, therefore, originally void, cannot be recognized by this Court. Judgment for the defendant.

The effect of President Johnson's proclamation, of the 25th of December, 1868, proclaiming a universal pardon, has produced much controversy with reference to the question. If the Act of 1861 is void, the incorporated company may be resolved into a copartnership, the individuals of which, being cleansed of all guilt by the proclamation, their acts may become binding and obligatory. Without the aid of argument, however, I am unwilling to change the course matters have taken. It is true that Judge Trigg, from the United States Circuit Court, in the Eastern District of Tennessee, has held, in the case of *The United States v. 1500 bales of cotton*, which had been purchased and used in furtherance of the rebellion, that the impurity was washed away by the proclamation of December 25, 1868. But a distinction may be drawn between executed and executory contracts. The Pope may grant absolution as to past offences, but his power to grant indulgences, to complete an act illegally commenced, is very questionable.

In making this decree, so contrary to my own past feelings, I am assured, by the names of the defendants who have taken the ground above indicated, of a returning sense of allegiance to the Government, and an appreciation of our misfortunes. I hope it may prove a lesson to us that we may never forget.

It is, therefore, ordered and decreed, that the demurrer be sustained and the bill dismissed.

The plaintiffs appealed, and now moved this Court to reverse the decree, on the grounds:

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*1. Because the Act of Assembly, under which the defendants organized and issued the bills referred to in the pleadings, was not in aid of the rebellion, but simply an Act to enable the planters to raise supplies upon their cotton, which they could not send forward to market during the existence of the blockade.

2. Because, from the case made, the demurrer ought to have been overruled, and the defendants should have been required to make good their engagements, as they had ample means to do, still in the hands of the corporators.

3. Because the decree is not sustained by the law of the land, or by the principles of equity.

[For subsequent opinion, see 27 S. C. 248, 3 S. E. 297.]

Bobo, for appellant.

Wallace, contra.

March 23, 1870. The opinion of the Court was delivered by

MOSES, C. J. If the Act of December 21, 1861, referred to in the pleadings, was passed "for the purpose of giving aid and assistance and support to the war then waged by the State of South Carolina, in conjunction with other States, against the authority of the United States," as is submitted by the demurrer, it is incapable of conferring rights, because invalid and void.

At the time of its passage, the State was in armed hostility to the Union, with which it had severed its connection, so far as such a result could be effected by its own action, or that of the States with which it had confederated. War existed between the States so combined and the Federal authorities. The design, on the one hand, was the establishment of a new Government, to be formed from and by a portion of the old, and the purpose of the other was to prevent a dissolution of the Union, by the attempted withdrawal of either one or more of the States.

Legislation was exercised by such of the States so endeavoring to secede, except where the occupation of a superior and controlling Federal force offered opportunity to prevent it. The governments existing in the said States were so far "actual" and sufficient as to give validity to all laws they might prescribe for the regulation of their internal relations, provided these were not extended or used to aid, in any way, the war then waged against the United States. They were thus competent (in the language of Chief Justice Chase, in *The State of Texas v. White*, 7 Wallace, 733 [19 L. Ed. 227]) "to do all that was necessary to peace and good

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order among citizens," and to enforce obe-

dience to their mandates, where these were not inconsistent with the duty and allegiance of their inhabitants to the Federal Government. The enactment of all laws intended for the advancement of the social, moral or industrial relations of the people of the State, unconnected with the objects of the war, would be recognized as within the competency of their Legislatures. While the States so combined against the Government were exerting their energies to forward the common cause in which they were engaged, still each had a duty to perform to its own citizens, separate and distinct from the obligation which bound it to contribute, in every possible way, to the success of the war.

As these States were of the parties thus arrayed against the United States, it might be said that, in one sense, the acts of the various departments of each of them must be understood and received as having a direct view to the establishment of the new Government, of which each was to be a portion. That, having the opportunity to legislate, and the means of enforcing their action, all enactments which lightened the burthens of the people, by developing new resources, and all improvements, by which labor was reduced and its application made more remunerative, contributed to strengthen their condition, and, thereby, better afforded them the means of contributing effectual assistance to the war, by increasing their own powers of endurance.

This, in our view, is not the character of the legislation which is void, because in aid of the war. To render it objectionable for such reason, it should, in itself, provide some resource, the tendency of which would, directly or indirectly, extend to the Government in whose interest it was acting a facility of means by which its ability to carry on the war would be increased. The extent of the aid would not vary the application of the principle—it might be of greater or lesser value or degree, but still it must be something definite, which could be seen or understood, and not left to be elicited by wild conjecture, or implied from circumstances forced into connection.

In the case of *Texas v. White*, so much relied on in the argument here, the facts out of which the question there arose may be concisely stated in the following language, extracted from the opinion: "The insurgent Legislature of Texas organized a military board, and authorized that board to provide for the defence of the State, by means of any bonds in the Treasury, to the extent of a million of dollars. The defence contemplat-

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ed by the Act was to be made against the United States, by war. Under this authority, the bonds in question were used in payment of cotton cards and medicines." The very face of the Act thus carried on it the evidence of the purpose to which the bonds

were to be appropriated, and rendered unnecessary any enquiry whether the particular articles purchased were intended to contribute to the defence of the State. The bonds furnished the means of the purchase, and were thus appropriated, with the design of carrying out the end proposed by the Act conferring the authority so to use them.

In the absence of an explicit declaration in the Act, (under consideration here,) that its purpose was to aid the war against the United States, the intention of the Legislature must be ascertained by a resort to the general rules by which statutes are construed. There is no difficulty as to what the Legislature proposed to be done, or accomplished, by the language which it has used. No doubt arises, under any Section of the Act, as to its meaning. It is rather, if not entirely, a question as to the motive which prompted the Legislature to its passage, and the end which they designed to accomplish by the enactment itself. To ascertain these, regard may be had to the condition of the State at the time, and the circumstances by which it was surrounded. On these points history may speak, but no testimony can be admitted to prove what was in the mind of the Legislature. It must be derived from the Act, either by the intent being apparent on it, or it must arise from an implication so strong as to be irresistible.

The Act in question is entitled "An Act to charter a Cotton Planters' Loan Association," and was passed on 21st of December, 1861.—13 Stat., 45.

It did not announce, in mandatory terms, a new rule of conduct, to which the people were to yield obedience, or demand the performance of some duty or obligation on their part; but it afforded an opportunity to the citizens of each Congressional District to establish themselves into a chartered association, the principal privilege of which was to issue bills or notes on a capital of cotton subscribed, (and insured,) at a rate not to exceed the amount of six dollars for every hundred pounds of short, and fifteen dollars for every hundred pounds of long cotton ginned and baled, to discount bills of exchange, on their own issue, at a rate of interest not to exceed six per cent. per annum.

The charters were to continue till January, 1865. The bills were to be redeemed in gold six months after the removal of the block-

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*ade from the coast; and authority was given to sell the cotton subscribed at any time after the expiration of six months from such removal.

From this reference to the blockade, and the fact that the bills to be issued by the said companies were receivable in payment of taxes and other dues to the State, and, also, of the war tax of the Confederate States, of which the State had assumed the pay-

ment of the proportion to be met by its people—provided that, as to this last, it should be first made a condition that the same currency should be received in satisfaction of the amount which the State had ordered to be borrowed, to meet the tax so assumed—it is submitted that the apparent purpose of the Act was to raise money in aid of the war, and that it was intended as a measure to that end.

The inference does not seem to be the only one which may be legitimately drawn, and the Act must be sustained, unless the objection thus urged against it is so overruling as to resist every other conclusion. The cotton was not to be sold until six months after the removal of the blockade; and, as the issue of the corporations was not to be redeemed until the same time, the cotton was looked to as the medium through which the coin necessary for the redemption was to be raised. So far from the Act affording facilities for the exportation of the cotton, (which was, in fact, the capital created by the charter,) in spite of the blockade, it was to be retained until the opportunity of free access to foreign markets should be afforded. It would be an imputation of absurdity against the Legislature, to suppose that they believed or expected that the bills of these local institutions—at the time, probably, not known, even by name, beyond the State—would be recognized in the banking marts of Europe as a safe medium of exchange, through which materials necessary for the war could be furnished and imported.

It is said, too, that they were receivable for taxes, and other public dues to the State, and that this attached to them a value which encouraged and promoted their circulation. But in what respect did this aid the State in carrying on the war? Confederate notes were also receivable for taxes and public dues. They constituted the only currency in circulation; they emanated from the very government which had control of the conduct of the war. It was the paper which the Confederate Government had an interest in sustaining. If the introduction of the notes of these companies was calculated to depreciate the national currency, (so to call it,) such abstraction of value certainly weakened

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the very and only *currency on which the Confederate Government relied for its own support.

It is said, too, that, as these notes were receivable by the State in payment of the war tax levied on the people by the Congress of the Confederate States, and assumed by the State, so far as the same was to be collected from its citizens, there was an appropriation of them, by the State, to a measure clearly in aid of the war. The State, for the payment so to be made, was to be reimbursed by the collection of the said tax through its own officers, and for its use, and

it received, as a consideration of the assumption, ten per cent., of which its own treasury had the benefit—thus really diminishing the quota of taxes which otherwise would have passed from the State into the hands of the Confederate Government. To raise the required amount, the State was forced to borrow, and the receipt of the notes of these Associations in payment of the said war tax, so assumed, was on condition that they should be received in payment of the loan. This condition, thus demanded by the State, so far from shewing that the notes were regarded as of greater value than Confederate currency, would imply that they were not held in as high estimation, for the purpose of exchange or otherwise, or the preference would have been to retain them rather than to secure a mode for their disposal.

We may be permitted to look to the Act to extend and alter the charter of this very association, passed on the 23d December, 1864.—13 Stat., 256. It may, by reflection back, serve to show that the design of the Act so extended, while it may have been induced by a desire to make the cotton held by the people available, not only as a source of profit, but as the means of raising money for their present uses, without a sacrifice of the commodity itself, was not intended in aid of the war.

The charter was within a few days of its expiration. The blockade still existed. All the rights and powers conferred by the original charter were again vested in the company, except that its stock was not to be increased, and it was forbidden to issue or re-issue any notes, and the necessity of keeping the cotton insured was removed. With these changes, its charter was extended to January, 1869. It could scarcely have been anticipated, in December, 1864, that the war would continue until 1869. The superior force brought by the Federal arms to bear on the Confederacy—the suffering and privation to which the people at home had been subjected—must, at that date, have impressed every impartial mind with the con-

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viction *that the war could not be of much longer duration. With the termination of it, the one way or the other, the blockade would necessarily cease. With all this in view, the company, which, it is averred, was established to counteract, if possible, the effects of the blockade, had an extension to a period before which, in all probability, it would cease to exist. If the Act passed in 1861 was intended to aid the war, it might appear a little remarkable that, when the charter was before the Legislature, in 1864, for extension, the changed condition of the country, resulting from the war, did not require and demand any alterations in its terms, to make its employment more useful

and certain for the purpose for which it is said it was originally designed.

It cannot be successfully maintained that every Act of the Legislature during the war, the tendency of which was to offer to the people the probable opportunity of better investments for the proceeds of their labor, or the means by which it could be lessened and their gains therefor not decreased, or to improve their moral or pecuniary condition, must necessarily be construed to be in aid of their resistance of the Government of the United States. Carried to the extent claimed by the argument, the Legislature, in the actual exercise of its functions, would have been powerless to do anything which might contribute to the promotion of the interest of the people or the State.

No other question arising in the cause has been considered by this Court but that raised by the demurrer, which is the only one brought up by the appeal.

It is ordered and adjudged, that the order of the Judge below, sustaining the demurrer, be reversed, and that the case be remanded to the Circuit Court of Union County for hearing.

WILLARD, A. J., concurred.

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*DENNIS C. CROSBY, Administrator, v.
DENNIS CROSBY.

(Columbia. Nov. and Dec. Term, 1869.)

[*Limitation of Actions* ⚭60.]

G., an administrator, became the guardian of one of the four children and distributees of his intestate, and, shortly thereafter, he and his co-administrator made their final return to the Ordinary, stating a balance against themselves, divided into four equal shares, and payments to the other distributees, or their guardians, of their respective shares. In none of their returns did the administrators charge themselves with interest on annual balances; and, after the final return, G. charged himself, as guardian, with his ward's share, as stated in said return—he, the ward, being, at that time, thirteen years of age. The ward arrived at age, and then died; and, on bill by his administrator against G., for account: *Held*, That the final return to the Ordinary did not give currency to the statute of limitations in G.'s favor, so as to protect him, by the time which had since elapsed, from his liability to account for interest on the annual balances before the final return.

[Ed. Note.—Cited in *Renwick v. Smith*, 11 S. C. 305.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323-341; Dec. Dig. ⚭60.]

[*Executors and Administrators* ⚭473, 474.]

Held, further, That to this bill a representative of the co-administrator, he being dead, was not a necessary party.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2041-2060; Dec. Dig. ⚭473, 474.]

[*Guardian and Ward* ⚭125.]

Though an infant, having a guardian, may, in equity, be barred, as against strangers, by the

statute of limitations, yet, as against the guardian himself, he will not be barred, where the equitable claim sought to be enforced was due by the guardian and another, or by the guardian alone, at the time of his appointment. It was the duty of the guardian to take care that the claim was paid, and he cannot set up his own laches as an event giving currency to the statute in his own favor.

[Ed. Note.—Cited in *Williams v. Harrison*, 11 S. C. 414.]

For other cases, see *Guardian and Ward*, Cent. Dig. § 428; Dec. Dig. ☞125.]

[*Guardian and Ward* ☞30.]

G., at his brother's death, took home with him the latter's infant son, then six years of age. He afterwards administered on his brother's estate, which was quite small, and, after about seven years, he became the guardian of his nephew, but manifested no purpose to charge the infant for his board and clothing, until about two years after he became guardian: *Held*, That the reasonable inference was, that the board and clothing were given gratuitously by G., until he became guardian, and, consequently, that he could not charge his ward with such as he had provided before that time.

[Ed. Note.—Cited in *Exchange Banking & Trust Co. v. Finley*, 73 S. C. 429, 53 S. E. 649.]

For other cases, see *Guardian and Ward*, Cent. Dig. § 122; Dec. Dig. ☞30.]

[*Guardian and Ward* ☞31.]

Charges for board and clothing, in a guardian's account, not allowed, upon evidence that the ward had worked as a laborer for the guardian, and that the labor was equal to the value of the board and clothing.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 139; Dec. Dig. ☞31.]

Before Carroll, Ch., at York, June, 1867.

Appeal from the Circuit decree of the late Court of Equity.

The plaintiff is the administrator of Daniel W. Crosby, who died intestate in the latter part of the year 1863, and the defendant was the guardian of the intestate. The bill was for account.

Allen Crosby, father of the intestate, died in January, 1847, leaving a small estate, real and personal, and four children. The defendant and one J. S. Hemphill administered on the estate, and, in July, 1854, the defendant was appointed guardian of the plaintiff's intestate. On the 6th November, 1854, the administrators made a final return to the Ordinary, stating a balance against themselves of \$706.08, divided into four equal shares of \$178.52 each, followed

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*by a receipt from one of the distributees for the sum last mentioned as his share in full, and by receipts from the guardian of two others for the same amount, as in full of their respective shares. There was no receipt for the share of the plaintiff's intestate. Neither in the final, nor in any other return, did the administrators charge themselves with interest upon annual balances.

Plaintiff's intestate was about six years of age at his father's death. The defendant, who was his uncle, took him home with him, and he resided with the defendant un-

til May, 1861, when he entered the army of the Confederate States. He returned in December of the same year, remained at home until February, 1863, when he again entered the army. He died in the service in the fall of that year.

The other facts of the case appear in the report of the Commissioner on the accounts of the defendant. The report is as follows:

"Allen Crosby, the father of the ward, Daniel W. Crosby, died in January, 1847, and in that month the ward went to reside with his uncle, the defendant, Dennis Crosby, who, during the same year, was appointed one of the administrators of Allen Crosby, and, in July, 1854, was appointed the guardian of Daniel W. Crosby. The ward resided with the defendant from January, 1847, until May, 1861, when he entered the army. He returned home in the winter of 1861, and, during the year 1862, attended to, and labored on, the plantation of the defendant. Early in 1863, he returned to the army, and died in the service, some time in the fall of that year. When the defendant was appointed guardian of Daniel W. Crosby, he became chargeable, as guardian, with his ward's share of the personal estate of Allen Crosby, of which defendant was administrator. In the return made by the administrators of Allen Crosby, and filed in the Ordinary's office, November 6, 1854, no charge is made against them for interest on the annual balances; and the guardian, Dennis Crosby, instead of charging himself with \$178.52, as amount of ward's share of personal estate in his hands, should have charged himself with \$319.31. It also appears that the guardian received, on the 4th October, 1854, the sum of \$956.16, being his ward's distributive share of the proceeds of sale of the real estate of his father, Allen Crosby. I, therefore, report the amount of ward's estate, in 1854, in the hands of the guardian, to be \$1,275.47. Deducting credits for 1854, and prior years, leaves a balance in the hands of the guardian, on 1st January, 1855, of \$1,198.45, being the corpus

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of ward's estate. The defendant had no authority from this Court for breaking in upon the capital of his ward; and it does not appear to me that there was any necessity therefor. He had lived with the defendant from January, 1847, up to October, 1854, when the guardian first charges himself with a portion of ward's estate; and as the necessity, up to that time, (if it existed,) had passed, he could not make it retrospective by subsequent charges. But, apart from this, I am satisfied, from the testimony of the intelligent and highly respectable witnesses examined before me, that the services of the ward, as a laborer for the defendant, from the year 1854 (when he was thirteen years old) up to 1861, and his services on his plantation in 1862, would be suffi-

cient compensation for the board and clothing of the ward during the entire period that he resided with defendant. As appears from defendant's vouchers for sums paid for ward's tuition, he was at school only a small portion of the time.

"The entire sum paid for tuition, as shown by the returns, amounts to \$63.04; and, when the ward was not at school, he was laboring for the defendant. I have looked to the value of the services, and do not deem it material whether they were compulsory or rendered voluntarily.

"Defendant, however, states in his answer that he never required his ward to work; but he is contradicted by the evidence of his son, Dr. Crosby, a witness for the defence, who says he "was required to work as much as the other boys." I am satisfied, from the evidence, that, when the ward was not at school, he worked for defendant, with his negroes, as a common laborer, during every year from 1854 to 1861; and also worked and attended to plantation affairs for him in 1862. It is true the evidence of the witness, Murphy, who has long been an employé of the defendant, represents the services of the ward as voluntary, and worth but little; but the weight of the testimony, I think, clearly justifies a different view, and does not sustain him. In stating the accounts I have allowed the guardian credit for all sums expended for the benefit of the ward, including amounts paid for tuition; and, also, the sum of fifty dollars paid ward in 1862, omitted in defendant's return. It was paid in Confederate money, worth, at that time, in United States currency, \$21.90. As the disbursements no year exceeded the interest accruing annually upon the corpus, I have simply calculated the interest upon the corpus of the estate from January 1, 1855, up to the 17th day of June instant, and deducted therefrom the aggregate credits to which the

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defendant is entitled, *and carried the balance of interest to the corpus, and find the amount due to ward's estate, up to the 17th June instant, to be two thousand and three dollars and three cents. The guardian made but two returns, and it appears from them that his entire expenditures, for the ward, amount to about two hundred dollars, including Ordinary's and attorney's fees; and that he has absorbed the remainder of the ward's estate (except the small balance of \$82.37) in charges made for himself. He was the uncle of this orphan—a stranger could scarcely have been less liberal. The marked difference in defendant's treatment of his ward and his own son, of same age, is testified to by disinterested neighbors; and, taken in connection with his absorbing for himself so large a portion of his ward's estate, does not indicate a just and impartial administration of his trust. From the character and concurrent testimony of the

witnesses offered by the complainant, I think full justice is done the defendant in the statement I have made of the accounts. One of these witnesses estimates the services of the ward as worth his board and clothing and five or six dollars per month. The most of the witnesses estimate them as worth his board, clothing and tuition during the period he was under defendant's care; and, in addition, his services for 1862 are valued at \$150. The value of ward's services I have set off against all charges made for board and clothing. The latter was of cheap and coarse material, not exceeding in value, by defendant's own estimate, \$15 per annum. It does not appear that there was any necessity to justify the entrenchment made by the guardian upon the capital of his ward. The interest was more than sufficient to meet the annual expenditure allowed, and leave a balance to be added, as above stated, to the corpus of the estate."

The case came up on the report and exceptions made by the defendant.

The decree of His Honor is as follows:

Carroll, Ch. The first of the exceptions taken to the report depends upon a matter of fact, which was not conceded by the plaintiff, and to establish which no evidence whatever was adduced by the defendant.

The Court has no other alternative than to hold the exception unsustainable.

Allen Crosby having died intestate, in January, 1847, the administration of his estate was granted to the defendant and James S.

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*Hemphill. They made various returns to the Ordinary, of their transactions as such administrators. In each of them the aggregate of payments is deducted from the aggregate of receipts, and the balance thus struck is transferred to the next succeeding return, and set down among the receipts there enumerated. So they proceeded until November 6, 1854, when they rendered to the Ordinary their last return. The net balance against them, thus ascertained, is there divided by four, the number of their intestate's distributees, (his children,) and the share of each is set down at \$178.52. From this sum is deducted a partial payment, made to one of the children, William N. Crosby, and his receipt for the remainder, in "full to his share," is appended. Immediately following are receipts from the guardians of two others of the intestate's children, each acknowledging the payment of \$178.52, "in full of the shares" of their respective wards—one of the receipts seeming to be an original, and the other a copy, and the latter bearing the date of October 4, 1854.

No mention is there made of the share of Daniel W. Crosby. But the defendant had become his guardian on 4th July, 1854, and, in his first return as such guardian, made October 18, 1856, he charges himself with \$178.52, as his ward's share of the personal

estate, and as having been received on 6th November, 1854. In ascertaining that sum, the administrators, as has been stated, excused themselves wholly from payment of interest upon the annual balances in their hands. With such interest computed, the share of Daniel W. Crosby, in his father's personal estate, would have amounted, at that date, to \$319.31, and with this sum the report, accordingly, charges the defendant.

In his answer, the defendant refers to the amount of the personal assets remaining in the hands of the administrators, according to the statement of their last return, as having been "ascertained by the decree of the Ordinary." It does not appear that the administrators had been cited to account before the Ordinary, at the instance of the distributees, or any of them.

If the act of the Ordinary, in simply receiving and filing the last return of the administrators, ascertained and established the balance there stated to be the real amount due by them, then a like decree had been pronounced by him, upon the receipt and filing of each and every one of their antecedent returns, in respect of the several balances therein respectively set down.

If the defendant and J. S. Hemphill, as

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guardians, respectively, *of two of the infant distributees, could be regarded as having cited themselves, in character of administrators, to an account before the Ordinary, and if, upon such accounting, the Ordinary had actually decreed the balance struck by them, on 6th November, 1854, to be the entire residue of the personal assets remaining in their hands, yet such decree would in no wise have concluded their wards.—*Miller v. Alexander*, 1 Hill Eq., 27; *Sollee v. Croft*, 7 Rich. Eq., 34. This ground of defence, though assumed in the answer, was but faintly urged in the argument.

The defendant, however, excepts to the report upon the ground that, on the 6th November, 1854, he was not chargeable with more than \$178.52 on account of his ward's share of Allen Crosby's personal estate. He contends that, on that day, the administrators rendered a full and final return, ascertaining the net amount of the personal assets in their hands, and, on the same day, made actual distribution of the same among the next of kin of their intestate, or their representatives; that, by such acts, the administrators manifested, unequivocally, their intention to discharge themselves of that trust; that thenceforth all demands against them, as such administrators, became subject to the operation of the statute of limitations; and that the plaintiff's claim against the defendant, in that character, therefore, is effectually barred.

If the defendant had not been one of the administrators of Allen Crosby, and if, in his character of guardian, through oversight,

or mistake, he had received from them, in full payment of his ward's share in the personalty, a less sum than was justly due, it might be that, after the lapse of four years, the ward would be held barred from suit against the administrators, notwithstanding his minority. In such case his guardian might be regarded as fairly and substantially representing him. But where, as here, the same person is both guardian and administrator, the relations of the parties become essentially changed. Under such circumstances, the administrator is representing himself, and the infant, practically, is not represented at all.—*Long v. Cason*, 4 Rich. Eq., 60; *Sollee v. Croft*, 7 Rich. Eq., 36.

It may, perhaps, be inferred that, in November, 1854, the entire personal assets of Allen Crosby were in the exclusive possession of the defendant, as the three receipts subjoined to the last return of the administrators purport, all of them, to be acknowledgments of payments made by Dennis Crosby alone. His co-administrator, Hemphill, died in January or February, 1857. Upon

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that event, *the defendant became sole administrator, and the assets of his intestate unadministered, from and after that date, must be regarded as being in his hands only. Whatever was due by him, as administrator, to himself, as guardian, he must account for in the latter character. It is not deemed requisite, therefore, that the personal representative of his deceased co-administrator should be made a party to this suit.

Though the defendant, in fact, had never received more than \$178.52 for his ward's share of Allen Crosby's personal estate, yet, it is apprehended, he must be charged with the sum which he ought to have received upon that account. It was his duty to collect and take into his custody and care the estate of his ward. If he forbore to exact interest from his co-administrator, after his having had his intestate's estate in possession for nearly eight years, it argues such gross laches as justly imposes a personal liability upon him. The defendant's second exception cannot be sustained. The remaining exceptions to the report all relate to the credits which the defendant claims for the board and clothing of his ward. There is, undoubtedly, much conflict in the testimony. The Commissioner has had opportunities denied to the Court for estimating its force and weight. It is not perceived that the preponderance of proof is in favor of the defendant, or that the Commissioner has erred in his judgment in rejecting the credits in question.

It is ordered and adjudged, that the several exceptions taken to the report be overruled, and that the report be confirmed, and be made the judgment and decree of the Court.

The defendant appealed, and now moved

this Court to reverse or modify the decree, on the grounds:

First. Because the Chancellor erred in sustaining the Commissioner's report charging the defendant, on the 6th of November, 1854, the day of the administrators' final return to the Ordinary, with any sum beyond \$178.52, on account of his ward's share of the personal estate of Allen Crosby, inasmuch as, on that day, the administrators made a full and final return, and an actual distribution of the assets of their intestate; that, by said acts, the administrators manifested an intention to discharge themselves of their trust as administrators; and the complainant's claim, to open said account, is barred by the statute of limitations; that it was in evidence that the administrators advanced about \$1,900, to save the property of the intestate being sacrificed at Sheriff's sale, and it would have

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*been unjust for the Ordinary to have charged the administrators with any interest on the assets in their hands.

Second. Because, if the administrators' final accounting, before the Ordinary, can be properly opened, the personal representative of the defendant's co-administrator, J. S. Hemphill, is an indispensable party in this cause.

Third. Because the Chancellor erred in not allowing the defendant credit for boarding and clothing his ward, from the death of his father, in January, 1847, until the 6th of November, 1854, when it was proved that the ward was only about six years old and in very feeble health; and there is no pretext that he did or could have labored for defendant to support himself. It further appeared there was no assets in the administrators' hands, to pay said board and clothing, until the proceeds of the sale of the real estate came into the defendant's hands as guardian.

Fourth. Because the defendant is not allowed any credits for board and clothing for his ward during the years 1855, 1856, 1857 and 1858, when it was proved ward was at school the greater part of the time during those years, and could not have rendered services for the defendant equal to the value of his board and clothing; and such witnesses as resided nearest to the defendant and his ward, and had the best opportunity of knowing, positively deny that ward's labor was of any value to the defendant.

Fifth. Because the defendant, having boarded and furnished his ward with coarse clothing, from the age of six years until he left for the army, on or about his arriving at the age of twenty-one years, it is unconscionable and unjust to allow the guardian no credits whatever therefor, for the benefit of the administrators of the ward.

Smith, for appellant.

Wilson & Witherspoon, contra.

March 23, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The complainant, as administrator of Daniel W. Crosby, has brought his bill for an account against Dennis Crosby, the guardian of his intestate. An account was taken before the Commissioner, and a report made, to which exceptions were taken and reported upon by the Commissioner. The exceptions were heard before Chancellor Carroll, and the report of the Commissioner sustained, and defendant's exceptions overruled.

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To this *decree exceptions have been taken, which will be noticed, in their order, in the grounds of appeal.

The first and second grounds of appeal are based upon the allowance to the complainant of interest on the distributive share of his intestate while in the hands of the defendant, as administrator of the estate of Allen Crosby, the father of the ward. The report of the Commissioner allows complainant interest on annual balances in the hands of defendant, as administrator, not credited in the final accounting of the administrators. The objections urged to the decree, in this respect, are as follows: First, that the accounting of the administrators was full and final, and manifested an intention to discharge themselves of the trust as administrators, and that, no action having been commenced within four years thereafter, the statute of limitations is a bar to the complainant's demand upon that accounting; and, second, that certain advances were made by the administrators, by means of which the property of the intestate, whose estate they administered, was saved for the benefit of the complainant's intestate, as well as for other parties interested in that estate, and that the same should be allowed, by way of an equitable claim, as against complainant's demand for interest on the administrator's balances; and, third, that, if the accounting is to be opened, the co-administrator of the defendant should be represented as a party to the proceeding.

It was held, in *Long v. Cason*, 4 Rich. Eq., 60, that, after a final accounting, and the appointment of a new guardian, as between the old and the new guardian, the statute was a bar, unless proceedings adverse to the accounting were commenced in four years. It was said in that case: "We hold that, as to a chose of the infant, not assignable at law, and peculiarly within the power and duty of the guardian, the laches of the guardian, in the absence of collusion, by operation of the statute of limitations, bars the infant as to strangers, and leaves him to a remedy against the guardian."

The doctrine of that case, applied to the facts of the present case, leads to the conclusion that, if the statute bars the remedy against the defendant, in the character of administrator, it is because of his laches, in

the character of guardian, for which he is accountable to the complainant. The defendant was appointed guardian in 1854, the same year with that of the accounting of the administrators. If the accounting was unjust it was incumbent upon the defendant to rectify it, if the fault was on his part, or to take measures for its rectification, if the fault was on the part of his co-administrator; for, during all that period of time, he was the sole legal representative of his ward's interest in his father's estate. He is, therefore, chargeable with laches, in the character of guardian, and, as that trust still continues, there being an admitted balance of the ward's estate in the defendant's hands as guardian, the statute cannot be interposed as a bar.—*Riddle v. Riddle*, 5 Rich. Eq., 31.

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As to the equitable discount alleged to arise out of certain advances made by the administrators, for the purpose of saving property of their intestate, the naked fact appears in the answer, without any circumstances, there or elsewhere detailed in the case, to show any pecuniary loss to the defendant by reason of any such advance, nor any basis by which the amount of such loss could be ascertained, if any such existed. It is obvious that this claim is advanced as a make-weight, without the means or intention of making it good as an actual demand against the estate. Had it been made duly to appear that the administrators were actually in advance to the estate, a question might have arisen of the allowance of interest on such advances; but the returns of the administrators are inconsistent with such a supposition. The annual balances, on which the Commissioner computed the interest, are those appearing in the administrators' returns, and the defendant has failed to make a case for going behind his returns, and for throwing the burden of restating the accounts of the administration upon the representative of his deceased ward.

As it regards the non-joinder of the representatives of the co-administrator, Hemphill, it is only necessary to say that, as the laches of the defendant, as guardian, is the substantial basis of this bill, the co-administrator is an unnecessary party to it. The first and second grounds of appeal must be disallowed.

The remaining grounds of appeal embrace claims, on the part of the defendant, for board and clothing for his ward, covering two distinct periods of time, namely: from 1847, the death of A. Crosby, until 1854, the time when defendant became guardian, and from 1854 to the death of the ward, or a short time previous thereto, in 1863. In regard to the first period of time, he stands in the character of a guardian who has paid to himself a debt claimed to be due to himself as against his ward at the date of assuming the guardianship; while, as to the latter period of time, he stands as a guardian making claim

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for advances and expenditures towards *the maintenance of his ward. The additional fact appears, that almost the entire corpus of the estate, in addition to income, has thus become expended.

Much evidence was offered, by both parties, bearing upon this part of the case, from which the Commissioner concluded that the services of the ward, as a laborer for the defendant, from the year 1854, when he was thirteen years old, up to 1861, and his services on his plantation in 1862, would be sufficient compensation for the board and clothing of the ward during the entire period that he resided with defendant. The Chancellor acceded to the justness of the Commissioner's conclusions, based upon the evidence; and now, after the questions of fact have received the careful consideration of two experienced minds, favorably situated for weighing the evidence, we are called upon to determine that their conclusions are overborne by a clear weight of undisputed testimony.

So far as it regards the claim for the maintenance of the ward prior to the defendant becoming guardian, the difficulty in the defendant's case is not confined to the question of fact thus determined against him, but is affected by an inference that his act, in furnishing the infant a home and the means of living, was gratuitous.

The law on this subject is well stated by Chancellor Wardlaw, in *Riddle v. Riddle*, (supra.) He says: "Where a father, or near relative of the infant, is trustee, he should show, distinctly, his purpose to charge for maintenance," or it may be inferred to have been gratuitous. This proposition is entitled to the greatest weight in a case like the present, where the claim is made by the father's brother, for the maintenance of a very young child, for seven years previous to any steps being taken to procure guardianship for the infant, and when the uncle subsequently becomes the guardian himself. Has the defendant, then, shown "distinctly his purpose to charge for maintenance," so far as the period previous to the guardianship is concerned?

According to the claim now made by the guardian, at the time of his appointment as guardian, July 4th, 1854, the estate of the infant in his hands, as administrator, amounting to \$178, was insufficient to pay the amount of such claim; and, even after the correction of that amount, by the addition of interest on annual balances, the aggregate is less than the amount of the defendant's demand at that date.

Is it to be assumed that, in seeking to be-

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come the guardian of *the infant, he stood as a creditor of the infant for an amount greater than the infant's whole estate in hand at that time? It does not appear that at this time, or until two years afterwards, he manifested an intention to charge the in-

fant with his maintenance for the period prior to the guardianship. The first notice of this demand is contained in the return, as guardian, made in 1856. This return credits the ward with a cash balance of \$994.90. The following memorandum, introduced at the foot of the sheet containing the return, and after the jurat and signature of the Ordinary, is the only note of it, viz.: "Boarding ward from 1847 until January, 1856, to be included in credits, and, also, for clothing." The first evidence of the amount of this indefinite claim being stated, is found in the last return, as guardian, made in 1866, where it is charged at \$75 a year from 1847 to 1855, making \$600; and interest is charged thereon at \$147. Thus, nineteen years elapsed from the commencement of the account against his ward, before it is made the subject of a definite charge.

Equity must assume that the motive of the defendant, in seeking the guardianship of the infant's estate, was to secure to the infant the benefit of that estate, and it is not to be inferred that the real motive was to obtain satisfaction of a demand against the infant's estate that would absorb the whole estate in hand at the time of the application for guardianship. The idea of a gratuitous maintenance is the only one consistent with the assumption that the guardian entered upon his trust under the influence of motives appropriate to that relation.

In *Riddle v. Riddle*, a delay of seven years, under a state of facts remarkably similar to those presented by the present case, was held to afford evidence that the maintenance was intended to be gratuitous. But the delay in the present case, previous to the claim being made definite, was nineteen years.

It is clear that the maintenance of the child, previous to the guardianship, must be considered gratuitous.

In *McDowell v. Caldwell*, (2 McC. Eq. 43 [16 Am. Dec. 635]), it is held that when the maintenance of the wards by the guardian, in his own family, originated in an express offer to maintain them free of charge, the guardian could not afterwards interpose a claim for maintenance; that the guardian might have put an end to the arrangement; but, until he did so, it subsisted as a gratuitous undertaking. It is a matter of no importance, whether the intention to give a gratuitous maintenance is established by

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proof of an express promise or by *inference. It is enough that it is found to exist, and the remark, in *McDowell v. Caldwell*, becomes applicable.

It may, therefore, well be urged that, at the least, the maintenance of the ward ought to be considered as gratuitous down to the date of the return to the Ordinary, which affords the first evidence of an intent to charge the ward's estate for his maintenance; but it is not necessary to rest the case on

this proposition. So far as the conclusions of the Commissioner bear upon the period from the granting of guardianship down to the death of the ward, it is clear, that the evidence affords no ground for disturbing such conclusion.

It was held by Chancellor Wardlaw, in *Riddle v. Riddle*, on the authority of *Booth v. Sineath*, (2 Strob. Eq., 31.) that if the trustee exact from the infants all such labor and service as they are capable of rendering, the inference is especially strong that he expects no compensation for board beyond their services. It matters, therefore, little whether the defendant is to be regarded as having assumed the support of his ward for such services as he might be able to render, or as having been paid for such support out of such services. In either case the result is the same—that he should be charged with the estate of his ward coming into his hands, without deduction for board or clothing.

The Circuit decree must be affirmed, and the appeal dismissed.

MOSES, C. J., concurred.

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*MARY DUNN and Others v. W. C. DUNN, Trustee, and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Trusts* ⇐222.]

The trustee of A., a married woman, having money which he held for her sole and separate use for life, "without being liable for the debts, contracts or liabilities of her husband," with remainder to her issue, with her consent, loaned the money, in 1856, to her husband, without security, but took from the husband a mortgage of slaves, to indemnify him, the trustee, against loss. In 1862, some of the slaves were sold, and the trustee received, under the mortgage, the proceeds in Confederate money, which he retained until it became valueless. Other of the slaves remained in the husband's possession until they were emancipated. A. had no power, under the instrument creating the trust, to consent to the loan: *Held*, That the trustee committed a breach of trust, which made him liable to A., when he loaned the money without security; and that he was not entitled to an allowance on his accounts, either for the Confederate money which he received, or for the value of the slaves which remained in the husband's possession.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 319; Dec. Dig. ⇐222.]

[*Husband and Wife* ⇐179; *Trusts* ⇐222.]

Before the adoption of the Constitution of 1868, it was a breach of trust for the trustee of a married woman to loan money which he held for her separate use to her husband, without security, and her consent made no difference, unless she had power to consent by the terms of the trust.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 711; Dec. Dig. ⇐179; *Trusts*, Cent. Dig. § 319; Dec. Dig. ⇐222.]

[This case is also cited in *Charles v. Caleb Coker & Bro.*, 2 S. C. 133; *Fraser v. Fishburne*, 4 S. C. 319; *Witsell v. Charleston*, 7 S. C. 98, 101; *West v. Cauthen*, 9 S. C. 60, as to control by married women of separate estate.]

Before Thomas, J., at Union, August Term, 1869.

By a decree of the Court of Equity for Union District, (now County,) made by Chancellor Dunkin, July 6, 1853, the defendant, W. C. Dunn, was appointed trustee of the plaintiff, Mary Dunn, then and now the wife of Henry G. Dunn. Certain lands, in which she had a separate estate, were directed to be sold by the Commissioner; and it was further ordered, that the proceeds of the sale "shall be held by the said W. C. Dunn (with leave to apply for directions as to investment) in trust for the sole and separate use and benefit of Mrs. Mary Dunn, (the plaintiff,) during her life, without being liable for the debts, contracts or liabilities of her present, or any future husband, and, at her death, to be divided among her issue then living, according to the statute of distributions."

The bill, in this case, was exhibited by Mary Dunn and her two daughters, with their husbands, against W. C. Dunn, the trustee, and Henry G. Dunn, the husband of the plaintiff, Mary. The object of the bill was to obtain an account of the trust funds which W. C. Dunn received under the said decree.

The defendant, W. C. Dunn, by his answer, stated: That the sum of \$3,969.89 was realized from the sales of the lands; that, "with the view of meeting the wishes of the beneficiaries of the fund," he, the defendant, on the 14th day of February, 1856, authorized and permitted Henry G. Dunn, the husband

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of the plaintiff, Mary Dunn, to receive the said sum from the Commissioner of the Court; and, on the same day, took from him, the said Henry G. Dunn, a mortgage of eight slaves, "for the better securing and indemnifying the said William C. Dunn," as the mortgage declared, "for, and on account of, any liability or damages he may sustain, or that he may be in danger of sustaining, from any act or omission, on my part, in not accounting and paying over to the parties aforesaid in interest," (the plaintiff, Mary Dunn, and her children,) "or their legal representatives, their portions of the said fund, according to the terms and conditions of the order and decree" of the Court touching the same, and conditioned for the doing and performing, well and truly, by Henry G. Dunn, of every thing required of the said W. C. Dunn, "as trustee as aforesaid, in regard to said fund;" that all the slaves remained in the possession of the mortgagor until 1862, when five of them were sold by the Sheriff under executions; and that, after satisfying some older liens, the Sheriff paid to the respondent, on his mortgage, the sum of \$3,223.25 in Confederate treasury notes, being the balance of the proceeds of the sales; that, "owing to the unsettled state of the country, and the uncertainty and insecurity of all investments," the respondent declined to invest the said sum of \$3,223.25, and retained the same in his hands until it was rendered val-

ueless by the fall of the Confederate Government; and that the three other slaves, upon which he held a lien, under his mortgage, for the balance of the trust fund, were retained by the said Henry G. Dunn, until, by the same event, they ceased to be property.

A good deal of evidence was given or read at the hearing, but, as the Reporter has not been furnished with a copy, he is unable to state what it was.

His Honor decided that the statements contained in the answer were sustained by the evidence; that the lending of the money to Henry G. Dunn was at the instance of the plaintiff, Mary Dunn; and he dismissed the bill.

The plaintiffs appealed, upon the grounds *inter alia*:

1. That, from the case made by the pleadings and evidence, the plaintiffs were entitled to an account of the trust funds which came to the hands of the trustee.

2. That the trustee had no authority to invest the trust funds without the direction of the Court.

3. That there was no investment of the

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trust funds, the money *having been loaned to the husband of the cestui que trust, upon security taken to indemnify the trustee.

Arthur & Steedman, for appellants, cited Hill on Trustees, 370, 378, 382; Ison v. Ison, 5 Rich. Eq., 15; Barksdale v. Hall, 13 Rich. Eq., 180.

Bobo, contra, cited Boggs v. Adger, 4 Rich. Eq., 410; Taveau v. Ball, 1 McC. Ch., 461; Bryan v. Mulligan, 2 Hill Ch., 364; Glover v. Glover, McMul. Eq., 153; Odell v. Young, McMul. Eq., 155; 2 Story Eq., § 1272; 1 Vern., 144; Frazier v. Center & Hall, 1 McC. Ch., 276; Fraser v. McPherson & Ford, 3 Des., 393; McKnight v. McKnight, 10 Rich. Eq., 157.

March 28, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The bill seeks to charge W. C. Dunn, as trustee, with a breach of trust. It is filed by Mrs. Dunn and her two daughters, as beneficially interested under the trust. Mrs. Dunn sues by a next friend—her husband, H. G. Dunn, being made a defendant. The daughters, being married, join with their respective husbands. A discovery is prayed against H. G. Dunn, but no relief is sought against him.

The trust estate consisted, originally, of lands devised by the father of complainant, Mary Dunn, upon certain trusts. Upon the application of the complainant, Mary Dunn, to the Court of Equity, an order was made by Chancellor Dunkin, appointing W. C. Dunn, the defendant, the trustee of Mrs. Dunn and her children; also, directing the lands to be sold, and the proceeds to be held

by such trustee for the sole and separate use and benefit of Mrs. Mary Dunn, during her life, without being liable for the debts, contracts, or liabilities of her present, or any future husband, and, at her death, to be divided among her issue, then living, according to the statute of distributions; leave was also given to the trustee to apply for directions as to investment.

The proceeds of the sale of the lands under this order were realized by the trustee to the amount of \$3,969.89, as admitted by his answer. It further appears, from the answer, that the entire fund was loaned to H. G. Dunn, but the trustee contends that ample security was taken for the loan, and that it was made "with the view of meeting the wishes of the beneficiaries of the fund." The loan to the husband was without security. The trustee alleges otherwise, but the facts set forth by his answer, and the terms of

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the mortgage, *alleged to be the security taken for the loan, show that his allegation is unsustained.

The mortgage was given by H. G. Dunn, and was of eight slaves. It was a mere obligation to indemnify and save harmless the trustee "from any loss or damage he may sustain, or that he may be in danger of sustaining, from any act or omission" of H. G. Dunn. It was further conditioned upon H. G. Dunn doing and performing, well and truly, everything required of the said W. C. Dunn, "as trustee as aforesaid, in regard to said fund." It neither contained, nor was accompanied by, any obligation or covenant to repay to the trustee the amount loaned. In point of fact, it was an obligation for the personal security of W. C. Dunn, taken upon an understanding that H. G. Dunn should assume all the responsibilities of a trustee, and intended to shield W. C. Dunn from the consequences of any misconduct that might be committed by H. G. Dunn. Such a transaction is a clear breach of trust on the part of the trustee.

But it is said that the complainants concurred in this arrangement, and, therefore, cannot hold the trustee accountable. The answer of the trustee does not explicitly allege the consent or concurrence of either of the complainants. It says that the arrangement, with H. G. Dunn, was made to meet the wishes of the beneficiaries of the fund. What those "wishes" were is left to inference. How the trustee became aware of the wishes of the beneficiaries, whether by communication on their part, or conjecture on his own part, remains uncertain. Whether the children were of full age, unmarried, and capable of binding themselves by their consent, and whether the complainant possessed sufficient knowledge of the facts and circumstances of the case, and of the legal and prudential considerations involved in

such disposition, does not appear by the answer.

The testimony introduced by the defendant, W. C. Dunn, at best, can only establish the fact that the beneficiaries desired the trust money to be loaned to H. G. Dunn upon the security of a mortgage of the slaves. But this was not done—the mortgage being a mere personal indemnity for the benefit of the trustee alone. In other respects the facts and circumstances attending the supposed consent of the complainants are left, by the evidence, in almost as great obscurity as that which surrounds the statements of the answer in this respect.

The defendant has failed to establish the

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charge of concurrence *and consent, on the part of the daughters of Mrs. Dunn, in such manner as to bar them from a remedy for the breach of trust committed by him.

The Circuit Judge has determined that Mrs. Dunn did consent to the loan to her husband; but his decree is silent as to whether her consent contemplated the taking of such security for the trust funds as that afforded by the mortgage.

The consent of Mrs. Dunn could, at most, only affect her life interest in the profits of the fund, but cannot absolve the trustee from liability to restore the corpus of the fund for the benefit of those in remainder. But the question here arises whether a married woman can bind herself, by a consent, in regard to her separate estate, so as to be barred from a remedy against her trustee for a breach of trust, by means of which the trust estate has sustained loss. In a case where fraud is not alleged, the effect of the consent of a married woman, in binding the separate estate, must depend on the power she has over that estate. If she cannot charge it, by her direct act, her consent cannot have such effect.

The rule on this subject as settled in the English Courts, illustrates the proposition advanced. The general rule, there, is, that a married woman cannot bind a trust fund, in which she has a beneficial interest, by her consent, not being *sui juris*. But, in the case of a separate estate, her consent will bind her, for she is treated, in respect to her separate estate, as a *feme sole*, and her consent is allowed the same force as her direct act and deed.—*Lewin on Trusts*, 775.

It is settled law, in this State, that, without the aid of a Court of Equity, a married woman cannot dispose of, or charge her separate estate, except in the execution of powers conferred by the instrument creating such estate.—*Ewing v. Smith*, 3 DeS., 417 [5 Am. Dec. 557]; *Wilson v. Cheshire*, 1 McC. Eq., 233; *Calhoun v. Calhoun*, Rich. Eq. Cases, 36; *Reid v. Lamar*, 1 Strob. Eq., 27. In the present case, the power of the wife must stand on the terms of the order settling the trusts, for the Court will not sanction a

loan of the wife's separate estate to her husband without security.

In *Robinson and Wife v. Dart*, (Dudley Eq., 128 [31 Am. Dec. 569],) an application by husband and wife, for payment to the husband of a legacy belonging to the wife's separate estate, was refused, notwithstanding the husband offered ample security.

Chancellor Harper says: "When the husband obtains possession of property given to the separate use of the wife, the Court

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makes *him a trustee for the benefit of his wife; but he has never been constituted a trustee for the purpose of enabling him to receive the property." The attempt to shift the responsibilities of the trustee, in the case in hand, upon the husband, was a manifest disregard of the intent of the order settling the estate. The terms of the present settlement convey no authority over the separate estate to Mrs. Dunn.

Is the case of a married woman dealing with her separate estate an exception to the general rule, that the validity and effect of an act of concurrence, acquiescence, or release, depends upon the power of the person performing such act over the subject-matter to which it relates? It must be borne in mind that such an act may operate either by way of destroying the right or barring the remedy.

If what is said on this subject, in *Frazier v. Centre*, (1 McC. Eq., 270,) is good law, then the case of a married woman dealing with her separate estate is an exception to such general rule, though upon what ground, within the rule, the exception can stand, is not clear.

Judge Nott says, in that case: "No Court has ever gone so far as to decide that a feme covert could not, with the consent of her trustee, vest her own separate funds in any manner which she might think best calculated to promote her interest." This statement clearly involves the idea that a feme covert possesses such power. That the case did not rest on the doctrine thus advanced by Judge Nott, is sufficiently clear. In the first place, Chancellor Thompson placed his decree dismissing the bill on two grounds: First, a former determination of the question between the parties; and, second, fraud affecting both the trustee and the cestui que trust. Although the appellate Court did not lay stress upon these points, yet it affirmed the Chancellor's decree, without questioning the grounds on which it rested. In the next place, the appellate Court regarded the investment in question as good in itself, standing apart from the consent of the cestui que trust. This proposition is summed up in the following language: "In the present case, it was, therefore, proper to lend the money to the husband, and have it secured by a mortgage on the house and lot in question; and there can be no doubt that, at the time, it

would have been thought a judicious investment. The loss of Mrs. Frazier, therefore, has not resulted from any fraud of the defendants, Hall and Centre, or misapplication of the funds by the trustee, but from a combination of circumstances, for which they are not answerable." It is worthy of notice that

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Frazier and Centre was not a question between the trustee and cestui que trust, but between the trustee and cestui que trust, on the one hand, and strangers, on the other hand. The complainants were seeking to trace trust funds into the purchase of the land, in order to charge the land, as against a purchase money mortgage. Without stopping to consider the soundness of the proposition, that trust moneys may be well secured by a mortgage of previously encumbered lands, it is undeniable that such is the language of the case, leaving the question of the effect of the wife's consent as a matter of scientific interest merely.

We conclude that *Frazier v. Centre* has not judicially determined the point under consideration.

There is no sound reason why this question should not be adjudged on the principles established by *Ewing v. Smith*. That case is good law, though settled on technical grounds. It adheres closely to the rules of the common law, while vindicating powers incidental to trusts, for the benefit of married women. It simply recognizes the fact that the special powers capable of exercise by a married woman, in derogation of the marital rights, as established at common law, rest in grant, and applies the ordinary rules of construction to the terms of the grant, in order to ascertain the nature and limits of such powers. The doctrine of this case fully met the views of the eminently equitable mind of Chancellor Kent, in the *M. E. Church v. Jacques*, 3 John. Ch., 82.

Taking our stand within *Ewing v. Smith*, we discover that the attempt to erect the consent of a married woman into an authority competent to destroy her trust estate, where power has not been lodged in her for that purpose, is an effort to destroy the usefulness of *Ewing v. Smith*, and to confuse the logic of its doctrine. Judge Nott, in *Frazier v. Centre*, did not yield full assent to the soundness of the reasoning on which *Ewing v. Smith* rests, and lost a favorable opportunity for recognizing the legitimate consequences of that decision. The only difference between the deed and the consent of a married woman is, that, in the one case, her act and intention is formally evidenced while, in the other, it is informal. To deny efficacy to her deed, and allow it to her consent, is to prefer that which is evidenced in a doubtful and disputable manner to that which is clear and unquestioned. Both must rest upon the same foundations—her powers over her separate estate; and, as to the nature

and limitations of those powers, *Ewing v. Smith* is conclusive authority.

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**McKnight v. McKnight*, 10 Rich. Eq., 157, does not interfere with this view.

In that case the trust estate consisted of slaves, and it was held that their personal use, in the joint establishment of husband and wife, was consistent with the trusts to her separate use. The view that the Court took left a certain amount of discretion in the wife as to where and when that personal use should be enjoyed, and, to the extent of that discretion, it was not improper to look to the consent of the wife as a source of justification to the trustee. This case is not an authority for allowing to her consent a force that transcends her powers. It is evident, therefore, that, if Mrs. Dunn did consent to a loan of her separate estate to her husband without security, it would not operate to divest her of that estate, for want of power, under the settlement, to dispose of or prejudicially affect that estate.

Could that act operate to bar her remedy against her trustee? This question depends upon her common law powers, there being no allegation of fraud affecting her action, and the answer is, that her release, not being efficacious, in consequence of coverture, her acts of concurrence or acquiescence are equally powerless to bar her remedy.

This case having arisen previous to the adoption of Art. XIV, Section 8, of the Constitution of the State, relative to the rights and powers of married women, must be adjudged according to the law as it stood previous to the adoption of the present Constitution.

Under the view taken, the trustee was guilty of a breach of trust from the time of the transfer of the trust funds, and must account for the same, principal and interest.

A question is presented by the case, whether, in such accounting, allowance should be made to the trustee, by way of discharge, for the value of certain of the mortgaged slaves, freed in the hands of the trustee, by the act of emancipation, and for Confederate money, held by him as the proceeds of the sale of certain other of the mortgaged slaves, that became valueless in his hands at the end of the war. It will be unnecessary to trace the facts in relation to these mortgaged slaves, inasmuch as it nowhere appears that either the slaves, or their value, were ever put in a state of security as part of the trust estate; and, until this was done, in accordance with the terms of the settlement, no ground for a discharge, pro tanto, of the trustee, on account of the loss resulting from

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the breach of trust, could exist. The decree of the Circuit Court must be reversed. The question of the allowance of interest not having been considered or discussed, will

come before the Circuit Court for consideration.

It is ordered, adjudged and decreed, that the decree of the Circuit Court be, in all things, reversed and set aside.

And it is further adjudged and decreed, that the defendant, William C. Dunn, is liable to account to and with the complainants, for the moneys that came into his hands under the order made in the case of *Mary Dunn et al. v. Margaret Young et al.*, dated June 6th, 1853. And that, on such accounting, the said William C. Dunn is not entitled to be allowed, by way of discharge, any amount as the value of slaves freed in his hand by emancipation, nor as the value of Confederate money held by him as the proceeds of any slaves, claimed by him to be a part of the trust estate.

And it is further ordered, adjudged and decreed, that this cause be remanded to the Circuit Court, for such accounting and for such order and decree as may be requisite to establish the trust estate of the complainants, in accordance with the terms of the said order of settlement, June 6, 1853.

MOSES, C. J., concurred.

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**MARY S. P. GIBBES and Others v. JAMES L. GUIGNARD and Others.*

(Columbia. Nov. and Dec. Term, 1869.)

[*Equity* ⇨345.]

The rule in reference to the effect of a responsive answer, as evidence for the respondent, has undergone some change, the later doctrine being that the evidence of one witness, corroborated by such circumstances as satisfy the judicial mind, is sufficient to contradict it, although the circumstances may not be equal to the evidence of another witness, and those circumstances may, it seems, be found in the statements of the answer itself.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 715-724; Dec. Dig. ⇨345.]

[*Account* ⇨17.]

Bill by cestui que trust against trustee, for account, alleged that plaintiff requested defendant to make no investments of the trust funds in Confederate securities, and she believed he had abstained from so doing, but that, after that class of securities had become nearly worthless, he had substituted some of his own in place of his indebtedness to the plaintiff; and called on defendant to answer whether he did, at any time, and, if yea, at what time or times, in particular, and from what person or persons, purchase for plaintiff, or invest her funds, in his hands, and, if yea, to what amount in Confederate States bonds. Defendant, in his answer, stated, in effect, that he did invest, between February and September, 1863, \$10,000 of plaintiff's funds in Confederate States bonds; that the purchases were made from a great many different persons, and, generally, in small amounts from each; and that he did not remember the names of the persons from whom he purchased, except two, whose names he gave: *Held*, That the answer was not responsive to the bill.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. § 85; Dec. Dig. ⇨17.]

[*Equity* Ⓒ345.]

The evidence of the plaintiff, with the corroborating circumstances, held sufficient to contradict the answer, assuming it to be responsive.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 715-724; Dec. Dig. Ⓒ345.]

[*Trusts* Ⓒ161.]

The appointment, or substitution of a trustee, without security, will not be sanctioned except under extraordinary circumstances.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 209; Dec. Dig. Ⓒ161.]

[This case is also cited in *Koon v. Munro*, 11 S. C. 152, and distinguished therefrom.]

Before Boozer, J., at Richland, August Term, 1869.

The case was first heard before His Honor Chancellor Johnson, in June, 1867. His decree is as follows:

Johnson, Ch. In 1841, James S. Guignard, Sr., in consideration of the natural love and affection which he had for his daughter, Mary S. P. Gibbs, the wife of James W. Gibbs, conveyed to James S. Guignard, Jr., a house and lot in the city of Columbia, in trust, that he should hold the same for the sole and separate use, benefit and behoof of his said daughter, for the term of her natural life; and, after her death, for the use, benefit and behoof of such person or persons as she, by her last will and testament, made notwithstanding her coverture, might devise the same; and if she should die without making any disposition, by will or otherwise, then that the property should be "in trust for the heirs of her body, to them, or to the survivors of them, share and share alike, to them, their heirs and assigns forever." The trustee, by the said conveyance, is authorized and empowered to sell and dispose of the said house and lot whenever he should be requested by the said Mary S. P. Gibbs, pro-

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vided the proceeds of such sale should be laid out in the purchase of other estate, real or personal, which should be secured for the use of his said daughter and her heirs, as in the deed expressed. In July, 1844, the trustee, on the written request of Mary S. P. Gibbs and her husband, sold and conveyed the house and lot to Henry and J. C. Lyons, for four thousand five hundred dollars, and, up to the 1st of January, 1865, paid annually to Mrs. Gibbs the interest on the said amount of money.

In 1845, James S. Guignard, Sr., gave to four of his children, of whom the complainant, Mary S. P. Gibbs, was one, a number of negro slaves; and, in the division of them, the lot assigned to her was valued at twelve hundred and sixty dollars, and was sold by her and her husband to James S. Guignard, Jr., for fourteen hundred dollars; and, by their request, he placed this amount with the other trust fund, making in all, five thousand nine hundred dollars, on all of which he paid the interest up to the time aforesaid.

In the year 1856, James S. Guignard, Sr., died, after having first duly executed his last will and testament—in which he appointed his two sons, John Gabriel Guignard and James S. Guignard, Jr., the executors thereof; and the latter alone qualified, after having proved the will. In it there are various devises and bequests—some of the latter being bequests of money to Mary S. P. Gibbs—and, in the thirty-sixth clause of the will, the residue of the testator's estate is given to his five children, and to the children of a deceased child, to be divided by them in six equal portions.

And in the thirty-seventh clause of the will, it is declared to be the express will and intention of the testator that all the property willed to his three daughters, in specified clauses of the will, should "be for their sole and separate use, benefit and behoof, notwithstanding coverture, for and during their natural lives, and not to be in any way subject to, or liable for, the debts or contracts of their present or future husbands; and, after their deaths, the same to revert and belong to their respective children, and to the survivors or survivor thereof, to his, her or their heirs and assigns forever."

In the answer of James S. Guignard, he acknowledges having received, as executor, under the provisions of the will, for the complainant, Mary S. P. Gibbs, in money, four thousand four hundred and thirty-eight dollars and three cents—making the aggregate principal sum in his hands, from all sources, for the said complainant, ten thousand three hundred and thirty-eight dollars and three

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*cents. It also appeared from the evidence that the interest on the four thousand four hundred and thirty-eight dollars and three cents had been paid, annually, up to the 1st of January, 1865.

The answer of James S. Guignard, in response to the allegations of the bill, alleges that he invested, under the provisions of the Act of 1861, the whole amount which he held for M. S. P. Gibbs, as aforesaid, in 8 per cent. bonds of the Confederate States, between the months of February and September, 1863. The complainants deny that he made such investment, and that, if he did do it, it was improperly done, and should not be allowed.

Was the investment made? and, if so, was it properly done? are the important questions in the case, and must be determined mainly by the evidence, if not entirely.

Mary S. P. Gibbs testified that she lived in the office of Dr. Gibbs, from September, 1863, till August, 1864; and that some time after she went to live there—either late in 1863, or early in 1864—the defendant, James S. Guignard, in speaking to her about his own matters, said to her, that she need not worry herself about her property as long as

he had anything, for he had given his note for ten thousand five or six hundred dollars, for the balance due her by him; and that he furnished her a written statement of her property in his possession, she thought about the 1st of January, 1864, as he had been in the habit of doing from year to year; and that the first item in it was interest on his note for ten thousand five or six hundred dollars; and that she afterwards gave the same statement to her son-in-law, Thomas S. Lee, and requested him to use it in making his returns to the Confederate tax collector, as her trustee had declined to do it. She also testified that whilst she was residing in Dr. Gibbs' office, her brother, J. S. Guignard, called upon her, and asked her if she wanted him to invest her money in Confederate bonds, and that she replied to him: "No, indeed; she wanted her property invested in personal bonds;" and that, about six weeks after Gen. Sherman passed through Columbia, she was at her brother's house, and he said to her: "All your money was in Confederate bonds." To which she replied: "No, you mean in personal bonds." "Well, personal bonds, they are no better than Confederate." And that, upon his remarking to her, afterwards, that her money was in Confederate bonds, she became uneasy, and got Thomas S. Lee to go with her for the purpose of seeing her brother, and ascertaining the truth of the matter; and that, in going, they met him in the street, and she asked him how her money

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*was invested; and she thought, though she could not recollect the exact words, he said: "In personal bonds, but they are not much better than Confederate bonds."

Thomas S. Lee testified that Mary S. P. Gibbs handed him a written statement of what purported to be an exhibit of the estate of Mrs. Gibbs, in the hands of James S. Guignard, for the purpose of enabling him to make a return for her to the Confederate tax collector; and that, in the statement, the first item was interest on a note of James S. Guignard, which the witness thought was for ten thousand six hundred dollars; and that, about six or seven weeks after Gen. Sherman passed through Columbia, he went with Mrs. Gibbs, at her request, to see James S. Guignard, in relation to her property; and that they met him on the street, and she said to him: "Brother, tell me, is my money in Confederate or personal bonds?" To which he replied: "Personal bonds—no better than Confederate bonds."

James S. Guignard testified that he acted as the trustee of the whole fund of \$10,338.03, and produced one or more receipts of Mrs. Gibbs for the interest, in which he was styled trustee, and that, in 1861, the trust fund was pretty much in money, but that he lent some of it out here and there, and that, in 1863, he found himself in the possession of the whole of it, and that it was paid in to

him, mostly in 1861 and 1862. That \$30,000 of his own money, and the whole of the trust money of Mrs. Gibbs, were invested by him in 8 per cent. Confederate bonds, in 1863. Mrs. Gibbs' money was invested in bonds between the 19th of July, 1863, and the 15th of December, 1863, and witness thought it was done in July. The witness produced on the stand a book, which he testified contained a statement of his transactions with the trust estate, from the first day of January, 1858, to the 25th day of November, 1864, in which the following entry was made, to wit: "Invested in Confederate bonds 8 per cent. 1—27, \$10,000." The time that the entry was made does not appear on the book, further than this, that it stands between an entry made on the 19th day of July, and one made on the 25th day of November, 1863. This is the only entry of any investment made at any time in the book; and the witness testified that he had made the investments in the Confederate bonds, at different times, and that he had purchased the bonds from different persons. The defend-

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ant, in his answer, denied that Mrs. *Gibbes had ever requested him not to invest her money in Confederate bonds. I regard the above as a fair abstract of the evidence bearing on the point, as to whether the investment was actually made by the defendant, as contended by him, or not.

Had all the investments made by the defendant of the trust funds in his hands, been regularly entered, from time to time, in the book as they were made, and, especially, if the investments of the trust funds in Confederate bonds had been regularly entered, as they were made, instead of making a lumping entry at one uncertain time, I would regard that portion of the evidence much stronger than I do. In giving the answer, and the evidence sustaining the same, all the weight to which they are entitled, I am not satisfied, in considering all the evidence together, that the investment was made by the defendant, James S. Guignard, as claimed by him; and I cannot sustain it, though it is with much hesitation that I so decide.

The question as to what estate the complainant, M. S. P. Gibbs, held under the will and deed of 1841, was made more, as I suppose, for the purpose of influencing the decision of the point just decided, than otherwise; but, for the purpose of avoiding further litigation, I think it better to adjudicate the question, as all the parties are before the Court. The opinion of the Court is, that under the will, and under the deed of 1841, she only took a life estate, and that the remaindermen take as purchasers.—See *Austin v. Payne*, et al., 8 Rich. Eq., 9; *Dauner v. Trescott*, 5 Rich. Eq., 356; and *Markley and Wife v. Singletary*, 11 Rich. Eq., 393.

The defendant, James S. Guignard, admits that there is a tract of land in Greenville

District, and various articles of personal property, which pass under the residuary clause of the will, which have not been divided according to the directions of the will; and the complainants insist that there are various other tracts of land, which are subject to division under the residuary clause of the will, which have not been divided.

It is ordered and decreed, that the foregoing opinion be taken as the judgment of the Court. It is also ordered and decreed, that the complainants have a decree against the defendant, James S. Guignard, for ten thousand three hundred and thirty-eight dollars and three cents, with interest on the same from the 1st day of January, 1855.

It is also ordered and decreed, that it be referred to the Commissioner to audit the accounts of James S. Guignard, as executor of the last will and testament of J. S. Guignard, Senior, so as to ascertain the amount actually due Mary S. P. Gibbs, as life tenant under the same; and that he so report, with leave to report any special matter.

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It is also ordered and decreed, that a writ of partition do issue to Commissioners, in accordance with the rules of this Court, to divide the tract of land in Greenville District amongst the parties entitled to the same. And it is also ordered and decreed, that further orders may be taken at the foot of this decree.

From that decree, an appeal was taken, on the grounds:

1. Because the defendant having, in response to the allegations and interrogatories of the bill, averred on oath that the funds of Mrs. Gibbs, the complainant, were invested by him in Confederate bonds, the Chancellor has erred in considering this positive averment to be outweighed by the testimony of Mrs. Gibbs and her son-in-law, as to their recollection of statements made by the defendant, not necessarily contradictory of this averment.

2. Because, assuming the correctness of the Chancellor's conclusion as to this fact, he has erred in decreeing thereupon, against the defendant, an absolute indebtedness for the whole amount of said investment, instead of decreeing an account as for an investment in personal bonds.

3. Because the decree, in providing for the present payment of the principal fund and interest, is inconsistent with the terms and provisions of the instruments of writing from which that fund is derived.

On that appeal a judgment was delivered by the late Court of Appeals, at May Term, 1868, as follows:

GLOVER, J. Not satisfied that the investment in Confederate bonds was made by J. S. Guignard, the Chancellor ordered that the complainants have a decree for \$10,338.03, and interest thereon from January 1st, 1865.

He also ordered that it be referred to the Commissioner to audit the accounts of J. S. Guignard, as executor, so as to ascertain the amount actually due the plaintiff, M. S. P. Gibbs, as life tenant under the will, with leave to report any special matter.

It was with hesitation that the Chancellor refused to sustain the investment, and he says, if the investments had been regularly entered as they were made, the evidence sustaining them would have been stronger. The only evidence to prove the invest-

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ments *was the answer and the testimony given by the defendant as a witness examined in the cause; and if the answer is responsive to the material allegations of the bill, it is conclusive proof, unless contradicted by two witnesses, or one witness, corroborated by circumstances, according to the nature of the case. Governed by this rule, we entertain the doubts that embarrassed the Chancellor in the application of it to this cause. The only charges in the bill, to which the fact of investment by the defendant would be responsive, are, that the plaintiff requested the defendant not to invest in Confederate securities, and that she believed he had abstained from such investment. The answer to a bill, simply praying for an account, is not conclusive proof, and such defence would be only in avoidance, and, like every other independent defence, must be proved. If, besides an account, a discovery is sought to sustain the plaintiff's case, the defendant must answer fully, and would be entitled to the benefit of the rule. It is not clear that the defendant's answer to the bill, respecting the investment in Confederate bonds, is strictly responsive to any fact charged in the bill; or that the plaintiff asks more than an account from her trustee. The defendant has filed, as an exhibit, with his answer, a schedule of his account; and his book, from which the schedule was extracted, was, also, offered in evidence. We do not assume to decide whether the defendant's evidence, as a witness, and his book, in which his debits and credits, as trustee, are entered, may not deserve great consideration in proof of the investment, independent of the answer; but he should be entitled to avail himself of all the benefit that such evidence can afford. His book shows but one entry embracing an investment in Confederate bonds, yet his answer states that these investments were made, from time to time, between February and August, 1863. We agree with the Chancellor, that if the entry of these investments had been regularly made, the evidence would have been stronger, and we are of opinion that the defendant should have an opportunity to explain his book in this respect.

It was argued that a separate estate having been given to the plaintiff, during discovery the relation between her and the

defendant, of trustee and cestui que trust, ceased. When the ownership of the wife in separate property is absolute, the principle contended for may apply—the right of disposition fluctuating between coverture and discovery—that she may be protected against an improvident husband during his life, and, when sole, enjoy the free control of the property; but when her separate estate is for

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life, *and others are interested as remaindermen, her disposition, while sole, is limited to the rents and profits. By the deed, dated May 4, 1841, J. S. Guignard is expressly named as trustee, and the uses and trusts are declared, and, as executor of his father's will, he stands in the same relation to the plaintiff, M. S. P. Gibbs—not in a technical sense, but as a trustee—like all who hold property for the benefit of others. The general assets in the hands of an executor may not be affected with a trust; but when the debts and legacies are paid, and the residue is ascertained, or when a legacy is set apart from the general fund, his representative character ceases, and the rules respecting trust property apply. From 1857 to 1864, the plaintiff recognized the defendant as her trustee, and some of her receipts are given to him in that character. It is a continuing trust, and she is entitled to the annual income during her life, but not to the possession and control of the corpus. It is premature, and not necessary that we should express any opinion respecting the estates of the parties under the will or deed beyond the interest of the plaintiff, M. S. P. Gibbs.

It is, therefore, ordered, that the Circuit decree be set aside, and the cause be remanded to the Circuit Court.

It is further ordered, that, on the re-hearing of the cause, the evidence already taken be read; and that any party to the proceedings be permitted to introduce any additional evidence touching the investment in Confederate bonds.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

The defendant had died (in February, 1868,) before the hearing in the Court of Appeals, and, in August, 1868, a second hearing was had in the Circuit Court of Equity, before His Honor Chancellor Lesesne. Additional evidence was taken, but His Honor failed to make a decree before the 1st January, 1869, when his office expired by the limitation of the new Constitution. An order, by consent, was then entered, dated 20th January, 1869, appointing His Honor the late Chancellor Lesesne "Special Referee in the case, and that his report be taken and deemed to be the decree of the Circuit Court, subject to be appealed from, as in other cases." His report, in pursuance of the said order, dated 10th January, 1869, is as follows:

Lesesne, Referee. The bill is against Mr. Guignard, for an account of a fund or funds in his hands, in which Mrs. Gibbs, the

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*plaintiff, is interested, and, also, for discovery as to certain points connected with the investment of the same. The principal of the fund consists of three sums, amounting, together, to \$10,338.03, namely: 1. The sum of \$4,500, being the proceeds of sale of a house in the city of Columbia, which, by deed, bearing date in 1841, was conveyed by James S. Guignard, the elder, to this defendant, James S. Guignard, in trust, for the sole and separate use of the plaintiff, Mary S. P. Gibbs, during her life, with certain limitations over, with a power of sale at her written request, the proceeds of sale to be invested in other property, real or personal, to the same uses. The sale was regularly made in July, 1844, and the price went into the hands of the trustee. 2. The sum of \$1,400, the price of certain negroes of the plaintiff, sold by her and her late husband, to the said defendant, in the year 1845, which the defendant placed with the trust funds. 3. The sum of \$4,438.03, being the amount of certain bequests to Mrs. Gibbs, under the will of the said J. S. Guignard, the elder, of which the defendant, J. S. Guignard, was executor. This last sum is subject to the trust of the said will, namely: for the sole and separate use of Mrs. Gibbs during her life, with certain limitations over. The interest on these three several sums was paid by the defendant to Mrs. Gibbs up to January, 1865.

The bill also seeks a partition of the residue of the estate of testator, of which Mrs. Gibbs is entitled to a distributive share of one-fifth, subject to the same trusts as the legacies before mentioned.

The defendant declares, in his answer, that he kept the entire fund invested in personal securities (not specified,) all of which were paid up, chiefly in the years 1861 and 1862, and in the year 1863, between the months of February and August, invested, from time to time, as opportunities offered, in Confederate States securities, which, at the close of the war, became valueless. He kept an account with the plaintiff in a book, a copy of which, beginning in 1857, and ending November 30, 1864, forms an exhibit to his answer. In that account is an entry in the following terms:

"Invested in Confederate 8 per cent. and one or two 7 per cent. bonds, \$10,000."(a)

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*It is without date, but the items next preceding and following it are dated, respectively, July 19, 1863, and December 15, 1863.

(a) Note.—I am satisfied, from an inspection of the original, (although the writing is obscure,) that this is correct. In the copy of the account filed as an exhibit to the answer, the entry is given thus: "Invested in coupon bonds, 8 per cent., \$10,000."

The said cause was heard before the late Court of Chancery in July, 1867, upon the bill and answers, and testimony adduced by the parties, and the presiding Chancellor pronounced a decree against the defendant, J. S. Guignard, in favor of the plaintiff, Mrs. Gibbs, for the sum of \$10,338.03, with interest thereon from the first day of January, 1865. He also ordered a writ of partition to divide a tract of land in Greenville County (forming the residue of testator's estate, or a part thereof,) among the parties entitled thereto. From this decree an appeal was taken, and the Court of Appeals, in their decree, made at May Term, 1868, ordered "that the Circuit decree be set aside, and the cause be remanded to the Circuit Court; and that, on the rehearing of the cause, the evidence already taken be read, and that any party to the proceedings be permitted to introduce any additional evidence touching the investment in Confederate bonds."

The testimony that was adduced at the hearing in 1867 forms part of the appeal brief, which, together with the appeal decree, will accompany this report. The cause has been argued before me with signal ability by the counsel of both parties, and additional testimony was introduced, which will also accompany this report. The great question in the cause is, whether the alleged investment in Confederate securities shall be sustained. In the words of the Chancellor, in the Circuit decree: "Was the investment made, and, if so, was it properly done? are the important questions in the case." He then proceeds to consider the former of them, and concludes that the investment was not, in fact, made, leaving, of course, the other untouched. In the argument of defendant's counsel, it is assumed as *res adjudicata* that the defendant was trustee of Mrs. Gibbs as to all three of the funds. But I do not so understand the decrees. They only decide that, as to the fund derived from the sale of the house, and the fund which she acquired under the will of Mr. Guignard, the elder. Nor do I so understand the fact, as to the remaining fund, which arose from a sale by Mrs. Gibbs to the defendant of her own absolute property. As to it, I regard him as standing simply in the relation of debtor to her. The fact that he kept it in the same account with the two trust funds, and in paying her annually, in one payment, the interest on all three, took her receipt from her as trustee, does not, in my judgment, amount to a recognition of him as trustee,

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or constitute him a trustee, with respect to the debt in question. So long as she was content to allow the principal to remain in his hands, and to receive only the annual interest, it was quite natural and very convenient that he should keep his account of it together with the other funds, as to which

it was his office, as trustee, to pay the income annually.

As to the fund arising from the sale of the house, the trust deed directs expressly that, in case of a sale, the proceeds shall be invested in other property, real or personal. The plaintiff contends that omission so to invest, (if there was such omission,) was a breach of trust, and the defendant's counsel insists that she sanctioned the omission, and there was, therefore, no breach of trust as to her, whatever there may be as to the remaindermen. If she did, in fact, sanction it, the counsel's position is certainly correct. His conclusion, however, rests on the facts that he accounted to her annually for interest on the fund, and that she gave receipts accordingly. But it does not appear that he ever informed her that he had used her money for his own purposes, and was paying interest out of his pocket. Such an admission would be inconsistent with the defence set up, and fatal to it. The defence is, that he, in truth, always kept her moneys invested in bonds and notes up to a certain time, when those investments were converted into Confederate securities. If any explanation was given in the annual settlements as to the source from which the income came, to be consistent with the defence, it must have been that the income was the fruit of those bonds and notes. And her giving receipts for interest, generally, cannot now be construed as sanctioning his use of the money on interest. If, in fact, he so used the money, he committed a breach of trust. The judgment of the Chancellor was, as I have remarked, that no investment of the funds in question was, in fact, made in Confederate securities. That was conclusive of the case against the defendant, and the Chancellor accordingly confined himself to the consideration of that question. The Court of Appeals, too, remanded the cause to the Circuit Court, to allow the defendant to "explain his book," and to introduce further testimony "touching the investment in Confederate bonds." Neither the Circuit decree, nor that of the Court of Appeals, discusses, or even refers, to the other important question propounded by the Chancellor, namely: whether, if such investment were made, "it was properly done." This Court is not, therefore, precluded from the consideration of that question. It is one of the issues in the cause, was left open, and was fully dis-

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cussed before me by the counsel on *both sides. According to my view, it is proper, if not necessary, to consider it. In the opinion I have formed, it must be decided adversely to the defendant, and I would gladly pass by the question of fact as to the investment. But I cannot avoid it, inasmuch as my opinion on the other question may not receive the sanction of the Supreme

Court. I, therefore, proceed to its consideration.

The new testimony adduced before me does not shed much, if any, additional light on the subject; and I do not find it necessary to lengthen this paper by commenting on all of it, or of that which was adduced at the previous hearing. All, as I have said, will accompany this report. Mr. Guignard, the defendant, had died very suddenly before the hearing, and it was agreed, by counsel, that, if necessary, his administrator, J. S. Guignard, should be considered a party to the cause, and a consent order to that effect be entered, at any time, *nunc pro tunc*. The counsel for the defence insisted that due weight was not given in the Circuit decree to the answer; that an answer which is responsive to the bill is evidence, and conclusive, unless contradicted by two or more witnesses, or by one witness and corroborating circumstances, or by corroborating circumstances alone, if sufficiently strong, or unless the answer overcomes itself by statements which are inconsistent with the response it contains. These points were discussed and sustained with great ability and research. The answer in this case, as to the fact of the investment of plaintiff's money in Confederate States bonds, was claimed to be responsive, and it was denied that it has been overcome in any of the ways mentioned.

But the Court of Appeals say it is not clear that the answer respecting the investment in Confederate States bonds is strictly responsive to anything charged in the bill, or that the plaintiff asks more than an account from her trustee. The plaintiff charges in her bill that he abstained from investing her funds in Confederate securities until some time in the year 1865, when said securities, having become almost if not entirely worthless, he transferred to her credit, or marked with her name, certain Confederate bonds, which he had previously purchased for himself, in payment of his indebtedness to her, and propounds an interrogatory in these terms: "Whether he did at any time, and, if yea, at what time or times, in particular, and from what person or persons, purchase for her, or in her name, or invest her funds in his hands, and, if yea, to what amount, in the purchase for her of Confederate States bonds; and whether he did not at some time, and when, transfer

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to her credit, *or mark for her, certain Confederate States bonds, and, if yea, what bonds, and to what amounts then in his possession, and which he had purchased for his own use, in lieu of and substitution for his own note, or other and what obligation or acknowledgment of indebtedness, which was held by him for her use?"

In his answer, the defendant declares that he did not abstain from investing plaintiff's

funds in Confederate States securities; but that, on the contrary, he did so invest, during the year 1863, not only the aforesaid sum of \$10,338.03, but, also, very largely for himself; that all of her money in his hands was invested in 8 per cent. coupon bonds between February and August, 1863; that they were, originally, purchased for her. And his response to the interrogatory is in the words following: "As to so much of the said bill as requires this defendant to answer at what time and from what person or persons he purchased for the complainant, Mary, any Confederate States bonds, he answers that said purchases were all made between the month of February, 1863, and the first day of September of the same year; but said purchases, having been made from a great many different persons, and generally in small amounts from each, he is unable to remember from whom all of said bonds were purchased. This defendant, however, does remember that he purchased some of said 8 per cent. bonds for the said Mary from Thomas Graves, of Mississippi, Henry Willis, a broker, then in Columbia, and others. As to so much of said bill as requires this defendant to answer if he did not at some time, and when, transfer to the credit of the said Mary, or mark with her name, certain Confederate bonds which he had purchased for his own use, in lieu of his own note, or other obligation or acknowledgment of indebtedness, this defendant answers: No; that no such transfer or substitution was ever made, or attempted to be made, by him, nor were any of said bonds marked with the name of the complainant, the said Mary. The said bonds, as they were purchased, were entered in the account of said defendant, as trustee, at and as of the date of said purchases, or very shortly thereafter; and the original purchases were made for the benefit, and with the funds, of the said Mary, in this defendant's hands as trustee as aforesaid." And the account before mentioned forms an exhibit to the answer, as "a statement of his receipts and expenditures," and is, of course, part and parcel of the answer.

The answer, as above quoted, is not, perhaps, as full and minute as the plaintiff required, and had the right to require that it

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should *be. Still, if borne out in its statements, it might be properly regarded as responsive to the bill, and entitled to the force and effect which appertain to a responsive answer. The material part of it is, that the "bonds, as they were purchased, were entered in the accounts of the defendant, as trustee, at and as of the date of said purchase, or very shortly thereafter." If the defendant could rightfully have stopped here, and had done so, the onus of disproving the fact of the alleged investments might have been thrown on the plaintiff. But the bald statement thus made was not enough. It was the plaintiff's right to require, in verification of

it, the production of the account referred to. The defendant knew this, and, accordingly, exhibited his account as part and parcel of his answer. But, so far from showing that the investments were entered when the several alleged purchases of bonds were respectively made, as the answer shows he knew that they should have been, and as they naturally would have been, it contains a "lumping entry" of the entire amount, dated months after the time at which he says he commenced making the investments—a general, inexact entry of eight per cent. bonds, and one or two seven per cent. bonds, amounting to \$10,000. The answer, in my judgment, overcomes itself, or, at any rate, is not so full to the point as to be entitled to the effect which belongs to a responsive answer. And, beside it, the testimony fails to show that the investments claimed to have been made were in fact made. Even his own deposition as a witness comes short of it. He says he "had a memorandum put round those (the bonds) for the trust estate just before Sherman passed through Columbia," (February, 1865.) These were shown, but it does not appear that they, or any other particular bonds, were purchased for the plaintiff at the times mentioned in the answer. I see no reason, therefore, for dissenting from the conclusion of Chancellor Johnson, that the alleged investment of \$10,000 in Confederate States bonds has not been legally proved.

But, supposing such investment to have been made, "was it," in the words of the Chancellor, "properly done?"

If the defendant (as to those portions of the fund in question which belonged to the trust estate) was really "holding funds for investment" in 1863, I would feel no difficulty in sustaining the investment of them in Confederate States bonds, and that independently of the Act of 1861 in relation to such investments by trustees. Such is the judgment of the late Court of Appeals, in the case of *Haile v. Shannon*, (MS., 1866.) But I do

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not consider *the defendant as, in fact, having had money in his hands for investment in the sense intended. The account filed with his answer is, in its terms, a money account. He credits the trust estate with the money received from time to time, and designates it constantly as amount due her, or amount in his hand; and he annually paid her the legal interest on such amount. He says now that the fund was all the time invested in personal notes. If he had shown that such was the fact, and that the notes, at the time they were given, were prudent investments, they would be sustained as such, notwithstanding the discrepancy between that state of facts and the account, as was done in the case of *Whitlock v. Whitlock*, (13 Rich. Eq., 165.) And then, if the notes, being past due, had been paid in 1863, I would go very far in upholding his receipt of payment and in-

vestment of the money in Confederate States securities. But he does not specify the notes, or say that they had fixed on them the character of investments, so that, if necessary, it could have been shown that they belonged to the trust estate, and were not legally his own property. There is, then, no proof of any investment having ever been made of the funds in question; and I must consider the defendant as having mingled the trust moneys with his own, and used them in such manner as he thought fit. This was a breach of duty, as has been impressively declared in the well-considered judgment of the late Court of Appeals in the case of *Spear v. Spear*, (9 Rich. Eq., 184.) It made him a debtor to the trust estate—a borrower of its money.—*Sweet v. Sweet*, (Speers Eq., 309.)

The case, then, stands thus: The defendant had, for many years, owed a large debt to the trust estate for moneys received as trustee, and used for his own benefit, and, late in the year 1863, he attempted to cancel this peculiar debt by paying it to himself with Confederate States notes, and then invested those notes in Confederate States securities. Will the Court sanction such a transaction? I apprehend not. There was no necessity nor reason for the payment of the debt at the date of his entry of the purchase of those securities which had not existed at any time after he incurred it—at least, so far as the benefit of his *cestui que trust* was concerned, and that should be the sole motive of a trustee, in his dealing with the trust estate. But it is very apparent that it was for his own interest. Confederate currency was then so depreciated that persons were glad to get rid of it for almost any consideration. "Fabulous prices" were paid for all sorts of property; and if this trustee had purchased property with the money of the

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trust estate, as it came *into his hands, he might, at the date referred to, with the proceeds of sale of a small proportion of it, have actually paid his debt in full. The Court requires that a trustee shall be faithful to his trust, and will not uphold him in a transaction that has resulted disastrously, and which, in disregard of the interest of his *cestui que trust*, was suggested by his own advantage.

I respectfully report, as the decree of the Court, that, as to the fund of (\$1400) fourteen hundred dollars, the same with interest from the first day of January, 1865, be paid to the plaintiff, Mary S. P. Gibbes, out of the estate of James S. Gignard, deceased; and as to the funds of (\$4,500) four thousand five hundred dollars, and (\$4,438.03) four thousand four hundred and thirty-eight dollars and three cents, that the same, with interest from the same date, be paid out of said estate to a trustee or trustees, to be appointed by the Court, to be held for the uses to which the said funds were subject, respectively; that

the parties have leave to apply, at the foot of said decree, for such further orders as may be necessary for carrying the same fully into effect; and that compensation for this report be provided, of such amount, and in such manner, as to the Court may seem suitable and proper. And, further, that a writ of partition issue, as ordered in the decree of Chancellor Johnson, and that J. S. Guignard, administrator of the deceased defendant, J. S. Guignard, be made a party defendant in the cause, nunc pro tunc, as of the sixteenth day of June, 1868.

It appears that there was a petition in the cause, to the late Court of Equity, by the plaintiff, for the appointment of Thomas S. Lee as her trustee, in the room and stead of James S. Guignard, deceased, and a favorable report thereon, dated November 14, 1868, by D. B. DeSaussure, Esquire, the Commissioner of said Court. And I respectfully recommend that the said Thomas S. Lee be so appointed trustee, and be invested with all the powers and rights, and subjected to all the liabilities which attached to the said James S. Guignard, in his lifetime, in respect to all the property of which the said James S. Guignard was trustee for the said plaintiff.

At August Term, 1869, the report was confirmed by an order of the Circuit Court, His Honor Judge Boozer presiding. The order is as follows:

Boozer, J. On hearing the report of the Special Referee in this case, and on motion of Messrs. Fickling & Pope, complainants' solicitors, it is

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*Ordered, that the same be confirmed, and made the order and decree of this Court, subject to the right of appeal, as provided for in a former order.

It is further ordered, that Thomas S. Lee be appointed trustee, without security, of Mrs. Mary S. P. Gibbes, in the room and stead of James S. Guignard, deceased, and be invested with all the rights and powers, and subjected to all the liabilities which attached to the said James S. Guignard, in his lifetime, in respect to all the property of which the said James S. Guignard was trustee for the said Mary S. P. Gibbes.

The defendant appealed, and now moved this Court to reverse the order of His Honor Judge Boozer, confirming the report of the Referee, on the grounds:

Because, according to the proof, (1.) the fund with which the decree charges the defendant, James S. Guignard, was held by him as trustee, and it was his duty to invest the same at interest; (2.) that, in good faith, and under the sanction of law, he did invest the same in the bonds of the Confederate States; (3.) that such investment was, under the circumstances, a proper investment; and, (4.) that, without fault on his part, the same has been lost to the estate,

and the defendant cannot be charged therewith.

Carroll & Melton, for appellant, made the following points:

I. The answer is responsive to the bill, and is entitled to the full force and effect which appertain to a responsive answer.

II. The answer is not overcome in any of the ways required by the equity rule.

III. The answer and testimony conclusively show that the fund in question was held for investment; that it was, in good faith, invested in bonds of the Confederate States, in the year 1863; and that it was, under the circumstances, a proper investment.

IV. The report of the Referee is based upon erroneous views of the law; upon a disregard of the rules of evidence; upon an erroneous assumption of facts; and upon a presumption of bad faith in defendant, wholly unwarranted by the testimony; and the decree thereupon should be reversed.

Fickling, Pope, contra.

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*March 28, 1870. The opinion of the Court was delivered by

MOSES, C. J. There are two leading questions in the cause:

First. Was the investment, as alleged in the answer, made?

Second. If made, is it such an investment as the Court of Equity will sanction?

To sustain the fact of the investment, the answer of the defendant, James S. Guignard, Jr., the trustee, is claimed to be entitled to the full force and effect of a responsive one.

That such is not its character, we think, has been adjudged by the decree of the late Court of Appeals. In addition to its expression on this point, it extended to the defendant "an opportunity to explain his book, in respect to the investment, with liberty to either party to the proceedings to introduce any additional evidence touching the investment in Confederate bonds." There would have been no necessity to open the case for further testimony, on the part of the defendant, if the answer had been so considered.

It is due, however, to the learned counsel who, in his argument, has exhibited so much ability and zeal, if the decision of the Court on the character of the answer is doubtful, that we should examine the question by all the lights which his research and investigation have furnished.

It is admitted, in the opinion of the Court of Appeals, that where "the answer is responsive to the material allegations in the bill, it is conclusive proof, unless contradicted by two witnesses, or one witness, corroborated by circumstances, according to the nature of the case."

The circumstances and facts, which are to stand in the place "of a second witness," need not be of such a character as to force

conviction by their own impression. If they so confirm the evidence of the witness contradicting the denial of the answer as to satisfy the judicial mind that it is either wilfully false, or, by mistake or misapprehension of the events of which it speaks, is founded on wrong assumptions, their effect will be to require the denial to be sustained by independent proof; and, if this is not furnished, the allegations of the bill will be taken as true. The course, in relation to the force of a responsive answer, has undergone some change. The more modern inclination is rather to assimilate the rules of evidence in the Courts of Equity to those which prevail in the Courts of Law.

Chancellor Wardlaw, in *Cloud v. Calhoun*,

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10 Rich. Eq., 366, *says: "The modern course of Courts of Equity is to restrict the effects of an answer as evidence. Any other course puts the case of a plaintiff too much within the disposal of an unconscientious adversary." In this, he is sustained by Chief Justice Marshall, in *Clark v. Van Riemsdyk*, 9 Cranch, 153 [3 L. Ed. 688], and by Greenleaf, in his note at page 280 of his third volume.

The bill here sought an account from the defendant of the funds held by him in trust for the plaintiff, Mary S. P. Gibbs, for life, with certain remainders, in which the other plaintiffs assert an interest. It charged that she was entitled, as tenant for life, under the will of her deceased father, James S. Guignard, the elder, of which her brother, the said defendant, was executor, to certain specific devises and bequests, and that, claiming of him an account, and the payment of what might be thereon due her, and partition of the residue of the estate, he had refused compliance with her requests, always averring that he held, as her trustee, under the will, his own note for the sum of \$10,000, the interest of which he had paid her to 1864.

That, at the beginning of the war, she had earnestly requested him not to invest any of her funds in Confederate securities; but, on the contrary, advised him to invest them in building on land in the city of Columbia, which he declined; that she believed that he did abstain from making investments for her in Confederate securities until 1865, when they, having become almost, if not entirely, worthless; he, as she is informed and believes, assumed to transfer to her credit, or mark with her name, certain Confederate States bonds, which he had before purchased for his own use, in payment and satisfaction of his indebtedness to her; and, on October 13, 1865, informed her that all was lost, and that he then held a package of said bonds for her of \$10,000 or \$10,600; that she then, for the first time, became aware of his attempts to dispose of her separate estate, and cancel his acknowledged indebtedness, by the substitution of securities which he

knew were absolutely worthless; that, still refusing to render any account of his actings and doings as trustee, or to pay what may be due her, she prays that he may be required to account; and, after a prayer for partition of the real estate of the testator, and the interpretation of a certain clause in the will, follows a general prayer for relief.

In addition to the interrogatories, which but, in effect, repeat the charges made, the defendant is required "to answer whether he did, at any time, and, if yea, at what time or

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times, in particular, *and from what person or persons, purchase for her, or in her name, or invest her funds in his hands, and, if yea, to what amount, in Confederate State bonds."

The answer, setting forth the various items which, in 1863, contributed to make the trust fund of the plaintiff, in the hands of the defendant, amount to \$10,388.03, denies the averment that he ever held, or declared to the plaintiff that he held, his own note for \$10,000 as her trustee; that plaintiff ever requested him not to invest her funds in Confederate securities; and that he refrained from so investing them, until such securities becoming worthless, he transferred some which he owned in satisfaction of his indebtedness, as charged; and further denies her application to invest in building, until some time in 1864, when the difficulty of obtaining materials and workmen rendered it almost impossible to build at all. It sets forth that the funds of the plaintiff in his charge, at the beginning of the war, consisted of personal bonds and notes, and probably a part in money, and, as payments were made, he reinvested in the same way, until some time in 1863, when, finding himself in possession of her whole trust estate in currency considerably depreciated, and unable to loan at interest, his only alternative was to make what was then regarded a safe and prudent investment. That he made the purchases of the bonds between February and September, 1863, generally in small amounts, and from a great many different persons, whose names he does not remember and cannot set forth, except one Graves and one Willis, from each of whom he bought some.

That, as the bonds were purchased, they were entered in his account, as trustee, at and as of the day of the purchase, or very shortly thereafter, and he filed, with his answer, a statement of his receipts and expenditures, as her trustee.

Whether the answer be responsive, is to be determined by the charges and interrogatories.

Which of these claimed of the defendant a discovery of the securities in which he had invested the trust funds? So far from enquiring as to the character of the investment, the bill averred that it consisted of his note, which he had abstained from converting into

Confederate securities; and that, in 1865, he assumed to transfer to her credit certain Confederate bonds which he possessed as his own, in the place of the note; and that it was not until October 13, 1865, he informed her he held a package of such bonds for her, amounting to \$10,000, or \$10,600.

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*The material charge conveyed by the allegations of the bill is, that he had substituted, in the way of payment or satisfaction, the depreciated currency which he owned on his own account. His answer, in denial of this, is responsive, but when he proceeds further, and alleges it was her own Confederate money, received by him in payment of the loan of her trust funds, from time to time, he sets up an independent matter of defence, which throws upon him the burthen of maintaining it by proof.

The interrogatory, whether he did, at any time, and if so, when, and from what person, purchase, on account of her trust interest, such securities, must be referred to, and taken in connection with the previous matter set forth in the bill. It is very true that, to some extent, every interrogatory may be considered as a distinct allegation. The purpose of the one now referred to could only be to compel a disclosure of the names of the parties from whom the purchases of the bonds were made, so that, if, in his answer, he repeated what the bill charged he had communicated to the plaintiff on the 13th October, 1865, she might possibly avail herself of the means of contradicting him.

Is the bill framed with a view to the discovery of the character of the investment made by the trustee, as ancillary to the prayer of relief by account and payment, or, substantially, is it only for an account? What was to be discovered?

The principal claim against the defendant, as stated in the bill, arose under the will of the father, and from a debt which she supposed he owed her at his death. She was the beneficiary of a fund which had passed into the hands of the defendant, who recognized and dealt with it as a trustee on her behalf. He, on his part, sets up, in defence, the loss of the whole, through an investment made by him without previous consultation with, or notice to, her; and he maintains that his answer, in this regard, is a shield which must protect him, unless he can be contradicted by two witnesses, or one witness, corroborated by circumstances, in themselves so convincing that they must be accepted as the testimony of an additional witness.

The interrogatory, which calls on him to answer "whether he did, at any time, and, if yea, at what time or times, in particular, and from what person or persons, purchase for her, or in her name, or invest her funds in his hands, and, if yea, to what amount, in the purchase for her of Confederate States bonds," is met by a response so vague and indefinite as to afford no information as to

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*the periods of the alleged purchases, or the persons from whom made.

The allegations in the bill do not appear to us so to negative the fact of the investment, that the assertion, in the answer, of his having made it, can be taken as evidence conclusive, unless rebutted by the testimony of a witness and corroborating circumstances.

If, however, the answer as to the investment made is to be regarded in response to the bill, still, the testimony of the plaintiff with the independent facts so strongly confirming it, may well stand in the place of "a second witness." From the fiduciary relation which the defendant bore to the plaintiff, assuming that he was under no legal obligation to consult or confer with her, his communication of his intention to convert the whole of the funds which he had in hand for her into Confederate bonds, even as a mere matter of business, was certainly to be expected: it was natural to look for it—and, yet, neither his answer or his testimony, intimate such disclosure. It may, at least, excite surprise that a transaction, in which she was so much interested, was not made known to her at the time, or soon thereafter. The conduct of the party failing to do that which, under the circumstances, it was likely he would have done, may contribute much force to a judgment which is to be reached by a review and consideration of his acts and omissions. The defendant does say, in answer, that she was apprised of the purchase long before the failure of the Confederacy, yet he does not repeat it in his testimony, neither does he state the time when, nor the manner in which, the information was obtained. How long after the alleged investment, does not appear from his answer or his evidence.

The plaintiff, in her testimony, states, in addition, that, after General Sherman had left Columbia, (which was in February, 1865,) the defendant told her "that her money was in personal bonds, not better than Confederate;" and, soon after, he said "the money was in Confederate bonds;" and, being uneasy, to satisfy herself, she, with Mr. Lee, (at her request,) sought her brother, and, on meeting him, she asked "how her money was invested," when he replied: "In personal bonds, but they are not better than Confederate bonds." The testimony of Lee is substantially in accord with her own, as to the conversation. Although the defendant was examined after this testimony was given, he did not attempt to contradict it.

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*"Verbal admissions should be received with great caution; but where they are made deliberately, and precisely identified, the evidence they afford is often of the most satisfactory character."—1 Green. Ev., § 200. See, also, Gresley Eq. Ev., p. 456.

The answer itself may furnish statements which might go far to refute the very de-

fence relied on by it. Chief Justice Marshall, in *Clark v. Riemsdyk*, already referred to, says: "There may be evidence arising from circumstances stronger than the testimony of a single witness;" and, if these are furnished by the defendant, they operate with still more force against him.

The answer states "that the bonds were bought, from time to time, as opportunities afforded, from a great many different persons, and, generally, in small amounts from each; that, as they were purchased, they were entered in his accounts, as trustee, and as of the date of the purchase, or shortly after." This is set forth as a fact, and with a particularity which forbids the conclusion that it is the language of the draftsman, and not that of the defendant. In his testimony, he says: "The entry was made in book, a lumping one," and immediately follows this by saying: "The entries were made according to the occurrence of the facts." How are these contradictory statements to be reconciled? An account current purports to contain a statement of receipts and payments, with the date of each separate transaction. When the account filed with the answer (which is a copy of that in the book) is examined, the entry proves to be a "lumping one," and without any date, except as of the year.

A reference to the account weakens the allegation that the fund was loaned out on personal security, from time to time, and, when paid in, was again put out at interest in bonds and notes. The account, so far from shewing this, exhibits the fact that, on the 1st day of January in each year, the defendant charges himself "with amount in hands," and continues thus to do, until January, 1861, inclusive. On 1st January, 1864, he credits the estate with one year's interest on \$10,338.03, \$723.68, which would be at a rate of interest of 7, not 8 per cent., which the Confederate bonds, as he avers, (except one or two,) bore. How was it, too, if the fund was loaned out annually, that the interest was paid quarterly to the plaintiff, as appears to have been done from 1857 to May, 1862, and what is the irresistible inference from the entry, "1860. April 2nd: To cash, 1/4 interest on \$9,008.03, funds in hand." Signed "S. P. G."

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*While we are forced, by the preponderating weight of the testimony, to adjudge that the investment alleged was not made, it is a matter of relief, that we may be permitted to say, it by no means follows that the defendant was influenced by any wilful purpose to deceive, but that he was led to a false conclusion, not with a design to do wrong, but from the imprudent act of so mixing the funds of the trust with his own, that the investment he made of the last, he supposed, in some way, attached to the first. His sudden death precluded him from the opportunity

afforded by the appeal decree, "to explain his book."

The conclusion which we have reached on the point we have discussed, renders unnecessary any consideration of the other ground taken in the motion.

The decree must, however, be modified in one respect. The fourteen hundred dollars is to be regarded as part of the trust fund; it has been so treated throughout the whole case. The defendant, in his answer, states that he received it in the character of trustee. If it was but a simple debt due by him to the plaintiff, the remedy to recover it would belong to another jurisdiction. It was the proceeds of a sale of slaves made by the plaintiff and her husband to the defendant, and with their consent, and that of the donor, their father, to be held by the defendant as part of the trust estate of the said Mary S. P. Gibbs.

It appears, by the order confirming the report of the Referee, that a trustee has been substituted in the place of the deceased, J. S. Guignard, Jr., and without security. Although there is no appeal from that order, lest our want of notice of it, after it has been brought to our view by the brief, may be misinterpreted, we take occasion to say that, unless under extraordinary circumstances, we would not sanction the appointment or substitution of a trustee without security.

The order of the Circuit Court, adopting, as its judgment, the report of the Special Referee in the matter referred to him, is confirmed, except as to the said fourteen hundred dollars, with interest from January 1, 1865, which is hereby ordered and adjudged to be paid out of the estate of the said James S. Guignard, Jr., to the party properly entitled to receive it, to be held subject to the uses and limitations of the trust which originally attached to it.

Decree modified.

WILLARD, A. J., concurred.

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*RACHEL M. MAYER v. BENJAMIN MORDECAI and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Trusts* \hookrightarrow 218.]

By deed made in May, 1860, three bonds, secured by mortgages of real estate, were assigned to B., in trust, to invest the proceeds, as soon as received, "in such manner as the said B. may think proper, on consultation with" the *cestuis que trust*, and then to permit them to receive the income. The *cestuis que trust* removed, shortly afterwards, from South Carolina, where the trust was created, to New York, and remained there during the war with the Confederate States. In 1862 and 1863, B. collected the bonds in Confederate Treasury notes, then much depreciated, and invested the proceeds in bonds of the Confederate States, without consultation with the *cestuis que trust*, with whom it was, at that time, impracticable to communicate:

Held, That B. committed a breach of trust in receiving payment of the bonds in Confederate Treasury notes, and investing the proceeds in bonds of the Confederate States, and that he was liable to account to the cestuis que trust for the sums received.

[Ed. Note.—Cited in *Sanders v. Rogers*, 1 S. C. 458; *Cureton v. Watson*, 3 S. C. 457; *Singleton v. Lowndes*, 9 S. C. 490; *Koon v. Munro*, 11 S. C. 152; *Rabb v. Flenniken*, 29 S. C. 285, 7 S. E. 597.

For other cases, see *Trusts*, Cent. Dig. § 311; Dec. Dig. ☞218.]

[*Trusts* ☞382.]

Held, further, That the obligors in the bonds were not liable to account to the cestuis que trust, for that they were discharged by their payments to B.

[Ed. Note.—Cited in *Creighton v. Pringle*, 3 S. C. 97; *Geigers v. Kaigler*, 9 S. C. 428; *Black v. Rose*, 14 S. C. 280; *Bolt v. Dawkins*, 16 S. C. 215; *Hyatt v. McBurney*, 18 S. C. 217, 219.

For other cases, see *Trusts*, Cent. Dig. § 621; Dec. Dig. ☞382.]

[*Payment* ☞9.]

[Cited in *Hyatt v. McBurney*, 18 S. C. 220, to the point that a creditor may waive payment in lawful money by accepting substitute.]

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 38, 40, 41, 49, 53; Dec. Dig. ☞9.]

[*Payment* ☞47.]

[Cited in *Salinas v. Pearsall*, 24 S. C. 184, to the point that ordinarily a purchaser need not look to the application of purchase money.]

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 127, 129; Dec. Dig. ☞47.]

[This case is also cited in *Blackwell v. Tucker*, 7 S. C. 400, and distinguished therefrom.]

Before Carroll, Ch., at Charleston, March, 1868.

Under proceedings in the Court of Equity for Charleston District, one of the Masters, by deed, dated 29th May, 1860, assigned to the defendant, Benjamin Mordecai, five bonds, secured by mortgages of real estate, amounting, in the aggregate, to \$8,000, and upwards, and about \$4,000 in cash, to be held by him "in trust, to invest the cash aforesaid, and the proceeds of the bonds aforesaid, as soon as received, in such manner as the said Benjamin Mordecai may think proper, on consultation with the said Maurice Mayer and Rachel M., his wife, and the same being so invested, then in trust to permit the said Maurice Mayer and Rachel M., his wife, to receive the interest and income of the said settled property" for their use "during their joint lives," with limitations over.

Thomas J. Kerr, Moses Goldsmith and Alonzo J. White, respectively, were the parties obliged, in three of the five bonds, and these three bonds, amounting, in the aggregate, to about \$5,000, were paid to Mordecai, in the years 1862 and 1863, in Confederate Treasury notes; and he invested the proceeds in bonds of the Confederate States of America. Kerr, Goldsmith and White were made parties defendant to the bill, and its object was to compel Mordecai to account

to the plaintiff, Rachel M. Mayer, wife of Maurice Mayer, deceased, for the amount of the three bonds paid to him as aforesaid; and, also, to obtain a decree setting up the bonds and mortgages given by Kerr, Goldsmith and White as valid and subsisting securities in favor of the plaintiff.

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*The other facts of the case are stated in the Circuit decree and the judgment of this Court; the Circuit decree being as follows:

Carroll, Ch. In February, 1860, the defendant, Benjamin Mordecai, became the trustee of the plaintiff, Rachel M. Mayer, by appointment of this Court. The entire trust estate that passed into his hands consisted of a sum in ready money, and certain bonds well secured by real estate in the city of Charleston. Under the order settling that property upon Mrs. Mayer, James Tupper, one of the Masters of this Court, on the 29th day of May, 1860, executed a deed conveying the same to the defendant, Mordecai, and declaring the trusts and limitations upon which it should be held.

In the course of the year 1860, Mayer and wife removed their residence to the city of New York, and there remained until the close of the recent war between the United States and the late Confederate States of America. After June, 1861, and while the war continued, all communication between the belligerent sections was cut off. During this period the defendant Mordecai collected three of the bonds held by him as trustee, amounting, in the aggregate, to more than \$5,000, and accepted payment in Confederate Treasury notes. The great bulk of the moneys so collected he received during the year 1863, and \$1,940.58 of that amount as late as the 10th of November of that year. The proceeds of the bonds so received by him he invested in the public securities of the late Confederate States, \$3,600 on the 23d July, 1863, in their 7-30 per cent. Treasury notes, and \$2,000 on the 10th November, 1863, in their 8 per cent. Treasury bonds.

According to the plain and unambiguous import of the trust deed, the bonds referred to were not to be treated by the trustee as permanent investments. The primary trust declared is, that he shall invest "the cash aforesaid, and the proceeds of the bonds aforesaid, as soon as received." Such proceeds—the interest as well as the principal—were to form parcel of the corpus or capital of the trust fund. If the attention is confined solely to the provisions of the deed, the trustee, in collecting the bonds, was acting within the strictest line of his duty. But it is objected that he could rightfully call in the money only for the purpose of investing it, and that the investment directed was impracticable, for any consultation with Mayer and wife had then become impossible. The investment contemplated was to be made

in "such manner as he, the said Benjamin Mordecai, may think proper, on consultation

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*with the said Maurice Mayer, and Rachel Mayer, his wife." It was provided that Mrs. Mayer and her husband should be consulted by the trustee before making the investments directed, in the confidence, doubtless, that he would pay due regard to their wishes and suggestions in the matter. But no more than this seems to have been designed. The final decision, respecting the investments, is to be made, not by them, but by him, "as he may think proper."

It was, undoubtedly, for her benefit, primarily and principally, that the settlement had been ordered. Contingent interests, it is true, are given to the issue, and the husband, in the event of his surviving her. But such provisions are incidental merely to the wife's equity to a settlement, when recognized and asserted in this Court. By the terms of the trust, no beneficial enjoyment could accrue to Mrs. Mayer, or her husband, in respect of the bonds referred to, until the investment, as directed, of the proceeds. The trustee, Mordecai, under such circumstances, might well have deemed it his duty not to be dilatory in collecting those securities, and investing the proceeds so that the income contemplated might be produced with all convenient dispatch for her use and benefit. If, through unforeseen events, the investment of those funds could not be effected in the mode prescribed, yet, if the trustee conformed to it as far as was practicable, he can scarcely be held to have failed in his duty.

If the investment by the trustee, Mordecai, in Confederate securities, cannot be sustained as coming within the description of the investments mentioned in the trust deed, they may yet be held justified upon another ground. It was no breach of trust, looking merely to the trust deed, for Mordecai to receive payment of the bonds referred to. If, in good faith, he collected them for the purpose of letting the proceeds to interest at a higher rate, and upon what he deemed higher security, he was in no fault, though such disposition of the money may not have conformed to the permanent investment contemplated by the trust deed. Having a trust fund in his charge, which he could not dispose of as directed by that instrument, he was, for the time, substantially in the condition of a trustee with funds as to the investment of which the deed creating the trust gives no directions at all. But, in such case, it is the trustee's duty to invest the fund. He is bound to make it productive to the beneficiaries, and, if he fail to do so, he becomes personally responsible.—Hill's Trusts, 375. "When the trust money cannot be applied, either immediately or by a

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short day, to *the purposes of the trust, it

is the duty of the trustee to make the fund productive to the cestui que trust by the investment of it in some proper security."—Lewin on Trusts, 337. The investments in question, being readily convertible into money, may, therefore, be sustained as investments temporary and provisional, operating merely to render the fund productive until it should become practicable to transfer it into the more fixed and permanent investment provided for by the trust deed.

But the plaintiff further contends that, though the trustee, Mordecai, may have had the abstract right to collect the bonds in question, and to invest their proceeds, yet that his acts, in receiving payment in the treasury notes, and in making investments in the public securities of the late Confederate States, were utterly inconsistent with ordinary prudence and circumspection. It is in proof that, in 1862 and 1863, Confederate treasury notes were the sole currency of the country, and, though depreciated, were then "commonly received," and "commonly taken in payment;" that "gold and silver were not used in the payment of debts, and were sold as merchandise;" and that "many persons received payment of bonds held by them in Confederate money, and invested in Confederate bonds." In 1863, we are informed by the testimony that "investments were daily and freely made in Confederate securities;" that "some of the best judges sold real estate, and invested in them;" that Confederate bonds varied in their market value, and "sometimes advanced to a premium of from 43 to 45 per cent.;" and that, in November, 1863, "Confederate securities were highly esteemed—Confederate bonds then at a premium."

It should also be borne in mind that, in 1862 and 1863, the doors of the Court were practically closed against the creditor, and there were no means of enforcing the payment of either principal or interest. The trustee, Mordecai, might well have supposed that, in converting private bonds into public securities of the Confederate States, he was consulting the best interests of the parties beneficially interested. By such investment he secured, at least, prompt payment, and a higher rate of interest. Unbounded confidence then prevailed among the people of the Confederate States that they would be successful in their struggle, and, in view of their immense resources, that their public securities would prove to be advantageous and eligible investments.

As far as the safeness of the investments in question is concerned, no blame whatever can attach to the trustee. While the Govern-

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*ment of the Confederate States subsisted, it was a part of the Government of South Carolina, and, under her law, imprudence and misconduct cannot be imputed to a trustee for having confidence in the public se-

curities of her government. The precise question is considered and adjudged in *Halle v. Shannon*, Mss. Decis., 1866; and no case can be produced where a trustee is held chargeable for having converted private bonds into Government securities.

Wilful dereliction of duty is not imputed to the trustee, Mordecai. He seems to have dealt with the trust estate as he did with his own proper estate. Of his good faith, in respect of his investments as trustee, he has exhibited convincing proof, by his large investments, upon his own account, in the same public securities.

It does not satisfactorily appear that he has been wanting in faithful endeavors to perform the trust committed to him, and it is considered that he has incurred no personal liability, either by the collection of the bonds referred to, or by the investment of their proceeds in the public securities of the late Confederate States of America.—*Hext v. Porcher*, 1 Strob. Eq., 170.

The result is, that the bill must be dismissed, as against the defendants, Kerr, White and Goldsmith. It is but just, however, that the costs should be paid by the defendant, Mordecai. The erroneous, and (until explained) suspicious statement of his accounts first rendered, well justified the plaintiff in instituting this suit.

It is ordered and adjudged, that the bill stand dismissed as to the defendants, Kerr, White and Goldsmith; that their costs of suit be paid by the defendant, Rachel M. Mayer; and, when she shall have paid the same, that they be repaid to her, with her own proper costs, by the defendant, Mordecai.

And it is further ordered, if desired by the plaintiff, that an account be taken of the funds and estate received by the defendant, Benjamin Mordecai, as trustee as aforesaid, and of his administration of the same, conformably to the principles of this decree.

The plaintiff appealed, and now moved this Court to reverse the decree, on the grounds:

1. That the defendant, Mordecai, was not required, by the terms of the trust deed, to call in existing securities at all, or authorized to receive payment thereof, except for the purpose of a more advantageous investment.

2. That the terms of the trust deed required that any new investment should be made

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"upon consultation" with Mayer and *wife, and, such consultation being impracticable, it was in violation of his duties, as trustee, to receive payment of, and, still more, to call in existing securities.

3. That the existing securities, being bonds secured by mortgage of real estate, worth, at the time, in the currency received by the trustee, four or five times the amount called in, the trustee, even with full discretion, was not authorized to call in such securities, un-

less some investment, in all respects more favorable, was presented. But the deed requiring "consultation," and this being impracticable, a fortiori, the change of securities was made at his own risk.

4. Because it was proved that at the time the bonds were called in, and payment received, they were worth more in the market than the money received in payment or the Confederate bonds in which said money was afterwards invested; and, if the securities were to be changed, the trustee should have sold the existing securities and invested the proceeds; and such disregard of the interest of the cestuis que trust was a breach of trust on the part of the trustee.

5. That it was a violation of trust voluntarily to call in securities, or to receive payment of the same, when the currency of the country was so greatly depreciated, and the more so, when the cestuis que trust were not within reach, and could derive no advantage from "prompt payment."

6. That the trustee had no right, without consent of the cestuis que trust, who did not reside in the Confederate States, to receive for them, as money, Confederate Treasury notes, which, even in the Confederate States, were not a legal tender in payment of debts, were greatly below the gold standard in Charleston, and, in New York, where the cestuis que trust resided, were of no value whatever.

7. That the investment of the funds of the cestuis que trust, residing in New York, in the public securities of a Government not acknowledged by the Government under which the cestuis que trust resided, unacknowledged by any other power, and, at the time, sore pressed by a powerful adversary, and the whole country devastated by war, was crassa negligentia, and the trustee acted at his peril.

8. That the securities in which the trustee invested were illegal and unconstitutional.

9. That the issue of Confederate notes was

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illegal and unconstitutional, and payment in said notes was no payment, and, therefore, the original mortgages are still of force.

10. That the decree of the Chancellor is in disregard of all the above positions, and otherwise contrary to the evidence and equities of the case.

Hayne, for appellant.

1. As to first ground of appeal, appellant refers to the provisions of the trust deed. In that deed there is no direction to collect, but simply a trust to invest, "as soon as received, upon consultation," &c. The original bonds under this deed (it is submitted) were held by the trustee under the same trusts with subsequent investments. The investment of the "cash" actually made, "upon consultation," was in a bond precisely similar to the bonds called in, to wit: a bond to Tupper, Master in Equity, for purchase of

Ottolengul property, secured by mortgage of real estate, one-third of the purchase money having been paid. At all events, if the interest of the bonds called in could not be paid, while in the original shape, to the *cestuis que trust*, (which is denied,) this could work no detriment to them during the time when all communication between trustee and *cestuis que trust* was cut off by the war.

2, 3. As to second and third grounds, appellant refers to the following authorities: "The trustee must be particularly careful to execute the trusts faithfully, and according to their terms; * * and, if any doubt or difficulty arise, it is advisable that the trustees should fulfill their trusts under the superintendence and protection of a Court of Equity."—Willis on Trustees, 124, (10 Law Library.) "Trustees have no power in themselves to change the securities on which the trust funds may be invested, unless expressly allowed to do so by the trust."—*Ibid*, 148. "The exercise of a power to vary the existing securities must, necessarily, be left very much to the discretion of the trustees; but the Court will not suffer this discretion to be mischievously or ruinously exercised. Where any check is imposed upon the trustees, by requiring the previous consent of the tenant for life, or his consent in writing, or the observance of any other formality, the power will be improperly exercised, unless the required condition is strictly performed."—Hill on Trustees, 482; *Cocker v. Quaile*, 1 R. and M., 535; *Greenwood v. Wakeford*, 1 Beav., 579; *Kelliway v. Johnson*, 5 Beav., 319. "So are they (trustees) answerable to make good any loss that may arise by placing it (trust money) on improper securities,

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or altering, *without full authority, the security on which the trust property has been previously invested."—*Ibid*, 181. See, also, *Adams' Eq.* 59; *Story's Eq.*, § 1276, note 1; § 1269, note 2; § 1272; 2 *Spence's Eq.*, 934; 1 *Ves., Jr.*, 297; 2 *Cox*, 276. "Money outstanding upon good mortgage security, an executor is not called upon to realize until it is wanted in the course of administration, 'for what,' said Lord Thurlow, 'is the executor to do?' Must the money lie dead in his hands, or must he put it out on fresh securities. On the original securities he had the testator's confidence for his sanction, but on any new securities it will be at his own peril."—*Lewin on Trusts*, 315. See *Ibid*, 298.

The Court will not permit a mortgage to be called in without inquiry.—*How v. Earle Dartmouth*, 7 *Ves.*, 150; *Hill on Trusts*, 382, 483. "Prompt payment" could not in any way promote the interests of the absent *cestui que trust*; and the fact noticed by the Chancellor, that the "Courts in South Carolina were closed to suitors," did not, in their situation, operate to their disadvantage. It was an additional reason for allowing the original investments to remain as they were.

4. As to fourth ground, see *Hill on Trustees*, or any other work on the same subject, *passim*.

5, 6 and 7. As to the fifth ground, the same, as, likewise, the sixth and seventh grounds.

8 and 9. The eighth and ninth grounds, appellant's counsel decline to argue before this Court, they having been already decided adversely by the Court of Appeals of South Carolina. They are submitted, however, for the adjudication of the Court in this case, should the Court be against the appellant on the other points made, with a view to secure to appellant a right to the judgment of the Supreme Court of the United States.

Porter, for Mordecai, appellee.

1. The liability of a trustee is not measured by the abstract rule of his duty; the test is, is there, or is there not, evidence of an honest and faithful endeavor to perform it?—*Hext v. Porcher*, 1 *Strob. Eq.*, 170.

If the trustee act faithfully, and with common diligence, he will not be liable if funds be lost.—*Boggs v. Adger*, 4 *Rich.*, 408.

The measure of the liability of a trustee in this State is good faith, and the same diligence that a prudent man applies to his own

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*affairs. Under this rule the trustee is entitled to be discharged, for there is not the slightest proof of bad faith, and he certainly did as well, if not better, for the *cestuis que trust* than for himself.

Then try him by the deed.

2. The deed is artificially drawn, and must be governed by the ordinary rules of construction. The matter of investment does not depend upon a power, but upon a trust. The very first trust is to invest cash, as well as proceeds of bonds. Distinction between powers and trusts—one discretionary, the other imperative and obligatory on conscience.—*Hill on Trustees*, 370-80; *Lewin on Trustees*, 22; *Withers & Yeadon*, 1 *Rich. Eq.*, 327; 2 *Sugden on Powers*, 393.

Under this deed no income was to be received by *cestuis que trust*, until investment so made. To invest carries with it the power to collect. There could be no investment, until proceeds were received or collected. "There is a clear distinction between cases where there is an express trust for the conversion of existing securities, and cases where there is no actual direction for the conversion."—*Hill on Trusts*, 380. It is like the cases where there is to be a conversion of money into land, upon request, or with consent and approbation. If the manifest object is the conversion, it may be done without request or consent.—*Lewin on Trusts*, 807; *Thornton v. Hawley*, 10 *Ves., Jr.*, 129. The power to invest includes the power to give discharges to the borrowers of the money, upon calling it in.—*Hill on Trusts*, 383; *Wood v. Harmon*, 5 *Madd.*, 368. Test the powers of conversion under this deed, by supposing that the bond was a personal bond,

without security, could not the trustee have made the change without consultation?

But it is said that there was no power to receive Confederate money, which was illegal, and not a legal tender, in payment of the bonds. To this there are several answers:

1. The trust is to invest; the object is conversion; and, if the conversion is made, and the investment accomplished, it is immaterial how or by what process this is accomplished. Suppose that, for the bonds, he had accepted Confederate Government bonds, without the intervention of currency, the objection would have no application. Government securities are the safest investment, and are never at peril.—Lewin, 343; Hill, 381.

2. If the power or duty to invest includes and carries with it the power to collect, then the trustee is authorized to collect in the best or only possible medium of payment.

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A trustee may receive payment in bank bills, if they be a part of the currency of the country. "Bank notes are part of the currency, and a good tender, unless specially objected to."—United States Bank v. Bank of Georgia, 10 Wheat., 333.

3. The Confederate Government was a part of the Government of South Carolina, and the State of South Carolina, in all her departments, recognized and dealt with the currency of the Confederate Government as money; and this justified a trustee in accepting, as a medium of payment, the only currency that was in existence here. It is a question of good faith and common diligence, and is to be governed by the law of South Carolina.—Pearce v. Venning, 14 Rich., 86; Ex parte Ward, guardian of Mrs. Sanders; Hale and Shannon, MSS., Dec., 1866.

But it is said the Government was illegal. The answer is, that it was a Government de facto. See Lord Ellenborough's definition of de facto officer: "One who has the reputation of being the officer that he assumes to be, but is not a good officer in point of law."—6 East, 368. A de facto government is one that, by force of arms, temporarily maintains a territorial jurisdiction, and exercises the rights of sovereignty.—United States v. Rice, 4 Wheat., 246. A de facto government gives the law where it has the power to enforce obedience; and those who live under it are entitled to protection in conforming to the existing state of things.—The case of the Port of Castine; U. S. v. Rice, 4 Wheat., 253; Dana's Wheat., (8th ed.,) § 337 and notes; Yrissari v. Clement, 2 Carr & Payne, 223; 12 Eng. C. L. R., 539.

Persons who leave their property in enemy's territory, act on the understanding that it will be dealt with according to the law of nations; and, according to the law of nations, the municipal and private laws, whether during belligerent occupation or

after completed conquest, remain to regulate private rights and relations until they are changed.—Dana's Wheat., § 347, note 4 on Complete Conquest, and note 3 on Belligerent Occupation. The citizens must be governed by some law regulating private rights and relations, and the law is that of the de facto government until it is changed by legislative authority of the conqueror.—Thorington v. Smith, (8 Wal., 1.) The practice of our State Government, in all its departments, and the decisions of its judicial tribunals, authorized and sanctioned the reception of Confederate currency in payment of debts, and the investment in Confederate securities, as proper and safe and legal.

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*The reception of Confederate currency was not illegal.—Phillips v. Hooker, Amer. Law Reg., Vol. 7, No. 1, Nov., 1867; Robinson v. Insurance Co., Amer. Law Reg., Vol. 8, No. 3, March, 1869; and the case of Thorington & Smith.

War prohibits intercourse, trading and suing; but it does not dissolve the fiduciary relation. That still exists, and the trustee must maintain it in good faith. He must preserve the property in his best judgment, and according to the laws and the circumstances in which he is placed; and, having done this in good faith, he is entitled to a discharge.

Buist, for White and Goldsmith, appellees.

The eighth and ninth grounds of appeal are the only grounds which affect the defendants, Alonzo J. White and Moses Goldsmith.

It is stated, in the points and authorities annexed to the brief, that the appellants' counsel decline to argue them before the Court, they having been already decided adversely by the Court, but they are submitted (it is said) for adjudication in this case, should the Court be against the appellant on the other points made. And it is submitted, on behalf of the said defendants, Alonzo J. White and Moses Goldsmith, should the Court entertain the said grounds of appeal, that they cannot be sustained against them. The bond executed by the defendant, White, was paid in full on the 25th day of May, 1863, and delivered up and cancelled, and the mortgage to secure the same satisfied on the records of the office of the Register of Mesne Conveyance, in Charleston, where it was recorded. The bond executed by the defendant, Goldsmith, was, likewise, paid in full, on the 10th November, 1863, and cancelled, and the mortgage also satisfied. They dealt with Mordecai, trustee, whom they alone knew and recognized as the party authorized to deal with them, and they were authorized and protected by law in so doing, and were bound to know and recognize him, and no one else. The money paid by them was the currency of the country, and the only currency, and satisfaction

of debts in that currency, at the periods at which these bonds were paid, was by no means unusual. If there is any liability in the premises, the trustee, Mordecai, who was acquainted with the provisions of the trust deed, under which he was acting, is the only person who can be held responsible. The defendants, White and Goldsmith, are innocent, and, in the absence of any evi-

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dence whatever of fraud or collusion, *in no point of view can any liability attach to them, or either of them.

And the following cases are referred to, in support of the positions thus assumed: *Pyron v. Redheimer*, 1 Speer's Eq., 135; *Spencer v. The Bank*, Bail. Eq., 468; *Laurens v. Lucas*, 6 Rich. Eq., 217; *Elliott v. Merrimann*, 1 Leading Cases in Equity, 76; *Smith v. Brown*, 5 Rich. Eq., 291.

March 28, 1870. The opinion of the Court was delivered by

MOSES, C. J. When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment, our cases hold that his discretion must be exercised with the same diligence and care that a prudent man would bestow on his own concerns.

It is not to be understood by this that, wherever loss ensues from the investment of the trustee, he will be excused by showing that persons of care and prudence, in the management of their own affairs, made investments of the same character and were disappointed in the result. A prudent man, dealing with his own means, might employ them in speculations promising large gains, or loan them on personal security, or invest in the stocks of railroad companies or other private corporations. If a trustee should, however, so loan, or engage in such enterprises, at the expense of the interests committed to his charge, he could not claim excuse by pointing to the course of individuals, noted for their prudence, by whose example he had been misled.

The principle which is to be extracted from the cases in this State consists with what is said in *Hovenden on Frauds*, 486: "He is bound to manage the property for the benefit of the cestui que trust with the care and diligence of a prudent man." What will constitute the care and diligence thus exacted will depend on the attendant circumstances. If the act, in itself, was an incautious and imprudent one, it will not be sustained; and no aid derived from the fact that the trustee was countenanced in it by the participation of prudent men will give it sanction or support.

In the case under review, the bonds and the cash constituted the whole trust estate. The cash was invested in a bond of the character of those transferred to the trustee, and was secured by a mortgage of real estate.

This was done on consultation with the plaintiffs, and the trustee had therefrom some indication of the investment they preferred. It was, at least, notice to him that

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the other *bonds were in a form of security satisfactory to the parties interested.

He maintains that he was bound to collect, because the proceeds of the bonds, when received, were to be invested; but how were they to be invested? "In such manner as the said Benjamin Mordecai may think proper, on consultation with the said Maurice Mayer, and Rachel M., his wife." The power to collect was not at all dependent on the duty to invest. The bonds, by the deed, were transferred and assigned to him. The legal title was in him, and this, of itself, conferred the power to collect. If the deed had not directed an investment, still it would have been his duty, on the receipt of payment of the bonds, to have disposed of their proceeds in some proper manner, for the benefit of those interested in the trust. An omission to do so would have made him chargeable with interest on the funds retained in his hands, and subjected him to the animadversion of the Court by which he was appointed, for holding, in place of investing them.

It is not in consistency with his position thus taken to say, that the duty to collect was so compulsory that it could not be deferred, because a necessity to invest was imposed upon him. The investment was to be "on consultation" with the plaintiffs. Of their absence, and the impracticability of reaching them, he was aware, and his own action in calling in the securities, which he says was demanded by the deed, was in disregard of a reservation or qualification, which must have been made expressly for their benefit. Although it may be possible that, after consultation, he had the power to reject their suggestions, and disappoint their wishes, by pursuing a course which might be objectionable, and even obnoxious to them, still the condition conferred a privilege, and they should have had the opportunity of communicating their impressions as to the investment which, in their judgment, would best conduce to their interest.

So far as any conversion was to be effected, it was to be done on consultation with the cestuis que trust. The result might have satisfied the trustee of the improvidence of the particular investment to which he was inclined. A conference with them might have aided his judgment. At any rate, he was to invest, after having the benefit which a consultation with them might possibly afford. His authority should have been strictly exercised.

While the trustee relies on their absence as an excuse, on the one hand, for not consulting them, on the other, he avers that an

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early *conversion was for their benefit, as

they were not entitled to the interest on the bonds until they were called in and the proceeds invested. If they could not, as they did not, after the collection of the bonds, receive the interest, in consequence of the want of intercourse between the citizens of the Confederate States and the United States, how were they benefitted in that regard by the change? It would have contributed more to their advantage to allow the interest to accumulate on the bonds than to place them in securities, which, if they produced interest to which the plaintiffs were entitled as income, could be of no avail to them for present use and support, and would, therefore, remain in the hands of the trustee, yielding no profit to them.

It is not clear that the plaintiffs were not entitled to the annual interest on the bonds, and that their enjoyment of it was to be postponed until they were converted, through collection, into some other investment. The deed looked to their reception of the interest on the "settled property," and the bonds constituted that property. A decision of that question is not now necessary, but it will not be out of place to refer to the order which prescribed and fixed the terms of the settlement. It directs "that the share of the plaintiff, Rachel M. Mayer, be conveyed by deed to Gustavus Poyanski," (in whose place the said Benjamin Mordecai was substituted,) "upon the trusts and conditions set forth in the answer to complainant's bill." The answer furnishes the fact, "that the income of the property, so settled, was to be for the joint use of her husband and herself, during their joint lives," &c. If there was a reason for such a change by the Master who executed the deed, it has not been made to appear in the course of the case. It is, at least, certain that the trust contemplated by the plaintiffs was to make them the recipients of the interest accruing annually from the share of the wife in the real estate of her father, which share was represented by the bonds and cash to be transferred by way of settlement.

The motive which induced the trustee to collect the bonds was not, in fact, to provide an investment which would furnish the plaintiffs with the annual income arising from it, as was submitted in the argument. His conception was, that they were entitled to the interest on the bonds, and on that he acted, for the exhibit filed with his answer shows that, to July 5, 1861, at which period communication with the plaintiffs became almost impossible, he did transmit to them the interest received on the bonds.

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*The collection of White's bond stands on a different footing from that of Kerr's and Goldsmith's. Payment of it was tendered to him in Confederate Treasury notes, and we are to consider whether the acceptance of it, in such currency, under the circumstances,

is consistent with the faithful discharge of the duty which he owed to those whose interests were confided to him, in a fiduciary capacity, at a time when they were entirely incapable of contributing, by their presence or their counsel, to the protection of them. The bond was secured by a mortgage of real estate. According to the testimony, in May, 1862, when the first payment in Confederate currency was accepted, such property was worth, in that currency, about fifty per cent. more than it would have brought in gold before the war; and, in May, 1863, when the second payment was made, it was worth three times as much. It was in evidence that "no prudent person would have sold property in 1863 for the same amount, in dollars and cents, that he would have sold it for before the war, and receive payment in Confederate money, or bonds representing on their face that amount." With knowledge of all this, he accepted, in a currency which was not a legal tender, even under the Constitution or laws of the Confederate States, payment of the bond at the amount due on its face. To say nothing of the want of all obligation to receive such currency, can his act be recognized as one of ordinary prudence? The bond and mortgage, as a marketable article, were worth much more than he received. If he had sold them, they would have yielded a higher amount, and his fund for investment in the securities in which he appeared to have so much faith, although issued by a Government waging war against that in the territory of which his *cestuis que trust* were domiciled, would have been still larger. Regarded, even, as a mere business operation, it exhibits, to no small extent, the characteristics of neglect and indifference to his trust.

The fact that the city was besieged, and the buildings subject to the chances of injury by the explosion of shells, affords no excuse. If parties were disposing of their real estate, and retreating to the interior, fearful of the fall of Charleston, the loss to the Confederacy of one of its principal supports, that had so long resisted an attack, would not have contributed to enhance the securities into which he converted the mortgage; and, even if the buildings had been destroyed, there would have remained some value in the land.

What has been said in regard to the bond of White, applies, with still more force, to those of Kerr and Goldsmith. The trustee,

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*under the circumstances already referred to, invited or called them in, without any offer of payment from the obligors. It is said, in the decree, "that, having a trust fund in charge which he could not dispose of, as directed by the deed, he was, for the time, substantially in the condition of a trustee with funds as to the investment of which the in-

strument creating the trust gives no directions at all."

Is it in his power to seek relief from such inability, when it arose, in a great measure, from his own voluntary act?

That he sold, during the war, his own residence, in Charleston, and invested largely in Confederate bonds, while it exhibits his great faith in the ultimate establishment of the Government whose currency he so much favored, may be accepted as the evidence of a patriotism so controlling as to absorb every selfish and interested motive. He could do as he pleased with his own, but he had not the right to risk, to the chances of the whirlpool, the means of others, entrusted to his care and protection.

Although the trustee is not discharged from liability to account for the three bonds, yet the mortgage, as against the original debtors, cannot be set up as of force. The legal title to the bonds was in him, and with the investment of the proceeds they had no concern. If, according to the ruling in this State, a vendee is not bound to see to the application of the purchase money, (*Lining v. Peyton*, 2 DeS., 375; *Laurens v. Lucas*, 6 Rich. Eq., 226,) or a mortgagee under the order of the Court, that the money is appropriated to the purpose for which the mortgage was taken, (*Spencer v. Bank of State*, Bail. Eq., 468,) much less can a debtor who makes satisfaction to the creditor, in a manner acceptable and agreed to by him, in the form of actual payment, be held to such requisition.

Mr. Justice Inglis, in *Austin v. Kinsman*, 13 Rich. Eq., 265, says, "a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and his voluntary acceptance of such substitute, as payment, makes it so."

If the satisfaction of the bonds was the result of a fraud between the debtors and the trustee, or induced by an improper combination, to the prejudice of the cestuis que trust, or if the debtor knew of the intended misapplication of the proceeds by the trustee, and in any way wrongfully facilitated the accomplishment of that design, the instruments would be set up as existing and

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binding. But *no such proof has been made in the case. On the contrary, as to the two principal bonds, the trustee required the payment. There was no medium of circulation but Confederate currency. This the trustee might have rejected; but, so far from doing so, he sought payment in it. There is no testimony showing any willful combination on the part of White, Kerr, or Goldsmith, with the trustee, that would justify an interference to hold them responsible for the act for which alone he should respond.

It is ordered and adjudged, that so much

of the decree as dismisses the bill, as to the said White, Kerr and Goldsmith, and directs the payment of the costs, be confirmed.

That the decree of the Chancellor, as to the said Benjamin Mordecai, be set aside, and the case remanded to the Circuit Court, with instructions for an order directing him to account, as trustee under the said deed, on the principles hereinbefore set forth, and for all proper orders necessary and requisite to carry out the judgment of this Court in the premises.

WILLARD, A. J., concurred.

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*MARY ANN FITZSIMONS v. PAMELA FITZSIMONS and Others.

(Columbia. Nov. and Dec. Term, 1869.)

[*Executors and Administrators* ⇨312.]

An administrator, with the will annexed, held not liable to a legatee, for personal effects of the estate detained by the administrator, after the debts were, or should have been, paid, and then lost by inevitable accident—the loss having occurred some time after a bill for account, exhibited by the legatee against the administrator, had reached a stage which entitled the legatee to apply for all such administrative orders as were requisite for the security of the effects, or the protection of the interests of the legatee, and before any such application was made.

[Ed. Note.—Cited in *Hinton v. Kennedy*, 3 S. C. 490; *Crane, Boylston & Co. v. Moses*, 13 S. C. 584.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1267; Dec. Dig. ⇨312.]

[*Executors and Administrators* ⇨86.]

Testator died in 1859, leaving, among his effects, a bond for money, well secured by a mortgage of real estate. In October, 1863, when the money due on the bond was not needed for the purposes of administration, his administrator received payment of the bond in Confederate Treasury notes, then greatly depreciated, and immediately invested the proceeds in 8 per cent. bonds of the Confederate States: Held, That the receipt of the Confederate Treasury notes was a devastavit which made the administrator liable to account for the amount of the bond in good money.

[Ed. Note.—Cited in *Koon v. Munro*, 11 S. C. 153.

For other cases, see *Executors and Administrators*, Cent. Dig. § 378; Dec. Dig. ⇨86.]

[*Executors and Administrators* ⇨105.]

Bill for account, filed January, 1860, by legatee, against administrator, with the will annexed. The administrator, with the knowledge of the legatee, deposited, from year to year, the annual balances, for the benefit of the estate, in a savings bank in good credit; and no objection was made by the plaintiff to this mode of securing and investing, at interest, the moneys of the estate, until after the bank became insolvent: Held, That the administrator could not be made to account for interest on the annual balances, any more than for the annual balances themselves.

[Ed. Note.—Cited in *Twitty v. Houser*, 7 S. C. 164.

For other cases, see *Executors and Administrators*, Cent. Dig. § 399; Dec. Dig. ⇨105.]

Before Lesesne, Ch., at Charleston, May, 1868.

Bernard Fitzsimons, late of Charleston, the testator in the cause, died December 4, 1859, leaving a widow, the defendant, Pamela, an infant daughter, Eugenia Clara, born in March, 1857, and a sister, the plaintiff, Mary Ann.

By his will, he devised and bequeathed his whole estate, real and personal, to his sister and daughter, as tenants in common, and appointed his sister guardian of the person and estate of his daughter.

The will was proved before the Ordinary on 10th December, 1859, and on the 27th day of the same month and year, administration, with the will annexed, was granted to the defendant, Pamela—the defendants, James White and M. McBride, being the sureties on her administration bond.

The testator's personal estate consisted of three negroes, some household furniture, the remnant of his stock in trade as a harness maker, and other articles of less value, appraised, in the aggregate, at \$5,183.66, and of rights and credits, as follows: (1.) A bond of R. W. Gale, due 25th November, 1859, for \$3,000 and interest, secured by a mortgage of real estate; and, (2.) other bonds, stock in certain insurance companies, cash on hand, and debts due.

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*Under an order granted by the Ordinary, all the visible chattels, except the slaves, were sold by the administratrix early in January, 1860. By virtue of another order from the Ordinary, the three slaves were offered for sale on the 17th January, 1860, for one half cash, and, as to the other half, on a credit of one and two years, with interest. They were bid off by Dr. Davega, on behalf of the plaintiff, at the aggregate price of \$3,160, but the terms of sale were not complied with. The original bill, in this case, was filed on the 19th, and a supplemental bill, on the 27th January, 1860. The administratrix and her two sureties were the parties defendant. The facts hereinbefore stated were set forth, and it was alleged that the debts of the testator were inconsiderable; that the sale of the slaves was not necessary for their payment, and that the plaintiff, as well on behalf of her ward as herself, greatly preferred receiving them specifically. It was also charged that the defendant, Pamela, had suddenly and clandestinely withdrawn herself and her child from the jurisdiction of the Court; and it was prayed *inter alia*, that the administratrix may be enjoined from selling the slaves, or demanding the price at which they were bid off; that she may be compelled to surrender the custody of her infant daughter to the plaintiff, as testamentary guardian; and that she and her sureties may be required to account for her administration of the personal estate of her testator.

On the filing of the original bill, an order was made by one of the Masters, enjoining the defendant, Pamela, from selling or removing the slaves.

On the 25th October, 1860, the same Master, in pursuance of an order made by himself, with the consent of the parties, submitted a report on the accounts of the administratrix, in which he stated the cash balance on hand to be \$2,167.06. Among the documentary proofs referred to by him, was the following: "Deposit book of Palmetto Savings Institution. First deposit, made 3d March, 1860, \$1,510.89. Amount remaining now on deposit, \$2,616.66."

At October Term, 1860, the case was heard by His Honor Chancellor Carroll, on the pleadings and evidence, and also on the report and exceptions thereto by the plaintiff.

From His Honor's decree, which was filed on the 25th September, 1861, it appears that the defendant, White, was the agent of the administratrix in all matters appertaining to the business of the estate: that the preparation of the inventory, the conduct of the sales, the custody of the books of account,

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bonds and evidences of debt, *the collection of moneys, making of deposits, and rendering the account, had all devolved upon him. His Honor refused to make any order in reference to the custody of the infant. He sustained some of the exceptions to the report, and ordered that it be recommitted, and reformed upon the principles of the decree; and he gave the plaintiff leave to amend her bill by making the infant a party. The plaintiff gave notice of appeal, but it was said, that the notice was shortly afterwards withdrawn.

On the 5th May, 1862, the bill was amended by making the infant, Eugenia Clara, a party defendant, and on the 20th February, 1863, her answer by guardian, *ad litem*, was filed.

No further proceedings were taken in the case until the 16th July, 1867, when a reference was ordered upon the accounts of the administratrix. It was commenced on 15th October, 1867. James White was the principal witness for the administratrix. He produced her account down to the close of the year 1863, and vouched it; and he testified that, in September, 1863, R. W. Gale offered to pay his bond in Confederate currency; that he, the witness, consulted the solicitor of the administratrix on the subject, and received a reply, in writing, dated 29th September, 1863, in which he stated that, as the Act of the Legislature legalized the investment of trust funds in Confederate securities, he was of opinion Mrs. Fitzsimons, as administratrix, would be justified in receiving payment, provided she immediately re-invested in a security recognized as valid by the law; that, acting upon this advice, he, the witness, on the 9th October, 1863, re-

ceived from Gale \$3,777.40, in Confederate currency, in full payment of his bond, and, on the next day, he invested, for the estate, \$3,740 of that sum in 8 per cent. bonds of the Confederate States. The bonds were purchased from the agent of the Confederate Government. The witness produced, in evidence, the deposit book of the estate with the Palmetto Savings Institution, and testified that all the moneys of the estate were deposited in that institution.

Much other evidence was given which it is deemed unnecessary to recite. The report of the Master, dated April 22, 1868, is as follows:

"This case was heard before Chancellor Carroll at the October Term, eighteen hundred and sixty, and on the twenty-fifth day of September, eighteen hundred and sixty-one, a decree was filed by him, in which it was ordered and decreed, that the report be

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re*committed and reformed upon the principles of the decree; that the plaintiff have leave to amend her bill by making her infant niece, Eugenia Clara Fitzsimons, a party to the suit; and that, in regard to the litigation in reference to the custody of the said infant, Eugenia Clara Fitzsimons, the parties, respectively, pay their own costs, and that the residue of the costs be paid out of the estate of the testator. Bernard Fitzsimons. I have been attended by the solicitors of the plaintiff and defendants, and a large amount of testimony has been introduced upon the subject of the accounts.

"The bill was amended on the fifth day of May, eighteen hundred and sixty-two, in accordance with the terms of the decree, and the answer of the infant, Eugenia Clara Fitzsimons, filed on the twentieth day of February, eighteen hundred and sixty-three.

"No further proceedings have been taken as to the custody of said infant, who has been residing with her mother, in the city of Savannah, Georgia, since the commencement of the proceedings. This issue is not now made before me. The questions which have arisen and been discussed before me, relate, principally, to the matters of accounts since the hearing of the case in October, eighteen hundred and sixty. Up to that time, the accounts were rendered by the administratrix and before the Court, and are only to be modified in accordance with the directions of the decree. Upon the accounts of the administratrix since October, eighteen hundred and sixty, it is objected:

"First, That it was improper to have received the principal and interest of the bond of R. W. Gale; and it is claimed that the administratrix should be held responsible for the same in consequence of the loss which has accrued by reason of its investment in Confederate bonds. I cannot, however, concur in this. The bond of Gale was past due, and payment thereof tendered, and, before

the receipt of the amount, the administratrix applied, through her agent, Mr. White, to her solicitor, for advice upon the subject, and he gave it as his opinion, that she would be justified in receiving payment, provided she immediately re-invested in a security recognized by the law. The evidence is also abundant, to the effect that it was usual, at the time that the amount of this bond was received by the administratrix, to receive payment of debts due in currency, and the most prudent and judicious persons did so. The evidence also shows that the administratrix, through her agent, on the tenth day of October, eighteen hundred and sixty-three, the day subsequent to the receipt of

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the *amount of the bond, invested the same with the financial agent of the Confederate Government in Confederate eight per cent. bonds. I am of the opinion that no liability can attach to the administratrix as to the principal or interest of this bond.

"Second, That the administratrix should be held liable for the value of the stocks and slaves contained in the inventory, and which have become valueless by reason of the results of the war. It does not appear to me, however, that this claim can, in any point of view, be sustained. The administratrix is not responsible, either for the emancipation of the slaves, or the depreciation of the value of the stocks. She could not settle the estate after the decree of Chancellor Carroll, because the plaintiff had given notice of appeal, and the infant, Eugenia Clara, was not made a party until the twentieth of February, eighteen hundred and sixty-three. No steps, whatever, were taken by the plaintiff in the case, from the time of the notice of the appeal, to the sixteenth day of July, eighteen hundred and sixty-seven, when a reference was ordered, on the motion of the plaintiff's solicitor. In the meantime, the administratrix kept these slaves and stocks, to abide the result of the proceedings in the case; and that they have proved valueless is the misfortune of the parties, and certainly upon no principle can the administratrix be held responsible for them.

"Third, That the administratrix should be held accountable for the amount deposited by her agent in the Palmetto Savings Institution. It seems, however, that the plaintiff is precluded from making this objection, because the deposit book of the said institution, in which the amounts to the credit of the estate were deposited, from time to time, as they were received by the administratrix, was before the Court in the case at the hearing in eighteen hundred and sixty, and that no objection was made at that time as to the deposits of the said amounts. The financial character of the institution is also established to have been high, and trustees and executors and administrators were well

warranted in placing funds of estates under their charge in such institution.

"It appears, by the deposit book, that the amount therein to the credit of the agent of the administratrix, is sufficient to cover the balance, with interest, due to the estate on her accounts. I recommend that, upon the transfer of the said deposit book to the Master, and of all the securities remaining in her possession, the administratrix be discharged from further accountability.

"The decree of Chancellor Carroll directs

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that the fees paid *by the administratrix for services rendered in that branch of the suit which is for an account of the administration, should be alone allowed, and that so much of the account of fees as covers the services rendered in the matter in controversy, in which she is personally interested, should be disallowed. I have, accordingly, allowed the solicitor of the said administratrix, the one-half charged for professional services up to the trial in October, eighteen hundred and sixty. The difference between the amount so allowed and that charged in the account of the administratrix, I regard as reasonable and proper to be allowed for services rendered by the solicitor of the administratrix, since the hearing, in October, eighteen hundred and sixty."

The plaintiff excepted to the report, for the following reasons:

1. Because it is submitted that the complainant is entitled to interest on the annual balances in the administratrix's hands from the first of January, 1861, on which day, as it appears by her account passed by the Ordinary on the 8th January, 1866, and offered in evidence, there was a balance of over three thousand dollars, while there remained only about six hundred dollars of unpaid debts. There was nothing, therefore, to prevent the said administratrix from paying over or tendering to the complainant, or paying into Court, that balance, on the day or at any time after, except that she had wrongfully, and in violation of her oath and the testator's will, fled from, and was out of the State; but the Master has not decided the question.

2. Because there was nothing but the causes mentioned in the first exception which prevented the administratrix from surrendering to the complainant, on the said 1st January, 1861, or at any time after, until February, 1865, the negroes and choses in action of the estate, according to the demand of her original and supplemental bills. Her neglect or refusal to do so was a conversion of the whole estate, and the Master should so have decided.

3. Because the said account shows that the administratrix was in possession of the negro, Henry, up to at least the 1st of October, 1862, receiving and retaining his wages—and the testimony is, that about that time

he was put into the work house by her agent, and there detained until liberated by the Federals, in 1865; and of the negro Jessie, to 1st July, 1861, also receiving and retaining his wages; and there is no evidence that either ever was, with the consent of the administratrix, in the possession of the com-

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plainant; *the report is, therefore, wrong in declaring that the administratrix is not liable either for their wages or their value.

4. Because, as the administratrix held the insurance stocks and bonds enumerated in the inventory, and, especially, the bond of R. W. Gale, secured by a mortgage of real estate, in trust for the complainant and her ward, her obligation, as administratrix "cum testamento annexo," was to surrender or turn them over to those entitled, under the will of her testator, as soon as the debts were paid or provided for, which was on the 1st of January, 1861; and she, therefore, had no authority to call in the bonds, much less to re-invest, as late as October, 1863, without the consent of the complainant, who was always in the State, and, up to — day of October, 1863, in the city of Charleston, living in great poverty and want, and the Master should have reported her liable for the same.

5. Because the administratrix had no right, in October, 1863, after all the debts had been fully paid, to receive payment of Gale's bond and mortgage in any currency, much less to sell it for Confederate money; she was a mere stakeholder or trustee, and the Master should have so decided.

6. Because the complainant is in no manner bound by the deposits in the Palmetto Savings Institution; they were not investments, but mere deposits, made in the name of White, as agent, and not even in the name of the administratrix or for the estate; they are mentioned in the account as a mere memorandum, and not as a debit, while the administratrix has always credited the estate with the moneys so deposited as cash on hand; the Master is, therefore, wrong in deciding that the complainant is concluded in not taking this exception to the first report. In this particular, as the first account stood, there was nothing to except to.

7. Because the assets of all kinds ought to have been turned over to the legatee, who was in the extremity of distress in 1861 or 1862, for, by her bills, she had demanded them; instead of which, they were willfully and wrongfully withheld, for the purpose of harrassing her, and, as far as possible, disappointing testator's will; the administratrix and her sureties are, therefore, liable for the appraised value of the estate, less so much as was applied to the payment of debts; and the Master is wrong in supposing that the complainants' notice of appeal from Chancellor Carroll's decree of 1861, which appeal was only from so much of the

decree as related to the infant Eugenia, and not from so much as related to the accounts, and was not prosecuted in any manner, re-

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moved the obligation of the defendant to turn over or tender the assets to the complainant, or impaired the complainants' right to have them.

8. Because there was no laches on the part of the complainants; every effort was made to recover the proceedings in the previous case, and the report, as soon as the records were returned to the city. It is not pretended that the defendants have been even inconvenienced by the delay; and so much of the Master's report as imputes delay to the complainant is erroneous. The delay necessary to the proceedings, to make the infant, who had been wrongfully and clandestinely removed from the State by the defendant, a party, ought not to be imputed to the complainant—such delay in no manner interfered with the matters of account, or the right of the complainant to the assets, as well for herself as for her ward.

The decree of His Honor the Chancellor is as follows:

Lesesne, Ch. This cause came up in the Master's report on the account of the defendant, as administratrix of Bernard Fitzsimons, and exceptions thereto taken by the plaintiff. The subject-matter of the exceptions is all considered and discussed in the report, and the Court is satisfied with the Master's conclusion. The exceptions rest mainly on the position, that it was the duty of the administratrix to turn over the estate to the legatee in January, 1861, and seek to charge her with the consequences alleged to have resulted from the failure to do so.

But the legatee had filed this bill, and brought the administratrix before the Court in January, 1860. The cause was heard in October of that year, and was in the Chancellor's hands in January, 1861; his decree was rendered some months after, and contained instructions to the Master in taking the administratrix's account. It would have been a very unusual thing, if she had turned over the estate before the Master should make his report, and the Court its decree thereon. The report did not come in for a long time, but no blame is imputable to her for the delay. The exceptions are overruled, and the report confirmed and made the judgment of the Court.

The plaintiff appealed, and now moved to reverse the decree of His Honor Chancellor *Lesesne*, for the following reasons:

1. Because, in overruling the several exceptions filed by complainant to Master Tupper's report, His Honor the Chancellor decided contrary to law, equity, and the facts

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which were before him; and *the complainant respectfully asks that her said exceptions

may be considered with her grounds of appeal.

2. Because the complainant is entitled to interest on the annual balances in the administratrix's hands from the first day of January, 1861.

3. Because the defendants are liable to the complainant for not surrendering, on the 1st January, 1861, or in a reasonable time after, when demanded, the negroes and choses in action of the estate.

4. Because the administratrix and her sureties are liable, as well for the wages as the value of the negroes of the estate.

5. Because the administratrix had not the right or authority, in October, 1863, when all the debts were paid, to receive payment of Gale's bond in any currency, much less to exchange or sell it for Confederate money.

6. Because the complainant is not bound by the deposits in the "Palmetto Savings Institution," made in the name of White, agent, neither is that included in this particular by Master Tupper's first report.

7. Because the complainant's notice of appeal from so much only of Chancellor Carroll's decree as related to the custody of the infant, did not remove the obligation of the defendants to put her in possession of the estate in 1861, and after.

8. Because there was no laches on the part of the complainant, and the delay in making the infant, who had been wrongfully removed from the State, a party, ought to be imputed to the defendants.

9. Because the decree is, in other respects, contrary to law and equity, and should be reversed.

DeTreville, for appellant.

1. An executor or administrator is liable for interest on the annual balances in his hands.—*Turner v. Turner*, 1 Jacob & Walker, 39; *Dawson v. Massey*, 1 B. & B., 231; *Ashburn v. Thomson*, 13 Ves., 402; *Little-shales v. Gascoigne*, 3 Bro. C. C., 73; *Darrell v. Darrell*, 3 Des. Eq., 241; *Brown v. Guignard*, Bail. Eq., 460; *Lafursh v. Richards*, Bail. Eq., 487; *Pettis v. Smith*, 10 Rich. Eq., 356; *Chesnut v. Strong*, 2 Hill, 146; *Oswald v. Givens*, Riley Ch., 38; *Duncan v. Dent*, 5 Rich. Eq., 7; *Duncan v. Folin*, Chev. Eq., 143.

On the evidence, the administratrix is

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liable for the value of *the negroes.—2 Strob. Eq., 227; *Roper on Legacies*, 1 Vol., 566, 568.

3. After payments of debts, and assent to, and admission of legatee's rights, an administrator or executor has no right to change assets from the form in which they stood at death of testator.—*Williams on Ex'ors*, 1239, 1240, 1241, 1242, 1243.

4. That administratrix had no right to invest moneys of estate in Confederate bonds.

5. That the deposit in the Palmetto Savings Institution was in no sense an investment, nor was it for the estate.

6. That, after the demand by bill, it was the duty of the administratrix to tender the balance in her hands to the legatee, or ask to pay it into Court.—*McAlister v. Boyce, McM.*, 275; *Chesnut v. Strong*, 2 Hill, 146.

Buist, contra.

Interest is not to be calculated on the accrued balances in the hands of the administratrix, because the moneys received by her were deposited in the Palmetto Savings Institution, where interest accrued on them from the dates of deposit.

The rule laid down in the cases as to annual balances in the hands of executors and administrators, applies where they have the amounts in their hands, and not to any such case as the present.

No liability can attach to the administratrix for not delivering the negroes and choses in action, and she is not responsible for the emancipation of the said negroes, or the valuelessness or depreciation of the choses in action.

The bill was filed by the complainant for the settlement of the estate, and it is submitted, in the answer of the administratrix, that the complainant should be required to give security for the same or any portion to which she might be decreed entitled, as she was insolvent, and it would, without such security, be wasted; and, in her supplemental answer, the administratrix avows her readiness to make such settlement when the proper time arrived.

Chancellor Carroll, in his decree, decides that the infant, Eugenia Clara, should have been made a party defendant, and that she must become such before any order could be made, either as to her person or estate.

The complainant took no steps to make her a party until the 20th February, 1863, and then it was done while the solicitors of the defendant were absent from Charleston in

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military service, and *without any notice to them or at their office; and no further steps of any kind whatever were taken in the case, until the 16th July, 1867, when a reference before the Master was ordered, on motion of the solicitor of complainant.

The complainant appealed from the decree of Chancellor Carroll, and no notice whatever of the abandonment of the said appeal was ever given, and none was to be presumed from the appeal not being prosecuted, for the sessions of the Appeal Court in the State were suspended during the war.

The first report of the Master in the case was upon an order made, by consent, for an account of the administration of the estate; and, by the decree of Chancellor Carroll, it was ordered, that this report should be recommitted, and reformed upon the principles therein adjudged.

The second report of the Master was not made until 23d April, 1868; and, in the meantime, the losses to the estate, by the

emancipation of the negroes, the valuelessness of the choses in action, and loss of the fund deposited in the Savings Institution, had accrued by reason of the war.

The administratrix had no right or authority to turn over the estate to the complainant before the final decree of the Court, and it was impossible for her to have done so; but, even if it had been done, it does not appear how thereby the losses consequent upon the war, by the emancipation of the negroes, &c., could have been avoided.

This administratrix cannot be held liable for the losses which have accrued in consequence of the war.—*Bellinger v. Gervais*, 1 DeS. Eq., 174.

The bond of R. W. Gale, when collected, was past due, and the obligor tendered payment. Before the receipt of the amount, the administratrix consulted her solicitor, and, through his advice, by letter, the amount due on the said bond was received, and, shortly thereafter, invested, as appears by the receipt of I. S. K. Bennett, in Confederate eight per cent. bonds.

This investment was in conformity with the provisions of the Act of 21st December, 1861, (13 Stat., 57), and, being made honestly, and in good faith, it is submitted that the administratrix will not be held responsible for the loss which has arisen by reason of said investment.

The evidence establishes that the currency of the country, in 1863, was Confederate Treasury notes, and that creditors gen-

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erally, at that time, received payment of debts due in that currency.

Decision of Supreme Court U. S., in *Thorington v. Smith*, (8 Wal., 1); *McLure v. Steele*, 14 Rich. Eq., 113; *McPherson v. Lynah*, 14 Rich. Eq., 121; *Manning v. Manning*, 12 Rich. Eq., 410; *Whitlock v. Whitlock*, 13 Rich. Eq., 170.

The deposit of the moneys received by the administratrix, on account of the estate, in the Palmetto Savings Institution, was before Master Tupper, in 1861, when the first report was made, and also before the Court, and no objection was made by the said complainant to the propriety of the deposit made.

The evidence shews that, at the time, this institution was in a most prosperous and flourishing condition, and regarded as a place where money could be securely deposited and draw interest.

For the loss which has accrued by the depreciation of the value of these deposits, the administratrix cannot be held responsible.—*Morton v. Smith*, 1 DeS. Eq., 123.

The administratrix certainly cannot be held responsible for the delays in the case, more especially for any delay in making the infant a party; for there is not the slightest evidence to establish the fact that such delay was caused by her; and the decree of Chancellor Carroll, filed on September 25,

1861, ordered the complainant to make the said infant a party, and to amend her bill for this purpose, which amendment was not made until 25th May, 1862.

March 28, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The complainant, M. A. Fitzsimons, as legatee of her deceased brother, Bernard Fitzsimons, and as testamentary guardian of his infant child, co-legatee with herself, has brought her bill against Pamela Fitzsimons, the widow and administratrix cum testamento annexo, of her brother, alleging the personal detention of her ward, and, also, actual and intended waste of the estate of her testator, and praying that her ward may be delivered into her personal custody, and that the administratrix may account for such estate. The only aspect of the case before the Court, under the present appeal, relates to certain items disallowed on the accounting before the Master. The testator died in May, 1859, leaving a will, but naming no executor. Letters of administration cum testamento annexo, were issued to the defendant, and within a year thereafter this bill was filed. No question is made as to the bill being prematurely filed,

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nor as to the liability of the defendant to account. The estate that came into the hands of the administratrix was largely in excess of the indebtedness of the testator, but has become greatly impaired, owing, among other things, to the casualties of the war, and the balance is still retained in the hands of the administratrix.

The principal question in the case is, whether the unreasonable detention, by the administratrix, of the effects of the estate, subjects her to liability for that portion lost by inevitable accident.

The account was, originally, taken by the Master, as appears by his report, bearing date 25th October, 1860, under an order made by the consent of the parties. From the date of this order, at the least, all parties were entitled to apply to the Court for such administrative orders as were requisite for the security of the fund, and for partial, or full, distribution, according to circumstances. It was subsequent to this period of time that the events happened through which the loss occurred. The plaintiff could have guarded against such losses by suitable orders. The defendant ought not to be placed in a worse position through the failure of complainant to make available her proper remedies.

Interest is allowed by way of damages for the unreasonable detention of moneys.

If the property is lost by inevitable accident, it may as well be traced to the failure of the complainant to make provision for its security, as to the act of the defendant in unreasonably retaining the effects of the estate beyond the period requisite for the pay-

ment of the debts of the estate. There is, therefore, no preponderance of equity calling upon the Court to shift the burden of such loss wholly upon the defendant. To apply this principle to the case in hand, it will be necessary to examine the items embraced in the grounds of appeal, constituting the exceptions to the account taken.

The first ground of appeal is general, bringing to view the exceptions to the Master's report passed upon by the Chancellor; but as these exceptions are reiterated in the succeeding grounds, the matters embraced in the first will arise for special consideration under such succeeding grounds of appeal.

The second ground demands, as against the administratrix, interest on annual balances from the 1st of January, 1861. As a general proposition, this is undoubtedly correct. The only question is, whether it is applicable to the case, and that will be best considered in connection with the sixth ground.

The third and fourth grounds claim that

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the defendant, in consequence of her failure to surrender the estate on the 1st of January, 1861, has made herself liable for the value and wages of the negroes, and for the choses in action. As it regards the choses in action, it is to be presumed that, so far as the same were not rendered valueless by circumstances occurring during the period they were held by the administratrix, they have been accounted for. It would appear, from the Master's report, dated April, 1868, that the choses referred to consisted of stocks that depreciated in the hands of the administratrix, a bond of R. W. Gale, and a credit for moneys deposited in the Palmetto Savings Institution. The bond and the deposit will receive separate consideration hereafter, leaving the question of the depreciation of the stocks to be considered with that of the loss of the negroes by emancipation. These losses must be regarded as inevitable, and fall within the rule above stated. As it regards the loss of the negroes, the complainant, having arrested the proceedings for their sale by her injunction, has no just ground of complaint. It has been contended, however, that the interruptions to the course of business in the Courts, occasioned by the war, prevented the complainant from obtaining the requisite orders. It is not in proof that she made any effort to obtain orders affecting the security of the property, and it is not to be assumed that administrative orders of that character could not be obtained. But, if it were otherwise, the consequences of an interruption in the business of the Courts would have to be borne where it might chance to fall, and is not the subject of relief of the character sought.

In regard to the claim to the wages of the slaves, the evidence is contradictory as to whether they were paid to the complainant; and it was peculiarly the province of the

Chancellor to determine the question of superiority of weight to be accredited to this evidence.

The administratrix had no authority to collect the amount of Gale's bond in Confederate currency. The money was not needed for the purpose of administration, and the mortgage securing the bond could not have been discharged otherwise than by payment, or tender in gold or silver, or the lawful currency of the United States. Accepting Confederate currency was an unnecessary act, that would have been regarded, at the time, in no other light than a sacrifice of at least a portion of the value of that asset, and actual loss has been realized therefrom. The fifth ground of appeal must, therefore, be allowed.

The sixth ground of appeal objects to the

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allowance of credit to the defendant for a deposit in the Palmetto Savings Institution, of the funds of the estate. This institution appears to have been in good standing until about the close of the war, when it became insolvent. It appears, by the account stated by the Master, that the administratrix was credited, March 2d, 1860, with a check for the amount then deposited in the Savings Institution. Whether any disposition was made of this check at the time, does not appear, nor does it appear that the plaintiff made any attempt to withdraw the deposit, or, indeed, objected to its security. It must, therefore, be considered that the deposit, if allowed to remain and to be increased by subsequent deposits, was at the risk of the complainant, so far as she had an interest in it, who could protect herself by the requisite orders. In the absence of proof to the contrary, it is to be assumed, that an amount equal, at least, to what ought to appear in the annual balances, was kept on deposit in the Savings Institution. Assuming such to be the case, and the complainant, on the principle of allowing a credit to the administratrix for the amount so deposited, is not entitled to an allowance of interest on the annual balances, independent of the interest accruing on the savings deposit. It does not appear that the administratrix received actual payments by way of interest on the savings deposit; and it must be assumed, as the case stands, that the interest was, from time to time, credited by the bank in account, and that the accumulations of interest have been lost, with the rest of the deposit, by the failure of the institution. The complainant is not entitled, therefore, to the allowance of interest forming the subject of the second ground of appeal.

The seventh and eighth grounds of appeal are argumentative merely, tending to free the complainant from a charge of laches in permitting the defendant to continue in possession of the fund. The question involved is not one of laches, but of the complainant's

failure to use her proper remedies, previous to the loss of the property, disentitling her to throw that loss upon the defendant.

The ninth ground is general, and cannot be considered independently of a specification of the matters to which it relates.

All of the grounds of appeal, except the fifth, are disallowed, and the cause must be remanded to the Circuit Court, to ascertain the liability of the defendant in reference to the bond of R. W. Gale, upon the principles before set forth.

MOSES, C. J., concurred.

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*ABRAHAM BAUM v. MYER STERN.

(Columbia, Nov. and Dec. Term, 1869.)

[Partition \hookrightarrow 14.]

Bill in the State Court, by A., against B., for partition of land. C. and D., judgment creditors of B., intervened, and a decree was made for sale of the land, and directing B.'s share of the proceeds to be applied to the judgments of C. and D., in their order of priority. After the decree, but before sale thereunder, B. was adjudged a bankrupt, and, thereupon, C. and D. intervened in the Bankrupt Court, and a decree was made by that Court, ordering B.'s assignee to sell his interest in the land, and apply the proceeds to C.'s judgment. Under this decree, the assignee sold B.'s interest in the land to E., and he filed a separate bill against A. for partition: *Held*, That E. could not sustain his bill, and it was dismissed.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 37; Dec. Dig. \hookrightarrow 14.]

[Partition \hookrightarrow 49.]

E. having, by his purchase at the assignee's sale, succeeded to all the rights of B., C. and D., his remedy was to come in under the decree in A. against B., and claim the interests of the parties to whose rights he had succeeded—semble.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 130–135; Dec. Dig. \hookrightarrow 49.]

[Bankruptcy \hookrightarrow 211.]

The execution of a decree for partition, of a State Court, is not arrested because one of the parties to the suit becomes a bankrupt, and his share of the property is vested in the assignee. The assignee, like any other purchaser, pending the suit, takes subject to the rights of the other parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. \hookrightarrow 211.]

[Bankruptcy \hookrightarrow 210.]

Proceedings in a State Court to enforce a lien, pending at the commencement of proceedings in bankruptcy, are not affected by the latter, but the creditor may go on to obtain satisfaction out of the lien. It is otherwise as to a personal judgment against the debtor.

[Ed. Note.—Cited in *Daniels v. Moses*, 12 S. C. 138.

For other cases, see Bankruptcy, Cent. Dig. § 322; Dec. Dig. \hookrightarrow 210.]

[This case is also cited in *Stern v. Epstein*, 14 Rich. Eq. 10, as to facts.]

Before Carpenter, J., at Charleston, April Term, 1869.

The facts of the case are stated in the de-

cees of His Honor the Circuit Judge, which is as follows:

Carpenter, J. This was a bill, filed by Baum, for partition of certain premises, situated in the city of Charleston, in one undivided moiety, of which Stern was tenant in common.

From the pleadings and evidence, it appears that, in August, 1866, the premises were jointly owned by Philip Epstin and Myer Stern. On the 10th of August, 1866, Stern filed his bill for partition against Philip Epstin. N. Zemansky, who had entered judgment in the United States Court against Philip Epstin, on 23d October, 1866, and Simon Wolff, who had entered judgment against Philip Epstin, in the Common Pleas for Charleston County, on ———, 186—, were made parties to the proceedings in equity. Upon the report of the Master and Commissioners in partition, a decree was made, on the 11th November, 1867, for sale of the premises, after due advertisement. (a.)

On the 2d March, 1868, and before any sale made under the decree, Philip Epstin filed his petition in the Bankrupt Court, was duly adjudged a bankrupt, and Henry Deas, Jr.,

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appointed his assignee. Both the judgment creditors of Epstin filed their petitions in the Bankrupt Court, setting up their liens, and praying sale of the premises for the satisfaction of the liens.

The petition of N. Zemansky was referred to the Register in Bankruptcy, who reported upon the validity and amount due on the judgments, and, on the 22d July, 1868, the United States Court, sitting in bankruptcy, ordered a sale of the interest of Philip Epstin in the premises, for the payment of the lien of N. Zemansky. Under the judgment of the United States District Court, sitting in bankruptcy, the interest of Philip Epstin was sold at auction. Abraham Baum, the complainant, became the purchaser, and title was executed to him for one-half part of the premises, by Henry Deas, Jr., the assignee, and Baum has filed his bill, in the present cause, for partition of the premises between himself and his co-tenant, Myer Stern. It is the right of the defendant in partition to have the title of the complainant in partition established before any sale or partition of the premises can be made, and that I understand to be the issue made in the present proceedings.

When Philip Epstin filed his petition in bankruptcy, no sale had taken place under the decree of the Court of Equity. All the proceedings in equity and the decree of the Court rest, for their validity, upon the fact that title to one-half of the premises was in Philip Epstin; that title had not been divested by sale under the decree, and, on the adjudication of bankruptcy and appointment

of an assignee, all the estate, right and title of Philip Epstin vested, by operation of law, in the assignee of Philip Epstin.

Of the jurisdiction of the Bankrupt Court to order a sale of the estate of a bankrupt, for the satisfaction of liens, I cannot entertain a doubt.

The Act of Congress, approved March 2d, 1867, known as the Bankrupt Act, extends the jurisdiction of the District Court of the United States to all cases and controversies arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the various funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the

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bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

Sitting here, as Judge of the Court of Equity of the State, I am bound to assume that all the proceedings in that Court were regular and legal, and as the complainant produces the order for sale, made by a Court of competent jurisdiction, and a deed executed by the proper officers of the Court, I must regard his title as clear, and himself entitled to the relief prayed for in his bill.

It is conceded by the counsel in the cause that an equal partition, by metes and bounds, cannot be effected.

It is, therefore, ordered, adjudged and decreed, that the Sheriff of Charleston do proceed, after giving twenty-one days' notice in one or more of the gazettes published in the city of Charleston, to sell the premises described in the pleadings; one-third cash, balance in three equal successive annual installments, with interest at the rate of seven per cent. per annum, payable annually, secured by bond of the purchaser and mortgage of the said premises; the buildings to be insured, and policy of insurance assigned; and that, out of the proceeds of said sale, he do first pay the costs of these proceedings, and the costs in the proceedings in Stern v. Epstin; and that he do divide the residue of said proceeds equally between the said Myer Stern and A. Baum.

The defendant appealed, and now moved this Court to reverse the decree of His Honor, on the following grounds:

1. Because, under the decree of Chancellor Johnson, in the case of Myer v. Phillip Epstin et al., filed on the eleventh day of November, eighteen hundred and sixty-seven, the lot of land in King street was ordered to be sold, and the proceeds of sale distributed among

(a.) See this case reported in Stern v. Epstin, 14 Rich. Eq., 10.

the parties to the said cause, including Nathan Zemansky and Simon Wolff; and the said decree is still valid and subsisting; and the present bill, which likewise seeks a sale of the said lot, cannot be maintained.

2. Because, Nathan Zemansky, having become a party to the proceedings in the case of Stern v. Epstin, upon his own petition, intervening for his rights, and praying that they be protected, is concluded by the said decree; and by no proceeding of his in the United States Court, after the bankruptcy of Philip Epstin, could the rights of the parties under the said decree be impaired.

3. Because the complainant Abraham Baum, purchased at the sale by the United States

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Marshal, no more than the right, title *and interest of the defendant, Philip Epstin, in the said lot of land in King street, subject to the said decree, and he acquired no right, by the conveyance to him by the said Marshal, to repudiate and annul the said decree, and file this bill for the sale of the said lot, ignoring the vested rights of all persons thereunder.

4. Because His Honor erred in ruling that the complainant took a good title to one undivided moiety of the said property, under the deed of Henry Deas, Jr., assignee, notwithstanding a previous existing decree in this Court for the sale of the said premises.

Simon Wolff, whose petition praying leave to be made a party to the proceedings had been dismissed by His Honor, also appealed, on the same grounds, except the last.

Cohen, for Stern, appellant.

Buist, for Wolff, appellant.

Porter & Conner, for Baum, appellee.

March 28, 1870. The opinion of the Court was delivered by

WILLARD, A. J. Complainant has obtained a decree in partition against his cotenant, the defendant, Stern, from which Stern now appeals. The facts brought up by the appeal are, that complainant's title was obtained by purchase at a sale of Epstin's interest in the land, under a decree of the United States District Court in bankruptcy. At the time of the institution of the proceedings in bankruptcy, Epstin, the bankrupt, was bound, as to the land in question, by a decree for partition in a suit by Stern, against Epstin, to which Zemansky and Wolff, judgment creditors of Epstin, were parties.

Epstin petitioned to be declared a bankrupt, and Zemansky and Wolff both intervened as creditors in the District Court upon petition. Epstin was declared a bankrupt, an assignment of his property made, and the real estate in question was sold by the assignee in bankruptcy, and the complainant became the purchaser. Wolff, who intervened in the present case by petition, also appeals from complainant's decree.

The main question in the case is, whether the complainant, in becoming a purchaser from the assignee in bankruptcy, Epstin's interest in the land in question, became bound by the decree in partition in the suit of Stern v. Epstin. If so, the present bill cannot be maintained, the matter being res

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adjudicata as to such parties *and their privies. Unless complainant can disconnect himself from the decree in Stern v. Epstin, he must be regarded as affected by privity with such decree. If complainant had, after decree, purchased Epstin's interest without the intervention of a judicial proceeding, he would have been bound by the decree.—*Bishop Winchester v. Paine*, 11 Ves., 194; *Murray v. Ballow*, 1 John's Ch., 566. So he would be bound had he purchased at Sheriff's sale under a judgment against Epstin.—*Stern v. Epstin*, 14 Rich. Eq., 10. Does he stand in a better position as purchaser from the assignee in bankruptcy? He took, by such purchase, only the estate that passed into the hands of the assignee.

The assignee took the rights of Epstin "in the same plight and condition as he possessed them."—*Mitford v. Mitford*, 9 Ves., 87. He also took the legal liens of Zemansky and Wolff, with power to sell by way of enforcing them. Epstin, Zemansky and Wolff, being parties to the decree in Stern v. Epstin, the estate in the hands of the assignee was charged with the equities established by that decree.—*Mitford v. Mitford*; *Brown v. Heathcote*, 1 Atk., 160. Accordingly the complainant, succeeding to the rights, as they stood in the hands of the assignee, is bound by the decree in Stern v. Epstin.

It has been contended, in behalf of the complainant, that the exclusive jurisdiction of the District Court, in cases of bankruptcy, ousted the jurisdiction of the State Court. It is not easy to perceive how exclusive jurisdiction in matters of bankruptcy can oust jurisdiction in partition. But it may be said that, inasmuch as the decree in Stern v. Epstin directed the application of the proceeds of Epstin's half of the premises to the payment of the judgments of Zemansky and Wolff, in their order of priority, it ought to be regarded, quoad hoc, as a remedy to enforce the payment of Epstin's debts, and, therefore, as brought within the range of a jurisdiction in matters of bankruptcy. Proceedings to enforce the lien of a creditor in a State Court, pending at the commencement of proceedings in bankruptcy, are not affected thereby, but the creditor may proceed to obtain satisfaction out of his lien; though, as to a personal judgment against his debtor, he is liable to be affected by his certificate of discharge.—*Peck v. Jenness*, 7 How. U. S., 612 [12 L. Ed. 841]. It is not a question here whether the District Court might have affected the rights of the parties as established by the decree, as nothing of that kind has

been attempted.—Ex parte Christy, 3 How., 292 [11 L. Ed. 603]; Norton's Assignee v. Boyd, 3 How. 426 [11 L. Ed. 664]. Nor is

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there any conflict between the rights of the several parties, as established by the decree in Stern v. Epstein, and as fixed by the bankrupt proceedings. The complainant virtually claims that he has succeeded to all the rights formerly possessed by Epstein, Zemansky and Wolff, as those rights stood under the decree. If that fact is established in a proper form, it will present the case of a change in the relative interests claimed under a decree, by matter occurring subsequent to the entry of the decree, and he will be entitled to have it modified accordingly. Thus it appears that full force can be given to the rights established through the agency of the Bankrupt Court, while, at the same time, the decree in Stern v. Epstein can be carried into execution.

It is clear, therefore, that the present bill ought to have been dismissed.

The third ground of appeal, in both the appeals of Stern and Wolff, advances the proposition that on a sale of the premises, under the decree in Stern v. Epstein, the complainant will only be entitled to what, according to the terms of the decree, Epstein would be entitled to receive, namely: the balance of one half of the proceeds of the sale after satisfying the respective judgments of Zemansky and Wolff. In other words that Wolff's judgment must be paid before the complainant can receive anything beyond what would be applicable to Zemansky's judgment.

We cannot sanction this view. Wolff submitted his demand to the District Court and the sale in that Court has worked a change in Wolff's interest in the decree which passed thereby to complainant and ought to be enforced for his benefit.

The appeal must be sustained and the bill dismissed.

MOSES, C. J., concurred.

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*JOEL M. WOMACK v. ROBERT AUSTIN, Ex'or, and Others.

(Columbia, Nov. and Dec. Term, 1869.)

[*Guardian and Ward* ⇨164.]

W., an infant, was entitled to a considerable estate under his father's will, and A. was executor of the will, and since the father's death, a period of between five and six years, had acted as W.'s guardian. Three days after W. arrived at age, A. turned over to him certain securities of which, as he represented, the estate then consisted, and took from him a release, drawn by A.'s agent, from further liability. There was no actual fraud, but W. acted without advice, and various matters relative to the value of the securities, A.'s duties in the discharge of his trust and W.'s legal rights, which it was important to W. that he should know before executing the release, were not disclosed: *Held*, That it was A.'s duty, under the circum-

stances, to make the disclosure, and, principally because he had failed to do so, the release was set aside.

[Ed. Note.—Cited in Livingston v. Wells, 8 S. C. 361.]

For other cases, see *Guardian and Ward*, Cent. Dig. § 551; Dec. Dig. ⇨164.]

[*Guardian and Ward* ⇨142.]

It is not necessary to show actual fraud in order to invalidate a release given by a ward to his guardian shortly after the arrival of the former at age.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 463; Dec. Dig. ⇨142.]

[*Appeal and Error* ⇨1009.]

To obtain the reversal of a Circuit decree, upon a question of fact merely, it must be shown that the overbearing force of the evidence is against the decree.

[Ed. Note.—Cited in Lucken v. Wichman, 5 S. C. 414; Thew v. Porcelain Mfg. Co., Id., 422.]

For other cases, see *Appeal and Error*, Cent. Dig. § 3974; Dec. Dig. ⇨1009.]

[*Trusts* ⇨218.]

Where the instrument creating the trust designates the securities in which the investments should be made, the trustee will not be excused, except in case of a controlling necessity, for investing in other kinds of securities.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 310; Dec. Dig. ⇨218.]

[*Executors and Administrators* ⇨102; *Wills* ⇨570.]

The will directed the moneys of the estate to be invested by the executor "in some safe public securities, in the stocks of the city of Charleston or of the State of South Carolina:" *Held*, That the stocks designated were those of the city in its corporate capacity, and those created immediately and directly by the State, and that the executor was liable for investments, made in 1861, in the stocks of incorporated Banks, and, in 1863, in bonds of the Confederate States.

[Ed. Note.—Cited in Sanders v. Rogers, 1 S. C. 458; Singleton v. Lowndes, 9 S. C. 490; Koon v. Munro, 11 S. C. 153.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 420; Dec. Dig. ⇨102; *Wills*, Cent. Dig. § 1243; Dec. Dig. ⇨570.]

[*Executors and Administrators* ⇨102.]

Held, further, That the executor was liable for investments made in 1863 in personal securities.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 420; Dec. Dig. ⇨102.]

[This case is also cited in Dunsford v. Brown, 19 S. C. 569, and distinguished therefrom.]

Before Carroll, Ch., at Charleston, February, 1868.

The object of the bill in this case was to set aside a release given on the 6th February, 1866, by the plaintiff, Womack, to the defendant, Austin, and to compel the defendants to account for the estate of the plaintiff's father, which came to the hands of his executors.

From the pleadings and the evidence, it appeared, that John B. Womack, the plaintiff's father, and the testator in the cause, died on the 30th June, 1861, leaving a considerable estate, and also leaving a last will and testament, whereby he bequeathed his

estate in such manner that, within a year after his death, the whole became vested in the plaintiff, his only child, as sole legatee thereof. The defendant, Austin, W. W. Wilbur, deceased, and the plaintiff, were nominated executors, and the will directed, *inter alia*, as follows: "After my just debts and funeral expenses are paid, I direct that all my real and personal estate, which I may be seized and possessed of at the time of my death, be sold to the best advantage, and the proceeds, together with the money and choses

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in action then in my *possession, or to which I may be entitled, be invested in some safe public securities, in the stocks of the City of Charleston, or of the State of South Carolina, by my executors." The will was dated on the 25th June, 1860, and the plaintiff was, at that time, between fifteen and sixteen years of age. On the 3d day of July, 1861, the will was proved before the Ordinary of Charleston District, by W. W. Wilbur and the defendant, and they assumed the execution thereof. Wilbur died some four months afterwards, leaving a will, by which he appointed the defendants, T. A. Wilbur and M. B. Wilbur, executors.

In September, 1861, the executors invested moneys of the estate then on hand, in the purchase of 225 shares of the stock of the People's Bank of Charleston, and 19 shares of the Planters' and Mechanics' Bank; and, in 1863, Austin invested \$3,000 in 8 per cent. bonds of the Confederate States. He also loaned \$3,000, on the 15th May, 1863, to Lewis Cannon, on bond and mortgage, and \$6,000, on the 29th October, of the same year, to T. S. Heyward, taking his note for the same, with Nathaniel Heyward as surety.

Austin took charge of the education and maintenance of the plaintiff soon after his father's death, and acted as his guardian during his minority. He arrived at age on the 3d February, 1866, and, two days after, (February 5th,) he and Austin went to the office of Mr. Buist, Ordinary of Charleston District, to have a settlement. No one was present but Mr. Buist and themselves. At this interview, which lasted about one hour, not much was done. On the next day, (February 6th,) the plaintiff returned to the office of Mr. Buist, and there, in the absence of Austin, who had gone into the country, he executed a paper, under seal, which Mr. Buist had drawn, by which he acknowledged the receipt, "from Robert Austin, surviving executor of John B. Womack," of the bank stock, Confederate bonds, bond and mortgage of Cannon, and note of Heyward, above mentioned, and some other securities. The conclusion of this paper is as follows: "The balance of \$1,096.08, in Confederate States notes, due said executor, as appears in his annual accounts to Ordinary's Court, he cancels and releases all claims to same in favor of legatee. The enumerated assets constitute the entire estate of said John B. Womack,

principal and income, and is now received by me, under provisions of testator's will, having arrived at legal age, to wit: twenty-one years and three days, in full payment and settlement of my entire claim as legatee; and I do hereby release and discharge

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said executor from all further claims *and liability for or on account of any right or interest I may have in said estate." The stocks and securities were then turned over by Mr. Buist to the plaintiff.

The plaintiff soon became dissatisfied with the settlement he had made. On the 15th February, 1866, he returned to Mr. Buist's office, and demanded of him the release he had executed, offering, at the same time, to return all the papers he had received. This was declined, and, not long afterwards, the bill in this case was filed.

The questions made in the case were: (1) As to the validity of the release; and (2) whether the investments in bank stock, Confederate States bonds, and the other securities named, could be sustained. Evidence was given, upon both points, which will be found sufficiently stated in the Circuit decree and judgment of this Court.

The decree is as follows:

Carroll, Ch. When an infant has but very recently attained to his majority, all acts on his part which confer a substantial bounty or advantage upon his late guardian are viewed by this Court with a jealousy almost invincible. In the absence of further evidence, the presumption arises that they were procured by undue influence exerted by the party benefited. To sustain such a transaction, it must appear, affirmatively, that it was the deliberate act of the late ward, after being fully informed of his rights and interests.—1 Story, § 317; *Hylton v. Hylton*, 2 Ves., 548; *Huguenin v. Basely*, 3 Lead. Eq. Cases and Notes. It is not deemed material whether the defendant be regarded as the testamentary guardian of the plaintiff, or the executor of his father's will. He had in his custody the plaintiff's entire estate; had assumed the trust of his maintenance and education, and stood towards him in such fiduciary relation as subjects his dealings with the plaintiff to the rules and principles adverted to. Within three days after attaining his majority, the plaintiff effected a settlement, with the defendant, of his accounts, as such executor and guardian, and executed a full release of all claims against him in that behalf.

There is no sufficient evidence to sustain the charges against Austin of actual fraud and circumvention. His accounts, as executor, seem to have been rendered annually and regularly. The settlement between himself and the plaintiff occurred in the office and presence of the Ordinary. It is in evidence, that, upon that occasion, the package of papers connected with his father's estate was

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*produced, and the plaintiff invited to ask such explanations as he desired of any items or particulars of the accounts. The testimony of Mr. Buist is, that he declined to do so, remarking that he had seen the papers before, Austin having frequently shown them to him. Prior to their settlement, the plaintiff seems to have been apprized of the more important acts of Austin in the administration of his testator's estate. Before that date as he admits in his testimony, he knew of Austin's investment in bank stocks and the bonds of the late Confederate States of America, in the note of T. S. & N. Heyward, and the bond of Lewis Cannon, as, also, that the Confederate bonds referred to had become utterly worthless. The accounting and settlement between the parties, though agreed upon, was not completed on the day it began. It was on the succeeding day that the plaintiff received the papers and securities representing the assets of his father's estate, and it was then that he executed the release to Austin. But, meanwhile, the latter had left the city, returning to his residence, and the release in question was executed in his absence, and was delivered to the Ordinary for him.

There are circumstances, also, which seem to indicate that, in reality, Austin had less of personal influence over his ward than usually results from that relation. At his father's death, the plaintiff was a cadet in the Military Academy of the State, and was afterwards a soldier in the army of the Confederate States until the close of the war. During this period, as it may be inferred, there could not have been much personal intercourse between him and his guardian. The plaintiff is educated and intelligent, and seems to be possessed of more than ordinary self-reliance and firmness of character. Yet, all this may well consist with his having had great trust and confidence in the defendant, and with the latter being possessed of corresponding influence over him.

Ordinarily, a guardian is not authorized to exceed the income of his ward's estate in his expenditures for his maintenance and education. Yet, at the accounting and settlement between the parties, it is not shown that there was any reference, whatever, to the rule which forbids it. Nor does it appear, upon that occasion, that there was the slightest allusion made to the real value of the bank stocks, or the possible liabilities that might rest upon the holder, or to the actual amount recoverable upon the bond of Cannon, or the note of Heyward; or, above all, to the authority of the defendant, as executor or guardian, to make such investments, or investments in the bonds of the late Confed-

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erate States. The plaintiff *was left under the impression that the bank stocks were valuable; that the investments in them were

conformable to his father's will, and that the note of Heyward, and Cannon's bond, represented a debt equal to the nominal sums specified on them. Such is the testimony of the plaintiff, and there is no reason to doubt its correctness. Such is the fair inference from the facts, as proved, independently of the plaintiff's testimony. Mr. Buist deposes that nothing was said about the actual value of the assets set down, and, at no stage of the settlement in question, was there any doubt suggested as to the authority of the defendant to invest his testator's moneys as he had done. So far from his being put upon his guard, and advertised, as he should have been, that he was engaged in a transaction irrevocable in its nature, the very opposite impression upon the plaintiff must have been produced by the declaration of Austin, "that, if there was anything wrong in the settlement, he would correct it." It does not appear to the Court that the plaintiff can be regarded as having consented to his alleged settlement with the defendant upon deliberate and "well informed consideration." If, therefore, by the release in question, he has relinquished any of his original rights without actual payment or satisfaction, he must be remitted to them and the release set aside.

On behalf of the plaintiff, it is urged that the defendant's investment in bank stocks, and in the bonds of the late Confederate States, were wholly unauthorized by his testator's will. The direction of the testator, to his executors, is to invest "in some safe public securities, in the stocks of the city of Charleston, or of the State of South Carolina." The stocks here designated seem to be stocks issued by the city of Charleston, in its corporate capacity, and stocks created directly and immediately by the State, both falling within the description properly of public securities. Such is the construction proposed by the plaintiff, and it is sustained. But, though the investments in question are held to be unauthorized by the terms of the will, it yet remains to be considered whether they have imposed a personal liability upon the executor.

According to the English decisions, an executor, though exercising reasonable care and diligence, will, in general, be responsible for all losses resulting from an unfortunate investment of his testator's funds, unless acting strictly within the line of his duty.—*Clough v. Bond*, 3 Myl. and Cr., 496. "I have no doubt," says Lord Redesdale, "that the executor meant to act fairly and honestly, but he was misadvised. If, under the best

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advice he could *procure, he acts wrong, it is his misfortune, but public policy requires that he should be the person to suffer."—*Doyle v. Blake*, 2 Sch. and Lef., 243. A rule less harsh and rigorous seems to be the law of this State. Our Courts have repeatedly adjudged that the liability of trustees is not

measured by the abstract rule of their duty, but is to be determined by the inquiry whether there be evidence of faithful endeavors to fulfill it. A more rigorous rule, it is said, would deter prudent and honest men, of ordinary capacity, from accepting the appointment of trustee.—*Hext v. Porcher*, 1 Strob. Eq., 170; *Boggs v. Adger*, 4 Rich. Eq. 411. In the case first cited, the deed of marriage settlement was recorded in the office of the Register of Mesne Conveyance for Beaufort District, and was never recorded, as it should have been, in the Secretary of State's office. "The registration," says Chancellor Johnston, "though erroneous, is proof of a faithful intention to perform the duty required by law." "I do not conceive," he adds, "that, to take advantage of a mistake committed in an evidently honest endeavor by the trustee to perform his duty, and to make him liable for the consequences, would either square with the dictates of justice, or promote the true policy of the Court."

In the late case of *Martin v. Jefecoat*, 10 Rich. Eq. 118, the widow of an intestate set up a claim to a family of negroes, which, says the Court, were "unquestionably the property" of her deceased husband. The administrator, acting under the erroneous impression that she was entitled to them, surrendered the slaves, constituting almost literally the entire estate of the intestate, and they were wholly lost to his children. The widow's title to the negroes she derived from the deed of her grandfather, Hoover. Referring to the opinion prevailing in the neighborhood of the intestate, that the negroes were not his, but hers, the Chancellor, who spoke as the organ of the Court, observes: "Upon no proper construction of that deed could such an opinion be supported." "But," he proceeds, "there was much in the terms of Hoover's deed calculated to mislead the common, un instructed mind, and by which one unlearned in law might arrive at anything but the right construction."

"The administrator," continued the Chancellor, "committed an honest mistake. He acted throughout in good faith," and it was adjudged that he was not accountable for the value of the slaves in question.

It cannot be maintained that the testator, in indicating the investments to be made by his executor, has expressed himself in terms

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*free from ambiguity. They are not unsusceptible of the construction that three descriptions of investments were contemplated: public securities generally the stocks of the city of Charleston, and the stocks of the State of South Carolina. If the defendant, in reality, adopted this interpretation, then he was rid of the chief obstacle to the construction he seems to have given to the terms "stocks of the city of Charleston." By the stocks thus designated, he appears to have understood the testator as meaning not mere-

ly stocks of the city, in its corporate capacity, but stocks of incorporated companies, having their seat and place of business within the city limits. It has been already said that such construction is deemed to be erroneous; but is it so clearly inadmissible that it could not have been really adopted by a man "of ordinary capacity" and "common, un instructed mind, unlearned in the law?"

The will, as the bill alleges, was made in the city of Charleston, where the stocks of the People's and the Planters' and Mechanics' Banks are proved to have been "favorite investments of funds held by trustees and executors." Might not the executor, the defendant, rationally and naturally have understood his testator, by those words, as not intending to exclude the stocks of the city banks, which were generally and habitually preferred by persons having trust funds for investment? That such, in fact, was the construction of the testator's directions, adopted by both of his executors, is fairly to be inferred from the advertisement in 1861, over both their signatures, in one of the newspapers of the city. The "stocks wanted" and sought for by that advertisement, are stocks in the "Bank of South Carolina," the "People's Bank," and the "Planters' and Mechanics' Bank," and, "also, State and City Stocks." The defendant, although a shrewd business man, is no lawyer, and was at that time a broker, engaged in the purchase and sale of negroes. What was the calling or occupation of his co-executor, William W. Wilbur, does not appear. It can scarcely be supposed that at the date of the advertisement, and within two months next succeeding their testator's death, both executors, and, without purpose or motive, should concur in designing a willful breach of their trust.

No want of good faith in this transaction is imputed to Wilbur, yet he appears to be as much responsible for the loss sustained by the investment in the bank stock, as the defendant, Austin. Both proved the will, and on the same day qualified as executors, and the names of both are subscribed, as

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such executors, to the advertisement referred to. The investments in the stocks of the People's, and Planters' and Mechanics' Banks, were actually made on the 12th and 19th September, 1861, and Wilbur, (say his executors in their answer,) "after an illness of over five weeks, departed this life on the 30th day of November, 1861." The inference, of course, is, that Wilbur co-operated and concurred in making those investments. Indeed, it is not left to inference, but appears positively and distinctly, by the bank book kept by Wilbur of the accounts between the Bank of South Carolina and himself and Austin, as executors of Womack, yet the bill alleges no liability incurred by Wilbur, and prays no relief against his executors in that

behalf. There seems to be no stronger ground for imputing a want of fidelity to Austin than to Wilbur, in regard to the investments in the bank stocks. No motive of personal gain could have influenced them. The proof is, that the two banks, the 'People's,' and the 'Planters' and Mechanics', "were regarded as the safest and best managed of all the city banks, were so reputed generally, and no better investment at that time could have been made, so far as men could then foresee."

If the will be construed to confer upon the executors the general power to invest in any safe public securities, then the defendant was authorized to invest in the bonds of the late Confederate States. There does not seem to have been any want of prudence and circumspection in making those investments, if warranted by the will. While the investments in the bank stock and Confederate securities referred to are considered to be unauthorized by his testator's will, yet the defendant is regarded as having acted in good faith, and in innocent mistake of his authority in that regard. In respect to those investments, nothing is perceived in the evidence, or the facts disclosed, inconsistent with faithful endeavors, on his part, to fulfil the duty that he had assumed, and for the loss which has resulted, it is held that no personal liability rests upon the defendant. Such is the conclusion attained, though with extreme diffidence, and much hesitation.

Cannon's bond, and Heyward's note are investments palpably unauthorized by the will, and could not have been regarded otherwise by the defendant. It is at the option of the plaintiff to accept or refuse them. If he rejects them, however, he cannot demand of the defendant such an amount of city or State stocks as might have been purchased with the aggregate of the sum specified in the note and bond referred to. But, in that

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event, he will be entitled to recover no more than the aggregate of those sums of money, with interest.—*Lewin on Trusts*, 341; *Shepherd v. Monts*, 4 Hare, 500.

As already remarked, a guardian, in general, is not permitted to encroach upon the capital of his ward's estate. There are cases in which it will be allowed, and without a prior order from the Court, but the emergency must be great, and the expediency manifest.—*Prince v. Logan*, *Speers Eq.* 33.

The defendant's omission to make sale of certain of his testator's slaves may, perhaps, be justified, if the facts upon which he relies in that behalf be true. But, as they constitute matters of discharge and independent defence, they are not proved by the mere statements of the answer. The defendant should establish them by evidence, and the opportunity of doing so will be afforded upon the accounting to be had before the Master.

It is ordered and adjudged, that this opinion stand for the decree of the Court. And it is further ordered, that an account be taken by James W. Gray, Master in Equity, of the estate of John B. Womack, deceased, and of the administration of the same by his executors, Robert Austin and W. W. Wilbur, during the lifetime of said Wilbur, and, after his death, of its administration by the defendant and surviving executor, the said Robert Austin, and also of all moneys justly due and owing to the plaintiff, in this behalf, by the defendants, or any of them, conformably to the principles of this decree.

The complainant appealed from so much of the Chancellor's decree as exempts Robert Austin from liability for the loss of the money invested in the stocks of the "People's Bank," and the "Planters' and Mechanics' Bank," and in the three Confederate States bonds," and now moved this Court to reform the said decree, for the reasons:

First. Because the language of the will is plain and intelligible to the meanest capacity; and any other construction than the one given to it by the Chancellor, is so clearly inadmissible, that it could not have been really adopted by a "man of ordinary capacity," and "common, uninstructed mind, unlearned in the law"—so the Chancellor has decreed: it, therefore, follows that, if Austin and Wilbur intended the two hundred and forty-four shares of bank stock as an investment for the complainant, their conduct was a palpable and deliberate breach of trust, the consequences of which should not fall on the complainant. But it is submit-

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ted that these *stocks were not originally purchased as a part of the twenty-two thousand dollars bequeathed to the complainant "when he attains the age of twenty-one years," but simply as a temporary investment, to await the expiration of the year after the death of the testator, or a more convenient opportunity to convert everything into the stocks indicated by the testator. The death of Wilbur, so soon after, and before the estate could be settled, left Austin alone responsible for the loss.

Second. Because Austin, after he had purchased the bank stock, was advised by Mr. Buist, the Ordinary, who is also a lawyer, to seek State stock, as he, Mr. Buist, thought the testator's meaning somewhat ambiguous, and His Honor the Chancellor also seems to think it not entirely clear of ambiguity; but there certainly was no kind of doubt that Austin was authorized by the will to invest in stocks of the city of Charleston, "and the State of South Carolina," and that, by doing so, (as he readily could, as the witness said,) he would have fully satisfied the will, and incurred no risk, while it was certainly very doubtful, to say the least, whether he was authorized to buy any other kind of stocks; yet he rejected the construction which was

sure and safe, and adopted the one which was doubtful, and this without consultation, enquiry or advice; it is, therefore, insisted that he did not act in good faith.

Third. Because there was no evidence of any such precaution, on the part of Austin, either in reference to his investment in the bank stock, or in the Confederate States bonds, as a man of ordinary prudence and discretion would exercise in the conduct of his own affairs; and if His Honor's decree is right, that good faith, which will be presumed in the absence of proof showing bad faith, is sufficient to save a trustee or guardian from liability, then is the office of trustee or guardian the most irresponsible and the most desirable which one can hold.

Fourth. Because, if Austin acted in good faith, and really believed he was carrying out the direction of the testator's will when he invested six thousand dollars in bank stock, (as the Chancellor has assumed,) it was in his power, at the trial of the case, by his own testimony, as his own witness, not only to prove it, but to explain why he did not also invest the balance of the cash (about twelve thousand dollars) remaining in his hands, and the other moneys (amounting to near ten thousand dollars) received by him afterwards from sales, either in bank stocks or in city or State stocks.

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*Fifth. Because nothing short of the most reckless disregard for the interest of his ward can account for the conduct of a guardian who invests in the stocks of a private corporation, the charter of which subjects the holder to a liability to double the value of such stock. "The extreme dillidence and hesitation" of the Chancellor in deciding that Austin is not chargeable with the loss, is not, therefore, to be wondered at.

Sixth. Because, had this purchase of private bank stock been made in good faith, as a safe, permanent investment, to await the arrival of the complainant at maturity, it was competent for Austin to prove it by his oath as a witness on the trial; and it is a very significant fact, from which the most unfavorable inference may be drawn, that he did not, or would not, avail himself of the opportunity which the law allowed him to justify himself, and contradict or explain the facts which were testified to by the complainant.

Seventh. Because the complainant has the same right to elect between these bank stocks and the three Confederate States bonds, and the money they represent, that he has to elect between Heyward's and Cannon's papers, and their aggregate amounts of money, which the Chancellor admits and decrees. Besides which, the bank stocks carry with them a penalty which attaches to the holder of them; and, if Austin can shift it from his own shoulders on to the complainant's, by showing that, against the plain import of

the will, he purchased the stock so encumbered for the complainant, then it is in the power of a guardian to ruin his ward, unless the ward has the right to elect when he shall come of age.

Eighth. Because, if the will can be so construed as to confer on the executors the "general power" to invest in any safe public securities, which is not admitted, the bonds of the late Confederate States were never, at any time, but especially at the time of the purchase, by Austin, of the three Confederate States bonds, safe public securities. They were never public securities at all, but were absolutely void in their inception; and the issuing of them, by a confederation of States, was a violation of the 1st Article, 10th Section, of the Constitution of the United States, and His Honor should have, therefore, decided such investments to be illegal and void.

Ninth. Because Austin's conduct was marked by fraud from the beginning to the end of his administration, and he has no claim to the favorable consideration of the Court.

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*The defendant, Robert Austin, appealed from so much of the Chancellor's decree as opens the settlement made before the Ordinary:

Because, admitting the full force of the authorities shewing the suspicion with which the Courts regard settlements between guardian and ward, the uncommon shrewdness and intelligence of the ward in this case, his self-reliance, energy and fruitfulness of resource, developed by his soldier education and experience, during and after the war, together with his previous knowledge of the transactions of the guardian, and the fairness and candor exhibited at the time of the settlement itself, make this case exceptional, and forbid the idea of undue advantage, and the plea should have been sustained, and the bill dismissed.

Defendant also appealed from so much of said decree as throws Heyward's note and Cannon's bond upon defendant, inasmuch as the money invested by defendant, as guardian, was Confederate money, having become transmuted into this currency, without default on the part of the guardian, and, being so transmuted, nothing better could be done with it. It was in evidence that such paper as Heyward's note and Cannon's bond were, at that time, at a premium in the market, and to get it for Confederate money, at par, was then deemed a wise and sagacious arrangement.

Defendant also appealed from so much of the decree as suggests that the guardian, notwithstanding the settlement, may be charged with the excess of expenditure over the income. The great depreciation of the currency, and the character and condition of the times, illustrated in the item of \$3,000 paid for a cavalry horse used by young Womack,

fully account for any apparent extravagance in expenditure. Indeed, it does not appear that this is a point made by complainant, and his continued acquiescence is presumed.

The Chancellor does not notice the fact that the estate, before investment, consisted already of Confederate money, and that no public securities, except Confederate bonds, could be obtained, except by the payment of an enormous premium. The condition of the country and the currency warranted some departure from the terms of the will.

De Treville, for plaintiff.

A deed, acquittance or release, by a ward to his guardian, three days after coming of age, is void, without proof of actual fraud.—*Waller v. Armistead*, 2 Leigh, 11; *Hylton v.*

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Hylton, 2 Ves., 548; **Huguenin v. Basely*, Part 2, Vol. 2, *White & Tudor's Leading Cases*, 38; *Wederburn v. Wederburn*, 15 Eng. C. R., 722; *Johnson v. Johnson*, 2 Hill's Ch., 286; *Mellish v. Mellish*, 1 Sim. & Stuart, 138; *Roach v. Harvey*, 1 Sim. & Stuart, 502; *Symonds v. Walker*, 3 Swanston, 60; *Hatch v. Hatch*, 9 Ves., 292; *Dent v. Bennett*, 4 Mylne & C., 569; *Fish v. Muller*, 1 Hoff. C. R., 267; *Rapalge v. Noisworthy*, 1 Sandford C. R., 399; *Gale v. Wells*, 12 Barb., 84; *Brewer v. Vanartsdale*, 6 Dana, 204.

Suppressio veri or suggestio falsi is actual fraud, and will vitiate any transaction, without reference to the relation of the parties.—1 Story's E. J., §§ 186, 191, 192, 198, 218.

Misrepresentation, falsehood and concealment attended the settlement and release in this case.

It is the right of every legatee to reject a legacy coupled with a condition. The possession of bank stock subjects the holder to a liability.—12 Stat. at Large, 212, Act 1852; *Sackett's Harbor Bank v. Blake and Wife*, 3 Rich. Eq., 225.

Investment in bank stocks and Confederate bonds, a gross breach of trust.—Hill on Trustees, 368; 7 J. J. Marshall; *Smith v. Smith*, 238; *Contee v. Dawson*, 2 Bland, 264; 2d Part 2d Vol. W. & Tudor's Leading Cases, notes on pages 291, 292, 293 and 294.

On the death of Willbur, all responsibility rested on Austin.—*Graham v. Davis*, 2 Dev. & Bat., 155.

A trustee, or guardian, who violates the express directions of the paper which conferred the office on him, without imperative necessity, does so at his peril, and prima facie acts in bad faith.—2d Part 2d Vol. W. & Tudor's Leading Cases, notes 291 and 293; 1 Johns. Ch., 527, *Manning v. Manning*; *Coggs v. Bernard*, 3 Lord Raymond.

Bank stocks are not public securities or proper as investments.—*Ackerman v. Emmot*, 4 Barb., 319; *Hemphill's Appeal*, 18 Penn. State Reports.

The liability of a trustee is to be measured by the abstract rule of his duty.—*Hext v. Porcher*, 1 Strob., 170; *Boggs v. Adger*, 4

Rich. Eq., 411; *Martin v. Jeffcoat*, 10 Rich. Eq., 218; *Speer v. Speer*, 9 Rich. Eq., 184; *Cooper v. Day*, 1 Rich. Eq., 16; *Fraser v. Fraser*, 7 Rich. Eq., 230; *Wood v. Wood*, 5 Pages' Rep., 596; *Burnett v. Sheil*, 2 Barb., 457, 459.

Bank stocks are neither public or private securities; city stocks are. Confederate States bonds were not safe public securities.—Story on Constitution, 489, §§ 685, 694; A. A., 1861.

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*Hayne, for defendant.

1. The plea of defendant, as to release, should have been allowed and the bill dismissed.

The decree cites 1 Story Eq., § 317; *Hylton v. Hylton*, 2 Ves., 548; *Huguenin v. Basely*, 3 Lead. Eq. Cases, notes and cases cited. These and other cases, cited by complainant's counsel, express very strongly the suspicion and jealousy in regard to dealings between guardian and ward, executor and legatee, and others similarly situated during the continuance of the relation, or very recently after the dissolution.

Hylton v. Hylton was the grant of an annuity; it was the grant that was set aside; the release and written discharge executed at the same time being allowed to stand. The transaction set aside was outside of a simple settlement. A speedy settlement, and release thereupon, come within the purview of the subsisting relation, and are not discouraged by the Courts. The suspicion and jealousy adverted to by the Chancellor will be found to attach to extraneous dealings, conferring on the guardian or trustee a substantial bounty or advantage. It is in such cases that the presumption arises that undue influence was exerted by the party benefitted. A release or discharge, in one sense, is a benefit; but are you, on that account, always to presume undue influence if the settlement is prompt? When would it be safe to settle? In *Hylton v. Hylton*, the ward came of age April, 1746, and the transaction set aside was in October, 1747.

Huguenin v. Basely does not apply; *Piese v. Waring*, and others there cited, involve bounties outside a mere settlement. The principle, as laid down in the note of Eq. Leading Cases, Vol. 2, Part 2, p. 55, is as follows:

"*Huguenin v. Basely* is a leading case on the very salutary jurisdiction of equity, to set aside, upon the principle of general public policy, voluntary donations obtained by persons standing in some confidential, fiduciary, or other relation towards the donor, in which dominion may be exercised over him."

Such a gift will be the more readily set aside, if, at the time of its being made, the guardianship accounts are not all settled, or the ward's property is retained by his guardian.

"In *Hatch v. Hatch*, 9 Ves., 292, a guard-

ian, who was incumbent of a living, obtained from his ward, soon after she became of age, a conveyance of the advowson of the living

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of which he was incumbent, expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, &c.. Lord Eldon ordered the instrument to be delivered up to be cancelled.—Extracts from *Note on Huguenin v. Basely*."

I take the ground that a simple release or discharge, given by a ward recently come of age, is not, as contended, *prima facie* invalid. On the contrary, it can be impeached only by proof of fraud or mistake, and *prima facie* is valid.

2. The validity of the release becomes, thus, not a question of law, but of fact. This question of fact has been passed upon by the Chancellor in favor of the guardian, and the Chancellor's decree in regard to the weight of evidence, if not conclusive, has, at least, the force of a verdict.

3. Certainly there is no such conclusion or preponderating testimony to establish fraud or mistake as would justify setting aside a verdict.

4. The settlement and release were proper in themselves.

Campbell, same side.

April 5, 1870. The opinion of the Court was delivered by

MOSES, C. J. We concur with the Chancellor in so much of his decree as disaffirms the release of February the 6th, 1866, and subjects the settlement, which it was intended to conclude, to examination and inquiry.

To avoid a discharge, executed by a ward to his guardian, shortly after he has reached his majority, it is not necessary that there should be proof of actual fraud. Even if full opportunity is afforded to examine the accounts, yet, without willful intent to mislead, there may be such a want of communication, both in regard to them and the securities transferred, as would preclude the Court from giving it effect as an estoppel.

There does not seem to have been any disclosure to the ward of the value of either the bank stock or the personal bonds, although, at the date of the proposed release, the plaintiff was well aware that the Confederate bonds were without any. He was not made acquainted with the fact that the bank stock carried with it such a possible liability, on the part of the holder, as might make it, if even then of any worth, the source of future loss. In *Walker v. Lymonds*, 3 Swanst., 62, Lord Eldon said: "Conceal-

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ment is of different natures: *an intentional concealment, and an actual concealment where there may be an obligation not to conceal, even if disclosure is not required." The very fact that the account of the re-

ceipts and expenditures exhibited a balance due the guardian, which he renounced, might have acted as an incentive to the release. The effect of a gift to the ward, under such circumstances, would be watched with jealousy by the Court. It is impossible to tell how it may have operated on the mind of a young man just of age, engaged in an adjustment of his affairs with one who had been selected by his father as a proper person to be entrusted with his education and moral training—one in whose family he had resided, and on whom he would naturally look with respect and regard. The very relation was likely to establish influences well calculated almost to enslave a youthful mind. The plaintiff, in his testimony, avers "that his affection for Austin had returned, and his confidence was restored, at the time of the settlement."

In *Wederburn v. Wederburn*, 2 Keen., 722, 15 E. C. R., 722, the absence of such full information as guardians are bound to give was held sufficient to open a partial, but definite, settlement, after the lapse of many years, sufficient information not having been obtained till a short period before the bill was filed.

Did the plaintiff understand, or was he informed that, whatever part Mr. Buist took in the transactions, it was not in his official capacity as Ordinary? He drew up the instrument, but does not remember that he read it to the plaintiff. Without any wrong intention by Mr. Buist or the defendant, Austin, the plaintiff may well have been mistaken as to the character in which he intervened in the matter, and concluded that, as the conference was in his office, and in his presence, and some of the papers read over or compared by him, he was officially supervising the settlement. The circumstances attending the transaction might well contribute to a conclusion, on the part of the plaintiff, that he was forfeiting no right by the execution of the instrument so prepared.

In *Revett v. Harvey*, 1 Sim. & Stuart, 502, a release, executed by one who stood in the relation of ward, within a month after he came of age, and without the intervention of a friend or adviser on his part, for such reason was set aside.

In the case before us, although the instrument was not, in fact, executed until the second day, the defendant, Austin, never suggested to the plaintiff, to whom he was to submit his account, the propriety of having

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a friend or adviser, nor did he seem *to suppose it due to his own character and position that, in a settlement with his ward, so recently of age, he should be represented by some one of more experience than himself, who would not be affected by the influence of the same feeling which it was probable the plaintiff entertained towards him. It may be, that he felt so satisfied of his own pur-

pose to do exact justice, that it did not occur to him that something in that regard was due to the plaintiff, whose judgment, by reason of his youth, must have been so immature that it stood in need of advice and aid in a matter, and on an occasion, of so much importance to him.

It may have been that the defendant had a high estimate of the ability of the plaintiff, and, therefore, did not regard such suggestion necessary; for he states, in his answer, that the "plaintiff is exceedingly sagacious and intelligent, having been educated at the State Military Academy, and being, during the war, sufficiently self-reliant to elude the vigilance of the guard over the Confederate prisoners at Elmira, in the State of New York, and escape therefrom to the South without capture or detection." The qualities required for an act of so much boldness and endurance may be of a very different kind from those necessary for the protection of one's interest in a settlement with a shrewd and keen business man. Pooser, a witness introduced by the defendant, while he bore testimony to the intelligence of the plaintiff, and his ability, as a youth, to take care of himself, said that "Austin is a very shrewd business man, and an overmatch for plaintiff at twenty-one."

Lord Hardwicke, in *Hylton v. Hylton*, 2 Ves., Jr., 549, says: "Where a man acts as guardian, or trustee in nature of a guardian, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or cestui que trust coming of age, and at the time of settling account or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such advantage." The question there was in reference to an annuity granted to the guardian soon after the ward arrived at age.

In the *Administrators of Johnson v. The Executors of Johnson*, 2 Hill Eq., 286 [29 Am. Dec. 72], the late Chief Justice O'Neill, in delivering the opinion of the Court, says: "A guardian dealing with a ward just after he has arrived at full age, and obtaining any beneficial contract from him, or a release of the ward's rights, must, in order to have it sustained, show its perfect fairness."

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In remarking on *Hylton v. Hylton*, he observes: "That the same rule governs a release which is, in point of fact, a gift to the guardian of his arrears, and, unless the ward sees most clearly what he is about to do, it cannot be supported."

The proposition of the counsel of the defendant, that a release or discharge, given by a ward recently of age, is not *prima facie* invalid, may be conceded. If, however, the attendant circumstances render it valueless for the purpose proposed and contem-

plated by the party in whose favor it was executed, then, so far as these appear, they are first to be passed upon as questions of fact. The judgment of the Court is to be taken as a conclusion on them; and, in this view, the defendant would gain nothing from a review of the testimony, if, as he contends, "that the decree in regard to the weight of the testimony has at least the force of a verdict." If he can reverse the judgment of the Chancellor on the facts which induced him to disregard the release as binding, he must shew that the testimony, by an overbearing force, preponderated in his favor.

Concurring with the judgment of the Chancellor as to the release, we differ with him on his conclusions as to the bank stock and the Confederate States bonds.

However our cases may vary from the English authorities, as to the strictness by which a trustee is held to the line of his duty, and whatever favor may be extended to him, where loss ensues in spite of all "faithful endeavors" to prevent it, and however he may be held excused, by showing that he managed the fund "with the care of a prudent man," yet these interpositions in his behalf can only be claimed where the instrument under which he acts confers some discretionary power. Where it prescribes and directs certain investments, and it is in the competency of the trustee to make them, he is not at liberty, by substituting those of a different character, to create, in effect, a new deed, in the place of the one under which he accepted the trust. Chief Justice Dunkin, in *Snelling v. McCreary*, 14 Rich. Eq., 300, says: "When left to his own judgment, the trustee must exercise his discretion in the manner in which a prudent man would in the management of his own affairs."

Where, however, the course which he is to pursue is dictated and directed by the authority which originates the trust, he is provided with a chart, from which he is not allowed to depart, unless forced by a necessity which he cannot resist.

The Chancellor, in his decree, sustains the construction of the words of the will proposed

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by the plaintiff, "that the stocks designated seem to be stocks issued by the city of Charleston, in its corporate capacity, and stocks created directly and immediately by the State, both falling within the description properly of public securities."

Suppose, however, that there was a doubt whether such bank stocks may properly be included under the term of "stocks of the city of Charleston," why did the defendant resolve that doubt against the expressed direction of the testator, who, in plain terms, referred to "safe public securities," and invest in those of private corporations? That they were favorite modes of investment in the city of Charleston might have protected him, if everything had been left to his dis-

cretion, but cannot avail to shield him from the responsibility he incurred when he transcended the duty so imperatively fixed by the will, with the opportunity before him of following its instructions.

The evidence shows that, in 1861, when he so invested, State or city stocks could have been bought at or below par. With this knowledge, he preferred not to follow the instructions of the will, and he must abide by the consequences.

The investment in Confederate bonds could not have been made before the 2d March, 1863, for they bear date on that day. It is not necessary to inquire whether "the safe public securities" referred to by the will were to be understood as limited to "the stocks of the city of Charleston or of the State of South Carolina." The Chancellor, in his decree, holds that "while the investment in the bank stocks and Confederate securities are considered to be unauthorized by the will, yet the defendant is regarded as having acted in good faith, and in innocent mistake of his authority in that regard."

According to the view which we have taken of the course of the defendant in relation to the bank stocks, this concession of want of authority to invest in Confederate bonds puts him in the position of a guardian failing in what he is directed, by doing that for which he was, without authority.

Measured even by the rule under which the decree concludes he must be exonerated, he will fail to find relief. Is there evidence of "faithful endeavors" to fulfill his duties? Would a prudent man, under the circumstances, have acted in the same manner? After his investment in bank stocks, it was suggested to him by Mr. Buist "that it would be best to invest in State or city stocks, as the words of the will were ambiguous."

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These stocks were at par, and the *conversion, even after that caution, could easily have been effected. Would a prudent man, in 1863, charged with an investment for another in "safe public securities," have sought Confederate bonds, as constituting securities of that character? They were the issues, not of a recognized Government, but of one endeavoring to assert and maintain its independence, by waging war against the United States, from which, by force of arms, it was attempting to maintain the withdrawal of the States which composed it. It was deficient in those elements of stability so essential and important to make its securities "safe," much less valuable.

It does not appear from what source the guardian received the Confederate money with which he says he purchased the Confederate and personal bonds, for the accounts have not been exhibited to us by either side, nor are they so referred to in the Circuit decree that we can ascertain it. Personal bonds, at best, are the securities the least

preferred by Courts of Equity as investments. The authority to deal with them by this executor finds no warrant in the will which constituted him guardian, with instructions as to the conversion which he was to make of the money confided to him for his ward.

It is not proper that the question as to the effect of any expenditure by the guardian over the receipts for his ward should be now considered. If it arises on the account to be taken, it must first be passed upon by the Circuit Court.

It is ordered and adjudged, that so much of the decree of the Chancellor as sustains the investments in bank stocks and Confederate States bonds be reversed.

It is further ordered, that the case be remanded to the Circuit Court of Charleston County, with directions for an order by that Court that an account be taken of the estate of the said John B. Womack, deceased, and of the administration of the same by his executors, Robert Austin and W. W. Wilbur, during the lifetime of the said Wilbur, and, after his death, of its administration by the defendant, Austin, the surviving executor, and of all moneys justly due and owing to the plaintiff in this behalf by the defendants, or either of them, conformable to the principles of this decree.

WILLARD, A. J., concurred.

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*ALEXANDER H. ABRAHAMS & CO. v.
THE SOUTH-WESTERN RAILROAD
BANK.

(Columbia. Nov. and Dec. Term, 1869.)

[*Trover and Conversion* ⇨2.]

Trover lies for the conversion of bank bills.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 3-20; Dec. Dig. ⇨2.]

[*Bailment* ⇨16; *Pledges* ⇨48; *Trover and Conversion* ⇨1.]

A. borrowed from B., an incorporated bank, \$4,000 in Confederate Treasury notes, to be returned within ten days, and left with B. as security, \$4,000 in its own bills—the latter being more valuable than the former. A. returned within the limited time, offered to return \$4,000 in Confederate Treasury notes, and demanded back the \$4,000 he had left with B. as security. The latter refused to take the one or return the other: *Held*, by Moses, C. J., (Wright, A. J., concurring,) that B.'s refusal to return the \$4,000 in its own bills was a conversion of those bills, and that trover lay for such conversion.

[Ed. Note.—Cited in *V. P. Randolph & Co. v. Walker*, 78 S. C. 162, 164, 59 S. E. 856.]

For other cases, see *Bailment*, Cent. Dig. § 66; Dec. Dig. ⇨16; *Pledges*, Cent. Dig. §§ 113, 116; Dec. Dig. ⇨48; *Trover and Conversion*, Cent. Dig. § 51; Dec. Dig. ⇨7.]

Willard, A. J., dissenting, *held*, that the circumstances of the transaction did not show that the identical bills left with B., but only that bills of the latter, to the amount of \$4,000,

were to be returned; that a debt was created on both sides, and that trover, therefore, did not lie.

Before Carpenter, J., at Charleston, June Term, 1869.

This was a writ of error to remove the record and proceedings, in the case stated, from the Circuit into the Supreme Court.

The case and exception are stated in a report made by His Honor the Circuit Judge, which was treated as a bill of exceptions, and is as follows:

"This was an action of trover to recover from the defendants certain of their bills, amounting, nominally, to \$4,000, deposited by the plaintiffs in the said bank in 1862 or 1863. The declaration, which will be certified with the writ of error, contains only two counts, each in trover.

"A. H. Abrahams, one of the plaintiffs, testified as follows:

"In 1862, or 1863, witness had in his possession \$4,000 of the bills of the South-western Railroad Bank, of the denomination of \$20's and \$10's, and, also, some of \$5's; how many of each can't say; bills belonged to himself and son, the other plaintiff; he carried them to the bank, and asked Mr. Fuller, the Teller, to let him have the use, for eight or ten days, of \$4,000 Confederate bills, which were less valuable, and hold his \$4,000 of South-western Railroad bills as security, until he should return the Confederate bills; Mr. Fuller applied to Mr. Rose, the President, to know if it could be done; Mr. Fuller returned, saying he was authorized; Mr. Fuller then counted the bills which witness handed him, found \$4,000, and put them aside, and then delivered to witness

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\$4,000 in Confederate notes; within eight or ten days after, witness called at the bank again, and asked to have his parcel of bills returned to him, offering, at the same time, the \$4,000 in Confederate notes which he had borrowed; the President directed Mr. Fuller, the Teller, to give witness his package of notes, and receive the \$4,000 Confederate notes, as previously agreed; Mr. Fuller then asked witness, as a favor to himself, to let matters stand until the next day, as he was very busy; witness returned the next day; Mr. Fuller told witness that Mr. Cochran, the Cashier, wished to see him, the witness; Mr. Cochran asked witness if he was not a friend of the bank; if so, why did he wish to withdraw the bills thus left by him? that, if the Confederate notes were not good, neither were the notes of that bank; witness, nevertheless, persisted in his purpose of having his bills again, but they were withheld from him; he told Mr. Cochran that he came for them, and desired to have them; but he was never allowed to have them again, nor would the bank take back the Confederate \$4,000 which he had borrowed on the security of the said bills, and which

he offered to return when he applied at each time; witness does not recollect what was the value of these bank notes at the time of this transaction; they were worth more than Confederate notes by, perhaps, 20 or 30 per cent.; they are now worth about 65 per cent.; he never received credit in his bank book, (which was produced and examined,) or, as far as he knows or believes, in any book of the bank, for this \$4,000; it never was his intention to deposit them; he meant to leave them, as a simple pledge, to be redeemed by a return of the \$4,000 in Confederate bills; on refusal of bank to return him his said bills, he did nothing—condition of country prevented; at the close of his account with the bank, in 186-, there ought to have been a balance to his credit of \$6,000.

"On this evidence I ruled that the plaintiffs could not recover, under the form of action they had adopted, to wit: Trover—because they had not shown that they paid any money, or made any legal tender of the \$4,000, or its value, when they made the demand for the package of South-western Railroad bank bills, lodged as security, or, at any other time, and ordered a non-suit.

"To this ruling the plaintiffs did then, and still do except, for error in law."

The error assigned is as follows:

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"That His Honor has assumed that the obligation of the plaintiffs was to pay, or tender payment, for the bills lodged by them as security, lawful money, before they could entitle themselves to demand them. Whereas, their obligation was simply to redeem their bills, which were already their own, by returning, or offering to return, Confederate States notes to the amount of \$4,000; wherefore, they pray that the said judgment of non-suit may be reversed and vacated.

De Treville, for plaintiffs.

Offer of plaintiffs to return the Confederate notes, received by them, was a compliance with their contract or obligation, and entitled them to the package of bills which they had pledged. The refusal to deliver, when demanded, was a conversion.—Story on Bail., §§ 341, 345, 346; Jones on Bail., 79, 80; Bristol v. Bush, 7 Johns. R., 254.

A pawner who offers to redeem within the time and in the manner agreed on, becomes, thereby, entitled, unconditionally, to the thing pawned, and a refusal to deliver is a conversion; 10 Johns. R., 471; McLean v. Walker, 2 Esp. N. P., 625, margin.

Trover is the proper action for the recovery of choses in action, as bank bills, promissory notes, bonds, &c.—Todd v. Cruikshanks, 3 Johns. R., 43; 12 Johns. R., 484; Clowes v. Hawley, 2 Esp. N. P., 543; 2 Chit. Pl., 835, and notes.

Pringle, contra.

It was necessary that the plaintiffs should have proved that they made a legal tender of the value, either of the \$4,000 of the South-

western Railroad Bank notes, or of the Confederate notes, before they can maintain their action, and that they made no such tender. *Parker v. Simons & Epping*, 2 McM., 188; *Thorington v. Smith* (8 Wal., 1); *Phillips v. Hooker*, Am. Law. Reg., Vol. 7, No. 1, p. 16.

The tender of the Confederate notes by the plaintiffs is not proved by the evidence, and would not be sufficient, if proved.—Const. U. S., Art. I, § 10; Stat. U. S., 18th January, 1837, 1 Bright., 152; Stat. U. S., 11th July, 1862, 2 Bright., 109.

April 8, 1870. The opinion of the Court was delivered by

MOSES, C. J. To sustain the action of

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trover, one must have the *right of property with the right to possession. If these unite in him, and conversion is proved, a recovery must follow.

It is conceded in the argument that bank notes may be the subject of this action. The authorities, both in England and our own State, sustain that conclusion.

The objection to the plaintiffs' right of recovery was put, both by the Judge below and the counsel for the defendant in his argument here, upon the ground that when demand was made for the parcel of South-western Railroad Bank bills, they failed to show that they paid any money or made any legal tender of the four thousand dollars or its value.

The action was not brought for the recovery of a debt, but for damages for the conversion of specific choses in action.

If the bank had disposed, by sales, of the notes left with them, the plaintiffs would have been at liberty to waive the tort and sue for money had and received to their use. The gist of the action was the conversion, and there was, therefore, no necessity, on the part of the plaintiffs, to pay any money, or make any legal tender, to entitle them to a restitution of the bills in the hands of the defendant. The bank did not consider that the agreement imposed a liability on the plaintiffs, as for a debt due. The notes they left were of greater value, as shown by the evidence, than those they received. The refusal to return the South-western Railroad Bank bills was not because the notes they were offering, when they claimed their own under the agreement, did not constitute a legal tender.

Even if there had been a debt due, the objection to the character of the tender was waived when the refusal to accept was not put upon that ground.—5 Rob. Prac., 942.

The transaction amounted to a pledge or pawn, which, in the common law understanding of it, Mr. Justice Story, in his work on Bailments, Section 286, defines "to be a bailment of personal property as a security for some debt or engagement."

The testimony discloses the following facts: In consideration of the defendant delivering to the plaintiffs, for their use, the sum of four thousand dollars in Confederate Treasury notes, they left with the defendant that amount in its own bills, as security for the return of the like sum in the said notes in eight or ten days. Within the time limited, one of the plaintiffs called at the bank, offered the four thousand dollars in the same currency which they had received, and asked for their parcel of bills. The President directed the Teller to deliver the package, and

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receive the four thousand dollars *Confederate notes, as had been previously agreed. The Teller asked the party who had so called, as a favor to him, as he was busy, to let the matter stand until the next day. This was assented to, and he returned the following day, when the Cashier, (who did not deny the agreement,) after some conference between them, refused, on demand, to restore the bills so left, or to receive the four thousand dollars in Confederate money. No entry of the transaction was made in the books of the bank, either as a charge or a credit, although the plaintiffs were dealers with it.

The whole legal title, by a pledge or pawn, does not pass conditionally, as in the case of a mortgage; but the pledgee has only a special property during the time, and for the objects for which it is pledged.—Story on Bailments, § 287; 2 Parsons on Contracts, 112.

Lord Holt, in *Baldwin v. Cole*, 6 Mod., 212, says: "The very denial of goods to him that has a right to demand them, is a conversion; for what is a conversion but an assuming upon one's self the right of disposing of another's goods; and he that takes upon himself to detain another man's goods from him, without a cause, takes upon himself the right of disposing of them."

An assertion of right inconsistent with that of the owner to exercise dominion over his property is a conversion.—6 Bac. Abr., 677.

A demand and refusal is presumptive proof of a conversion, because it is the assertion of a control of property inconsistent with the general dominion over it which belongs to the owner.

Where personal property is held under pledge, and the full demand be tendered to the holder and he refuses it, the refusal to deliver on such tender is evidence of conversion.—1 Rol., 1, 50; 10 Coke, 56, C; 1 Comyn's Digest, 1, Title "E," 439; 2 Parsons on Contracts, 274; *Ratcliff v. Vance*, 2 Mill's C. R., 241.

We do not perceive in the case anything which forbids the application of the rules which strictly pertain to the action of trover, nor can we discover how their force is weakened, because the transaction was with a bank. The liability of the defendant did not

arise out of a dealing with a bank in the ordinary course of its business. It was a matter entirely outside of the usual routine of its operations. It is, nevertheless, bound, if loss ensues from its tortious acts. It made no difference that the article pledged was money, or its own bills, which represented it. The same principle is to govern as if the article deposited had been a watch or a jewel.

The obligation which devolved on the bank

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was properly understood by its President when he directed the return of the package of bills to the plaintiffs, which they had left, and the acceptance of the notes which they tendered.

It is ordered and adjudged, that the non-suit be set aside, and the case remanded for trial.

WRIGHT, A. J., concurred. (a.)

WILLARD, A. J., dissenting. I am compelled to differ from the majority of the Court in the conclusions arrived at by them. Conceding that the ground on which the Circuit Judge placed his judgment of non-suit is not tenable, still, it does not appear to me that the action can be maintained. If this view is correct, it follows that the non-suit ought to stand.

The plaintiff, in order to succeed in his action of trover, must establish that the defendants engaged to hold the specific notes delivered by him to them, as a security merely for the return of the Confederate currency loaned by them to him, and to return those specific notes upon the performance of the condition upon which they were held. It is not enough, to maintain this form of action, that the defendants merely undertook to deliver, upon the performance of the condition, notes of the same character and value as those deposited by the plaintiff. Nor can this action be maintained if the defendants had the right to use the notes in question.

The contract of the parties is to be looked to as decisive of this question. That contract was neither the ordinary contract that arises out of a bank deposit, in virtue of which a cash credit is immediately given to the depositor, and which gives rise to the relation of debtor and creditor, nor was it strictly a case of special deposit, where the bank is a mere bailee, bound to return the property specifically.

The plaintiff proved that he borrowed \$4,000 of Confederate currency of the defendants, upon a deposit, with them, of bills of the defendants to a like nominal amount. He was to use the currency borrowed, for

eight or ten days. It does not appear that he was to pay interest upon the loan. In point of fact, he tendered the same amount borrowed without interest added.

The language employed in concluding the

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agreement must be *considered in relation to the subject-matter of the contract, and the relations of the parties.

The notes exchanged were, in a commercial sense, money, and were so treated by the parties. The individual bills actually interchanged cannot be supposed to have been the subject of special consideration between them. What they looked to was simply the kind and value of the currency in reference to which they were dealing.

The defendants' business was to lend money for profit, and the plaintiff must be deemed to have approached them in that character. The transaction must be deemed a business transaction. If the bank were not to receive interest, and it is not pretended that they were, their only motive in making the transaction was the use of the currency received from the plaintiffs by way of exchange.

It appears that the bills of the South-western Railroad Bank were counted by the defendants and "put aside." They were undoubtedly placed with other bills of a similar character. As these bills were the defendants' own obligations, it is hardly probable that they would deem it necessary to resort to any extraordinary means of safe-keeping.

If the plaintiff's idea of this case is correct, then the defendants were bound to keep the identical bills delivered by him, and to return them. If they placed them with their other funds, and paid them out, they were guilty of a conversion. Nor could they purge themselves of the tort by having other bills, of like character and amount, ready to deliver to the plaintiff upon his returning the currency borrowed of them. It is not a reasonable view to put upon the plaintiff's testimony to assume that any such consequence was contemplated or intended by the parties.

The Courts have always discouraged attempts to convert ordinary commercial transactions into cases *ex delicto*, especially when, as in the present case, the effect will be to hold one party to his obligations, and allow the other to escape without fulfilling his.

It is one of the most admirable features of the common law that, while protecting the citizen in the enjoyment of his property to the extent of indulging his affections and tastes, and even his capricious likes and dislikes, it yields to the liberal spirit of commerce, and fosters confidence by encouraging mutuality and open dealing, and discouraging reserve and surprise.

I cannot regard the testimony in the case as establishing a tortious conversion on the part of the defendants.

(a.) Judge Wright took his seat upon the Bench in February, 1870, and the Term having been continued until March, this and a few other cases were heard before him. It.

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*HARRIET PHILLIPS v. SARAH B. RIVERS and Others.

(Columbia, Nov. and Dec. Term, 1869.)

[Judgment ¶554.]

A., being seized in fee of land, executed, in 1804, marriage articles, which were recorded, but not until three months had elapsed. In 1820 A. joined her husband in conveying the land to a purchaser, but omitted to sign the Magistrate's certificate of her renunciation of inheritance. After her death her heirs-at-law, P. being one, claimed the land as heirs, and filed a bill against the purchaser for partition. The decree, upon this bill, made in 1824, confirmed the renunciation of inheritance, declared the sale valid, and dismissed the bill. In 1866, P. filed a second bill against the successors of the purchaser, and claimed the land under the marriage articles: *Held*, That P. was concluded by the decree made in 1824 upon the first bill.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1053; Dec. Dig. ¶554.]

Before Carroll, Ch., at Charleston, March, 1868.

The decree of His Honor the Chancellor is as follows:

Carroll, Ch. At the death of William Rivers, the elder, in 1796, his daughter, Frances Susannah, became the owner, absolutely and in fee, of the land in controversy. She was married to Jacinth Laval, Jr., and, as it may be inferred, towards the close of the year 1804. In March, 1820, she joined with her husband in executing, for valuable consideration, a conveyance of the land in question to Henry S. Rivers, in fee. The Magistrate's certificate of her renunciation, though endorsed upon the deed, she omitted to sign, and within a few years afterwards she died. Subsequently to her decease, her children, who survived her, the plaintiff being one of them, exhibited their bill against their father, and his grantee, Henry S. Rivers, claiming, as heirs of their mother, that the deed was invalid, as against her, and praying for the partition of the land referred to. The cause was heard before Chancellor Waties, who, in March, 1824, decreed that the "said renunciation of inheritance, by Mrs. Laval, be confirmed; that the sale to the defendant, H. S. Rivers, be declared valid; and that the bill be dismissed."

With the merits of that decree, we have no concern. There was no appeal. No attempt has since been made, by any direct proceeding, to set aside, reverse, or modify it in any form. The present bill, filed 30th November, 1866, does not even allude to it. Forty-two years have since elapsed. After an acquiescence of such duration, it cannot now be assailed, and, however objectionable it may have been, it could never have been impeached, indirectly or collaterally. Though that obstacle were removed, yet the plaintiff's claim, as heir of her mother, could not be sustained. Whatever right or interest, in that character, vested in her (being im-

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mediate, and not deferred in enjoyment) has been long since barred in analogy to the Statute of Limitations, and by the lapse of time, and the presumptions thence arising.

If the plaintiff prevail in her suit, it must be solely through the title, which she derives from the marriage articles referred to in her bill. They were executed 1st November, 1804, but were not recorded in "the Secretary's office of this State," until the 29th April, 1805. In December, 1825, the purchaser, Henry S. Rivers, sold and conveyed the land to William Rivers; upon the death of the latter, it was sold by the order of this Court, in certain proceedings had for the partition of his real estate, and was purchased by one of his heirs, Horace Rivers, and he having died intestate, the land in dispute has descended to his widow and children, the parties defendant. They, and those from whom they derive title, have held the possession of the land, continuously, ever since its conveyance by Laval and his wife, in 1820.

The ground of defence chiefly relied upon at the hearing was, that Henry S. Rivers and William Rivers, under whom the defendants claim, were purchasers of the land for valuable consideration, without notice of the marriage articles referred to. Whether such notice was had, actually or constructively, by Henry S. Rivers and William Rivers, from whom the defendants deduce their title, was almost, if not altogether, the single question discussed in the argument. For the plaintiff it was contended that actual notice dispensed with registration altogether, and that the recording of the marriage articles, though after the lapse of three months from their execution, raised the presumption of notice to subsequent creditors or purchasers. Such, undoubtedly, is the effect of registration, after the period prescribed by law, in regard to ordinary conveyances. But a different rule seems to be recognized in relation to marriage articles and settlements.—*McCartney v. Ferguson*, 2 Hill Ch., 180; *Taylor v. Heriot*, 4 DeS., 227; *Forrest v. Warrington*, 2 DeS., 255.

An authority still more in point will be found in the case of *J. H. Jeffords v. Union Bank*, and *Jacinth Laval, MSS.*, 1826. The plaintiff in that cause had purchased from Laval certain negroes, included within the marriage articles referred to, and the purpose of his bill was to have the "benefit of his contract, and to be quieted in the possession of the slaves, or to have the contract set aside." In pronouncing the opinion of the Court, Judge Nott holds that the marriage articles, though not recorded in due time,

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were, "nevertheless, binding upon Laval himself. "But all the other parties," he observes, "stand in the relation of creditors or subsequent purchasers, and are, therefore, entitled

to all the benefits to be derived from the Act requiring marriage settlements to be recorded." After remarking that all the persons interested in the marriage articles were not before the Court, and that, therefore, no decree could be made which would affect their rights, he proceeds: "But the Court do not consider the right of Laval to dispose of the property, of such doubtful character as to authorize them to set aside the contract of the complainant on that ground." That judgment, it is manifest, can stand only upon the ground that Jeffords was a purchaser, for valuable consideration without notice, and that the registration of the marriage articles, after three months from their execution, furnished no presumption of notice, as against him.

In *Steele v. Mansell*, 6 Rich., 458, it is said, in reference to the cases cited concerning marriage settlements, "we pretend not to assail those decisions. They will consist with what we hold as to ordinary conveyances, under the joint action of the Acts of 1785 and 1698. In 1785 the provisions concerning marriage settlements were peculiar, and thence onward they have been stringent and progressively exacting. They have not admitted, and do not admit, of the supplemental application to them of the Act of 1698, which gives priority according to the date of registration without limit of time."

When the instrument has not been recorded, the notice of its existence "must be full, explicit, and clearly proved."—*City Council v. Page, Speers Eq.*, 212. There was no evidence of notice here, unless it be presumed from the tardy registration of the marriage articles, after the time prescribed by the statute; and such proof has been adjudged to be insufficient.

The defence set up must prevail, and it is ordered and decreed that the bill be dismissed.

The complainant appealed from the decree of His Honor, on the following grounds:

1. That His Honor erred in decreeing that the tardy registration of the marriage articles, to wit: one month and twenty-nine days after the time prescribed by law in the Acts of 1785 and 1792, the deed being dated 1st November, 1804, and recorded 29th April, 1805, and nearly fifteen years prior to the

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deed to Rivers, to wit: 18th day of April, 1820, rendered them void, as to Rivers, for want of notice. Whereas His Honor should have decreed that the settlement was not void because it had not been recorded within the time prescribed by law; but that it was valid from its date, between the parties thereto, and against all the world from its registry, registry being equivalent to notice.

2. That marriage articles are governed by the same rules of legal construction which

govern all other deeds which are required by law to be recorded.

3. That the decree is, in other respects, contrary to law and evidence.

Whaley, for appellant.

Pressley, Lord & Inglesby, contra.

PER CURIAM. Concurring with the Chancellor, that the decree of the Court, pronounced in March, 1824, in the cause in which the said Harriet Phillips was a party, and which prayed partition of the same land claimed by the said Henry S. Rivers, under whom the defendants in this case derive title, concludes all her rights in the same, the decree is affirmed, and the bill dismissed.

MOSES, C. J., and WILLARD, A. J., concurring.

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*MOSES R. SANDERS and MARTHA JANE,
His Wife, v. ROBERT ROGERS.

(Columbia. Nov. and Dec. Term, 1869.)

[*Trusts* ⇨218.]

A trustee, who held bonds for money, given in 1858, and well secured by a mortgage of real estate, in trust to invest the proceeds, as soon as practicable, in "lands or negroes," held to have become liable to his cestui que trust, as for a breach of trust, for receiving payment of the bonds, in March, 1863, in Confederate Treasury notes, then much depreciated, and depositing the proceeds in a bank, to await an opportunity to invest, until March, 1864, when, under the pressure of an Act of the Confederate Congress, he converted them into a certificate of 4 per cent. Confederate stock.

[Ed. Note.—Cited in *Cureton v. Watson*, 3 S. C. 456, 457; *Singleton v. Lowndes*, 9 S. C. 490; *Koon v. Munro*, 11 S. C. 152; *Hyatt v. McBurney*, 18 S. C. 217, 220.

For other cases, see *Trusts*, Cent. Dig. § 311; Dec. Dig. ⇨218.]

[*Trusts* ⇨218.]

Where the instrument creating the trusts directs in what kind of property the trust funds shall be invested, the trustee will be liable for departing from the direction, unless it is done without fault on his part. Where there is no such direction, and the investment is made in securities of a class not disavored by the Court, then, if the trustee acts with prudence and honesty, he will not be liable if, from circumstances which he could not control, a loss should ensue.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 310; Dec. Dig. ⇨218.]

Before Carroll, Ch., at Darlington, February, 1867.

Appeal by the plaintiffs from the Circuit decree.

On the 22d July, 1856, George C. James, the father of the female plaintiff, executed a deed whereby he conveyed to T. B. Haynesworth, Esq., a certain tract of land, in trust, for the sole and separate use of the plaintiff, Martha Jane, for life, free from the control and liabilities of her husband, with remainder to him for life, if he should be the sur-

vivor, and, after his death, to her children; and with power in the trustee to sell the land, at the request of the plaintiffs—"but the proceeds of the sale shall be invested, as soon as practicable, in other lands or negroes," to be held subject to the uses, trusts, restrictions and limitations therein before expressed. Under the power thus conferred, Haynesworth sold the land, on 8th November, 1857, to James H. Pawley, for \$4,425.00, and took Pawley's bonds for the purchase money, payable in one and two years, secured by a mortgage of the land. Haynesworth died in April, 1861, and on the 25th December of the same year, the defendant, Rogers, was appointed trustee under the deed. The bonds of Pawley, then due, and, except as to a part of the interest unpaid, were, shortly afterwards, turned over, together with the mortgage, to the defendant. On the 9th March, 1863, Pawley paid to the defendant \$5,030.08, in full of the amount then due on the bonds. Some twelve or thirteen hundred dollars of that sum were paid in Rogers' own promissory notes to one Polard, of which Pawley was the holder, and the balance was paid in Confederate Treas-

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ury notes. *On the 1st April, 1863, the defendant deposited in the Bank of Georgetown, to his credit, as trustee, \$5,030.08, the full amount received from Pawley; and, on — March, 1864, he converted \$4,100 of this sum into a certificate of 4 per cent. stock of the Confederate States.

The object of the bill was to compel the defendant to account, in good money, for the amount due on the bonds when he received payment in Confederate currency. Such other facts as appeared in the pleadings and the evidence, and were deemed material, may be found in the decree of the Circuit Court, which is as follows:

Carroll, Ch. When the defendant, Rogers, became the trustee, under the deed of George C. James, of 22d July, 1856, he received certain bonds of James H. Pawley, as parcel of the trust estate. These bonds were executed the 8th November, 1857, bore interest from 1st January, 1858, and were payable, respectively, on 1st January, 1859, and 1st January, 1860. They seem to have been sufficiently secured.

On the 24th March, 1863, they were paid in full to the defendant, Rogers, the aggregate of the debt then amounting to \$5,030.08. Payment was made in the Treasury notes of the late Confederate States of America, which were received at par, and, being afterwards invested, or the bulk of them, in four per cent. Confederate bonds or stock, became utterly valueless at the termination of the recent war. The contest between the parties is, whether the trustee, Rogers, shall be held responsible, and to what extent, for the value of the bonds against J. H. Pawley. It is objected that the trustee violated his

duty, by calling in, unnecessarily, the moneys of the trust estate thus well and safely invested, and by receiving payment in a depreciated currency. The bonds in question were never designed to be permanent investments. Under the power conferred by the deed of G. C. James, the land included had been sold by T. B. Haynesworth, the original trustee, and the bonds of Pawley represented the proceeds of that sale. By the express provisions of the trust deed, upon the sale of the land the proceeds were directed to be invested, "as soon as practicable, in other lands or negroes." The plaintiff, Sanders, had no land, but owned negroes, and there were some twenty negro slaves belonging to his wife's separate estate. It was very natural, under such circumstances, that she should desire a tract of land to be bought, upon which her negroes might be employed, and where she, with her husband, might re-

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side. *Certainly her father, her husband, and her trustee, were under the impression that she wished such purchase to be made. But, upon this point, we are not left to inference merely. Mrs. Sanders, in her testimony, declares that she "at one time tried to buy a tract of land from a Mr. Head." Her father deposes that, "before Pawley's bonds were paid, he heard of a negotiation, between Sanders and Head, for a tract of land. That the former wished to buy from the latter, and that Sanders and wife were then living on the land," which they had rented. The negotiation referred to must have been pending at the payment of Pawley's bonds, and the purchase contemplated by Sanders was none other than that which his wife speaks of in her testimony—a purchase to be effected with the funds of her trust estate. At least, such are the inferences fairly deducible from Sanders' letter to Rogers, of the 15th May, 1863. Nothing had been paid upon Pawley's bonds for more than three years. The doors of the Courts, by the effects of the Stay Acts, as they are termed, were regarded as closed against the collection of debts. The trust of the deed of G. C. James required an investment of the money due by Pawley as soon as practicable. The condition of the trust estate, and the interest and wishes of both Mrs. Sanders and her husband, seem to point to the propriety of an investment of that fund in land, and, at her instance, a treaty was actually on foot with a view to such investment.

Pawley was now ready to make payment of his bonds in Confederate Treasury notes, then the only currency of the country, and, under such circumstances, the trustee accepted payment in that form. At that date, the Confederate Treasury notes had undoubtedly suffered some depreciation. According to the evidence, however, they continued to be accepted in the community, for months afterwards, in payment of debts contracted before

the recent war. Large amounts of them were received by the Commissioner in the course of the year 1863; and it was not until the latter part of that year that he "felt in doubt as to whether he should receive Confederate money as Commissioner in Equity." It was further testified that, in 1863, lands had appreciated less than other descriptions of property, and "were sold for Confederate money." Rogers, himself, testifies that "when he received the money from Pawley, he did not suppose there would be any difficulty in buying lands with that money, and Sanders and wife wished land to be bought." It is further contended that the defendant, Rogers, incurred a personal liability for the amount of Pawley's bonds, be-

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cause he retained the *proceeds in his hands for twelve months, in contravention of the express direction of the trust deed, and then made such investment of them, or the greater bulk of them, as resulted in their total loss. Sanders' letter, of 15th May, 1863, already referred to, is of no little significance, and in more aspects than one. He announces in it the failure of the treaty for the purchase of the land from Head, which he states, however, to have proceeded not from Head's unwillingness to receive Confederate Treasury notes, but from some difficulty in getting good titles. In the immediate sequel of his letter, he makes the request (in which, as he states, Mrs. Sanders joins) that Rogers would put the money out to the best advantage, as they were not disposed to let it be idle. It does not appear that Rogers was wanting in earnest endeavors to invest the fund in land, or, that failing, to render it otherwise productive. G. C. James, the father of Mrs. Sanders, himself testifies that Rogers frequently asked him to aid him in buying land for her; applied to him to purchase the land he resided upon for his daughter, Mrs. Sanders; and, finally, requested him to borrow the trust money, which the witness declined. The efforts of Rogers to invest in land, or let to interest the proceeds of Pawley's bonds, seem to have been abortive; and, at the expiration of twelve months, the money was invested as has been stated, and was entirely, or in part, lost.

The whole amount of Pawley's bonds was not paid immediately and directly in Confederate Treasury notes. Some twelve or thirteen hundred dollars of that sum were paid in certain promissory notes, made by the defendant, Rogers, and payable to Joshua Pollard, of which notes Pawley was the holder. Undoubtedly the notes against himself were not designed by Rogers, when received, to be investments of so much of the proceeds of the bonds. Such disposition or use of the money would have been a palpable breach of his trust.—*Spear v. Spear*, 9 Rich. Eq., 184. That he contemplated, upon that

occasion, was not the substitution of securities, but the collection of the bonds—their collection in money. No investment in another form of mere obligation or promise to pay was intended. On the contrary, his sole purpose and motive, in the transaction, was to obtain payment in money, in order that he might effect another and very different investment—an investment in land. Pawley was willing to receive payment from him in Confederate Treasury notes, and of these Rogers seems to have had on hand a large amount.

To dispense with the mere form of deliver-

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ing to Pawley the *amount of his promissory notes in Confederate Treasury notes, and then having it immediately returned to him, he received directly his own promissory notes. They were delivered and received as the representative of so much in Confederate Treasury notes, and within a week afterwards the aggregate amount of Pawley's bonds, \$5,030.08, was deposited by him in the Bank of Georgetown, to his credit as the trustee of Mrs. Sanders. The dates of the promissory notes against Rogers have not been shown; but whether they were prior or subsequent to the commencement of the recent war, cannot affect the nature and meaning of the transaction. Any other view of it than that suggested, it is considered, would be a perversion of what was designed and done by the parties. The plaintiffs are not understood as imputing to the trustee any actual fraud or willful violation of his duties. It is said that, "if there was no mala fides in the conduct of the trustee, the Court will always favor him; for a trust is an office necessary in the concerns between man and man, and if faithfully discharged, is attended with no small degree of trouble and anxiety." "This Court," says Chancellor Kent, "has always treated trustees, acting in good faith, with great tenderness."—*Thompson v. Brown*, 4 John. Ch., 628. "The liability of trustees," it is well remarked, "is not measured by the abstract rule of their duty. The universal test of their liability, or exemption from liability, is this: is there, or is there not, evidence of faithful endeavors to fulfill it?" "Any rule more rigorous than this" it is added, "would deter prudent and honest men, of ordinary capacity, from accepting the appointment."—*Hext v. Porcher*, 1 Strob. Eq., 171, 172.

In the defendant's acts and conduct, in reference to the bonds of J. H. Pawley, nothing is perceived which is inconsistent with good faith and honest endeavors on his part, to discharge the duties of his trust. For the loss which has resulted from his investment in Confederate securities, the defendant is, therefore, regarded as not responsible. As, however, the sum so invested (\$4,100) is less than the amount received upon Pawley's bonds, a reference to the Commissioner still

appears to be necessary. It is ordered that an account be taken of the receipts, disbursements, and all and singular the transactions of the defendant, as trustee as aforesaid, conformably to the principles of this decree.

The plaintiffs appealed, and now moved this Court to reverse or modify the decree, on the grounds:

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*1. Because the presiding Chancellor erred in decreeing that Rogers had the right to receive the amount on Pawley's bonds in Confederate currency.

2. Because the presiding Chancellor erred in decreeing that the interests of Mrs. Sanders, to whose sole and separate use the property had been conveyed, could legally be affected by the acts or authority of her husband, whose only interest in this property was contingent.

3. Because the presiding Chancellor erred in decreeing that Rogers incurred no responsibility by purchasing his individual notes from Pawley with trust funds.

4. Because the presiding Chancellor erred in decreeing that Rogers' individual notes, purchased by him in his settlement with Pawley with trust funds, did not become, as such, a portion of the trust estate, which he had no right to convert into depreciated Confederate currency.

5th. Because the presiding Chancellor erred in decreeing that Rogers had the right to invest the trust funds in a different manner from that prescribed by the deed creating the trusts, without incurring responsibility.

6. Because the decree does not distinguish between a trustee with discretionary powers and one in whom such powers are not vested, but, on the contrary, justifies one of the latter class for doing an act which the deed of trust prohibits.

Warley, for appellants.

Harlee & Boyd, contra.

April 20, 1870. The opinion of the Court was delivered by

MOSES, C. J. The bonds and mortgage held by the defendant, Rogers, were in his hands, subject to the trusts which primarily attached on the land sold by the trustee, Haynesworth, in whose place, after his death, he was substituted. The deed required "the proceeds of the sale of the land to be invested, as soon as practicable, in other lands or negroes, and the property so purchased to be subject to the same uses, trusts, restrictions and limitations as are hereinbefore expressed of, in, and concerning the premises" thereby conveyed.

Rogers, trustee, was clothed with no discretion as to the trust. The investment of the proceeds of the land was to be made in lands or negroes, and if he had, on the ex-

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press directions and in*structions of the ces-

tui que trust, and her husband, diverted the trust fund from the disposition expressed in the deed under which he was appointed, he would be responsible for any loss which may have followed such violation of duty.

In the case of *Womaek v. Austin*, decided at the present Term, (ante, p. 421,) it was adjudged, that where the instrument prescribed the mode of investment, unless it could be shown that, without fault on the part of the trustee, it could not be made, he would not be excused for departing from the terms and directions of the deed or will creating the trust. It was not the announcement of any new rule by which the conduct of those holding fiduciary relations was to be measured, but the application of principles almost coeval with the administration of equity.

Where the judgment of a trustee is unrestrained and unfettered, if he resorts to an investment within the class not disfavored by the Court, and acts with prudence and honesty, he will not be made responsible, if, from circumstances which he could not control, loss should ensue. Where it is not controlled by the authority in virtue of which he acts, he will be excused for an erroneous exercise of it, provided there is evidence of honest intentions and faithful endeavors to do his duty.—*Mayer v. Mordecai*, 1869, (ante, 383 [7 Am. Rep. 26].)

It might be a contradiction in terms to say that there is faithful endeavor by a trustee to perform a duty, where, the impossibility of doing it not being shown, the duty imposed is violated by the very act of not executing the trust according to the intention of the party who created it, and assumed and promised by the party who accepted it.

The bonds of Pawley were for the purchase money of the land, and they were secured by a mortgage of it. They had been due over three years. The proceeds, when collected were to be invested in other lands or negroes. The mortgage was taken as full security for the debt, at a gold rate. Without a necessity for its collection, the defendant called it in, and virtually allowed Pawley to buy the land at an amount, in depreciated currency, nominally equal to the face of the bonds, when the consideration of the purchase then due and owing was the like sum payable in gold.

It is said, however, that Rogers was obliged to collect, before he could invest in other land. If he had even contracted for a place, to be paid for in Confederate notes, and, on the faith of it, had made the collection, and the sale, by no fault of his, had mis-

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car*ried, there would have been some reason for his claim of exemption from the consequences of the loss. Without, however, another tract of land in view, or any evidence of a probability that he could soon purchase one with the currency which he accepted, the

results of the risk which he encountered must be borne by him.

He had made no contract for the "Head land," for he states, in his answer, "that his attempt to secure it having failed, the complainants having no home, he did, in March, 1863, agree to receive from Pawley the amount of his bonds in Confederate money." If he knew that Pawley was prepared to pay, and was aware of the character of the proposed payment, did not common prudence demand that he should defer the acceptance until he should be satisfied that, with the same notes, he could purchase another piece of land, for the investment in negroes never entered into his contemplation, or that of his *cestui que trust*? The answer and the testimony furnish the fact "that land had not advanced in proportion to other property." The inference is, that it was of ready sale, and yet, knowing that he could procure the means of payment, he converted the bonds into a depreciated currency, without first contracting for land, to the payment for which he could have applied it. The result was, that Pawley, the debtor, gained a large advantage at the expense of the *cestui que trust*, if the consequent failure of investment in land is to fall upon her.

Generally it is not the duty of trustees to call in money, invested on good real estate, where there is no probable risk.—*Howe v. Earle of Dartmouth*, 7 Ves., 150. If, however, as the deed here required the proceeds of the land to be re-invested in the same way, the trustee would have been acting in proper consistency with the obligation imposed upon him, if, either first securing another parcel of land, he had sought payment of the bonds, or if even well convinced that he could do so in a reasonable time. There is no proof that he made such contract, or that, after the acceptance of the Confederate notes, he essayed, in any active manner, to procure with them another tract of land. On the contrary, he retained the notes on deposit for twelve months, and then converted them into Confederate four per cent. certificates. His excuse for doing this, he avers, is the fact that, under the Act of the Confederate Government, the holders of such notes were required so to convert them by first of April, 1864, or submit to a large depreciation. This necessity was, however, induced by his own act. If the receipt from Pawley, of the said notes, was voluntary, having placed himself

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in *a position where loss was forced upon him, unless he so converted them, how can it avail to shield him from the consequences of an act which he was not bound to perform, or how can he ask that the burthen should fall on his *cestui que trust*?

The conclusion which we have thus reached does not render it necessary that we should say anything on so much of the

grounds of appeal as charge the defendant with liability, because he received from Pawley his own notes in part payment of the bonds.

It is proper, however, that we should briefly state our views in regard to that transaction, lest we might be understood as concurring in those of the appellant.

Where a trustee sells, intending to apply the purchase money to the extinguishment of his own debts, and there is no proof of his means to replenish or acquire an equal sum from other sources, it is a breach of trust.

It was proved that the defendant had on hand abundant means to pay his notes, and that Pawley was willing to receive Confederate notes in satisfaction of them. It amounted, in effect, to exactly the same thing as if he had first paid his debt to Pawley, and then received from him the very bills in satisfaction of the bonds. There would have been a manifest difference had the testimony shown that he was without the ready ability to meet his notes, for then there would have been a dealing with the trust funds for his own private benefit.

It is ordered, that so much of the decree of the Chancellor as adjudges the defendant not responsible for the loss which has resulted from his receipt of the said notes from Pawley, and his investment in Confederate securities, be reversed. That the case be remanded to the Court of Common Pleas for Darlington County, with directions for an account of the said trust estate by the said defendant, on the principles of this opinion, with leave to plaintiff to apply to the said Court for all orders proper and necessary to carry out its results.

WILLARD, A. J., concurred.

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*M. CAULFIELD, Plaintiff in Error, v. THE STATE ex rel. THE ATTORNEY GENERAL, Defendant in Error.

(Columbia. Nov. and Dec. Term, 1869.)

[*Municipal Corporations* ¶155.]

By an Act passed in December, 1850, the office of Flour Inspector for the Parishes of St. Philip's and St. Michael's was created—the appointment vested in the Governor, and the tenure fixed at two years. By an Act passed in 1854, the Act of 1850 was so amended as to vest the appointment in the City Council of Charleston. In December, 1868, the City Council elected A. Flour Inspector for two years, and he was duly inducted into office. In May, 1869, the City Council, by Ordinance, declared the office vacant, and, in July thereafter, it elected C. to fill the supposed vacancy: *Held*, That the power of the City Council was to appoint merely; that it had no power to declare the office vacant, and, consequently, that A. was the legal incumbent of the office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 343, 344; Dec. Dig. ¶155.]

[*Powers* ⇨19.]

At the common law, an appointment under a power is not revocable, unless expressly made so at the creation of the power.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. §§ 36-47; Dec. Dig. ⇨19.]

[*Municipal Corporations* ⇨191.]

The first Section of the Act of August 15, 1868, to regulate the tenure of certain offices, &c., did not terminate A.'s office upon the election of a successor—clearly so, as A. was, himself, the successor of the incumbent at the time of the passage of the Act; nor did that Act vest the City Council with power to alter or abridge the tenure of the office, which is a State, and not a municipal office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 525; Dec. Dig. ⇨191.]

Before Moses, C. J., at Chambers, September, 1869.

This case was brought up, by writ of error, from the Circuit Court for Charleston County, where the original papers remain of record. It was an application to the Chief Justice, at his Chambers, at Sumter, and was based on an affidavit, as follows:

"Personally appeared before me, C. N. Averill, who, being duly sworn, says that he was elected by the City Council of Charleston, on the 29th day of December, 1868, to the office of Inspector of Flour, for the City of Charleston, for the full term of two years, in accordance with the provisions of the Act of Assembly of the said State, in such case made and provided; that he duly qualified, was duly commissioned, and entered upon the duties of the said office, and has continued to discharge the said duties; but one M. Caulfield has, without warrant or authority of law, as this deponent is advised, usurped the said office of Flour Inspector, and claims to exercise the duties thereof; and this deponent having required the said M. Caulfield to desist from the exercise of his said office, and he having refused, this deponent prays that a rule may issue against the said M. Caulfield, to show by what authority he claims to exercise the said office of Flour Inspector."

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*Upon that affidavit, the following rule, signed by the Chief Justice, was issued:

At Chambers,
Sumter, S. C., August 24, 1869. }

On reading the foregoing affidavit, it is ordered that the said M. Caulfield, therein named, do appear before me, at my Chambers, in Sumter, aforesaid, on the fifteenth day of September next, at ten o'clock A. M., and then and there show by what authority he exercises and enjoys the office of Inspector of Flour, of the City of Charleston; and that this order, and the proceedings in the premises, be entered of the State ex relatione the Attorney General, Daniel H. Chamberlain, against the said M. Caulfield.

Let a copy of the said affidavit accompany

this order, and be served on the said M. Caulfield.

On the 15th September, 1869, Martin Caulfield, the respondent, filed his return to the rule, under oath. It is as follows:

"A rule having been served upon Martin Caulfield, directing him to appear and show by what authority he holds and claims to exercise the office of Inspector of Flour for the City of Charleston, now comes the said Martin Caulfield, and, in response to said rule, shows:

"1. That, by Section 1 of an Ordinance entitled "An Ordinance to declare vacant certain offices, and to provide for an election for the same," ratified by the City Council of Charleston, on the 20th day of May, A. D. 1869, the office of Inspector of Flour, then and prior to that time filled by C. N. Averill, was declared vacant.

"2. That, on the 6th day of July, A. D. 1869, public notice thereof of ten days having been given in a city newspaper, the City Council of the city of Charleston, at a regular meeting, did proceed and duly elect to the office of Inspector of Flour for the city of Charleston, said Martin Caulfield.

"3. That, on the 10th day of July, A. D. 1869, the said Martin Caulfield, having first given bond, with good security, approved by the City Council, in the penal sum of two thousand dollars, conditioned for the faithful discharge of his said office, was duly qualified by taking the oath prescribed by law, and commissioned as Inspector of Flour for the city of Charleston.

"4. That, on the 15th day of July, A. D. 1869, the said Martin Caulfield made due and formal demand upon the said C. N. Averill,

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*late Inspector of Flour for the city of Charleston, to vacate and surrender said office to him, said Martin Caulfield. That, from that time henceforth, the said Martin Caulfield has assumed and exercised the duties pertaining to the said office of Inspector of Flour, for the city of Charleston, as by law he was and is entitled to do.

"And this respondent, having fully answered the premises, begs to be hence dismissed with his reasonable costs, in this behalf most wrongfully sustained."

The Attorney General, prosecuting for the State, demurred to the return, and the respondent joined in demurrer.

The pleadings being closed, and counsel for the relator and the respondent having been fully heard, the Chief Justice delivered his opinion and judgment, as follows:

Moses, C. J. The information in this case relates to the office of Inspector of Flour for the city of Charleston. The office referred to is Inspector of Flour for the Parishes of St. Philip's and St. Michael's, as it is properly called in the argument of Mr. Tharin for the respondent.

It sets forth the election of C. N. Averill, by the Council, on the 29th day of December, 1868, for the full term of two years, his assumption of the office, and discharge of its duties, until usurpation and possession of it by the said M. Caulfield, who claims to exercise the duties appertaining to the same, and prays process of quo warranto against the said Caulfield.

The office was established and the term fixed by the Legislature. With this exception, the facts and the pleadings are the same as submitted in the case of Coogan v. State Ex Relatione The Attorney General, (a.) and the questions arising have been there considered and decided.

An additional point has been made here by the counsel now representing the respondent.

The Act "to provide for the inspection of flour" was passed on the 20th December, 1850, and required and authorized the Governor, on or before the 25th day of the same month, to appoint the Inspector, who was to continue in office for two years.

On the 21st December, 1854, the Act was amended, and the appointment conferred on the City Council.

It is claimed that the election by the Coun-

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cil on the 29th December, 1868, was against law, and the election of Caulfield, therefore, valid.

For the proper understanding of this question, the day of the first election, under the Act of 1854, should have been made known to the Court, by the pleadings or otherwise, so that the date of the expiration of the term thereunder could be ascertained.

It could not have been the intention of the Legislature that the time fixed by the Act of 1850 was to be mandatory on the Council. So to consider it, would charge the Legislature with the absurd requisition of an impossibility. The Act was not ratified until the 21st, and how could the election be made by the 25th, when, by law, ten days' notice of the election for every city office is to be given in the public papers?

Was it to remain vacant until the next ensuing 25th December?

I am not even satisfied that the period fixed for the appointment by the Governor, in the Act of 1850, bound the Council to an election by the same day, under the power given to it by the Act of 1854.

It is not my purpose to consider the point at any length. I shall only refer to what is said by the Court in the case of *The People v. Runkle*, 9 Johns., 147: "The trustees elected after the day would be in by color of office; that the election would not be void, and their acts would be good, and the irregularity, if any, would cure itself in a subsequent year."

The State is entitled to judgment of ouster against the respondent, M. Caulfield.

(a.) See next case.

It is, therefore, ordered, that the respondent, M. Caulfield, do not, in any manner, further intermeddle with, or concern himself about, the said office of Inspector of Flour, or with the duties, rights, books and property of the said office, but that he be absolutely judged and excluded from exercising or using the same, or any of them, for the future, and that he abstain from doing or performing, or assuming to do or perform any act or acts whatsoever, in any manner pertaining to the said office, on pain of contempt of the Court.

Let all the papers be filed in the office of the Clerk of the Court for the County of Charleston.

The case was now heard in this Court.

Corbin, for plaintiff in error.

Lesesne & Miles, contra.

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*May 13, 1870. The opinion of the Court was delivered by

CARPENTER, J., sitting in place of the Chief Justice. The office of Inspector of Flour for the Parishes of St. Philip's and St. Michael's was created by the Act of Assembly of December 20, 1850. The Inspector was to be appointed by the Governor, and hold his office for two years; to give a bond to the State, and take an oath of office, before the Clerk of the Court of Common Pleas, for the performance of the duties of his office. The office thus created was a State office. The Act of 1854 amended the foregoing Act by transferring the power of appointment from the Governor to the City Council of Charleston; but the amendment did not change the character of the position by making it a municipal instead of a State office; nor did it give the City Council of Charleston any power or authority to alter or abridge the nature or tenure of the office.—12 Stat., 8, 316.

It is a well settled principle of the common law, that, in all cases of appointments under powers, the appointment is not revocable, unless expressly made so at the creation of the power. When an appointment is made, the party, in contemplation of law, takes immediately from the creator of the power. An officer thus created is the creature of the law which confers the power of appointment, and he holds his position the same as if his name had been specially mentioned in the statute.—Shower, 523, cited in *ex parte Hennen*, 13 Peters, 230 [10 L. Ed. 136].

The City Council of Charleston having, on the 29th of December, 1868, appointed C. N. Averill to the office of Inspector of Flour, under authority of the Acts of 1850 and 1854, for the term of two years, subsequently, by an Ordinance ratified May 20, 1869, declared that and certain other offices vacant, and provided for an election to fill the vacancies thus created; and, under the operation of this Ordinance, the City Council of Charleston proceeded to elect Mr. Caulfield, the plain-

tiff in error, to the office of Inspector of Flour.

In my judgment, the Ordinance of the City Council of Charleston, of May 20, 1869, did not make the office of Flour Inspector vacant, because the City Council had no power or authority to abridge the tenure of the office, which was created and regulated by the State. As we have seen, the power of appointment of the officer, conferred by the Legislature upon the City Council, does not carry with it the power of removal, or to abridge the term of office.

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*The counsel for the plaintiff in error insists that, pursuant to the first Section of the Act to regulate the tenure of certain offices, the appointments thereto, and for other purposes, ratified August 15, 1868, the right of C. N. Averill to the office of Flour Inspector was terminated by the election of Martin Caulfield thereto. I had occasion to give construction to the Act referred to in a judgment pronounced in the case of *The State Ex Rel. The Attorney General v. Henry Trescott*. In that case, I held that the office then in question, that of Register of Mesne Conveyance, not being one of those provided for by the Constitution, was liable to be altered or abolished by the legislative powers of the State, upon the organization of the permanent Government. But the General Assembly, having chosen not to amend the Act, or to abolish the office, but to provide, instead, that the incumbent should remain in office until his successor should be elected and qualified, I held that the word "until," in the above connection, was a word of limitation, the meaning of which was that he should continue in office until the election or appointment and qualification of his successor, according to law, and no longer. To this construction of the statute I shall adhere, although recognizing the force of the reasoning of the counsel for the defendant in that case.

But I am not prepared to extend the effect and operation of the Act of August 15, 1868, beyond what I then conceived to have been its necessary meaning, if it was to have any meaning at all: for it is, in general, true, that a statute shall not be so construed as to operate retrospectively, or to take away any right, unless it contains either an enumeration of the cases in which it is to have such an operation, or words which can have no meaning unless such construction is adopted—*Broom's Legal Maxims*, 29. To give to the Act of 1868 the operation contended for in behalf of the plaintiff in error, will not only be to extend it, by implication, to a case not within those enumerated, but to repeal a former and express statute; and implied repeals are not favored by the law, since they carry with them a tacit reproach that the Legislature thus ignorantly, and without knowing it, made one Act repugnant to and inconsistent with another.—*Broom's Legal Maxims*, 24.

But, admitting the right and power of the

Legislature to repeal its former Act, by implication, by the passage of a subsequent and inconsistent Act, it cannot be held that the Legislature has delegated to a municipal corporation the power to repeal an Act of the Legislature, or to alter or abridge the tenure

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of offices created by *the Legislature, without the most explicit declaration of such intent, or the most absolutely necessary implication. It has been held that the Legislature cannot confer upon a municipal corporation the power to repeal, by Ordinance, a statute of the State.—*Abbott on Corporations*, 491. It is certain that the case is not expressly referred to in the statute; and, in my judgment, it cannot be maintained by necessary implication. The cause of exclusion from office of Averill does not proceed from the Act itself, but from the election held by the City Council, under their Ordinance declaring the office vacant. If the election of Flour Inspector had been postponed until the existing tenure of office had expired by the Act itself, no right would have been violated. The wrong done is by the Ordinance of the city interpreting the Act as declaring the office vacant as a necessary implication from its language. The Ordinance of the City Council which declares the office vacant is, therefore, null and void.

But, whether I am right or not, in the foregoing conclusions, there is another fact in the case which has not been adverted to in argument, but which seems to me to be entirely conclusive upon the point that the City Council of Charleston derived from the Act to regulate the tenure of certain offices and appointments no authority to declare vacant the office of Flour Inspector. The Act itself, as we have seen, was ratified on the 15th of August, 1868, when the office of Flour Inspector was held by another person, while Mr. Averill, the relator, was elected on the 29th of December following. The Act, if it had any application to the office of Flour Inspector, operated upon the incumbent of that office at the time of the passage of the Act, who had been appointed thereto under the Provisional Government, or under military authority, and whose office was terminated upon the appointment and qualification, according to law, of a Flour Inspector—that is, upon the appointment and qualification of C. N. Averill. The Act of August 15, 1868, simply declares that certain officers shall hold their offices until their successors shall be duly elected or appointed. Supposing the office of Flour Inspector to be one of those embraced in the Act, then Mr. Averill was the successor of the incumbent of the office appointed under military authority or the Provisional Government; and the Act cannot refer to Mr. Averill, because he was not appointed under authority of either, but was elected by the City Council, under authority of a law of the State.

For these reasons, as well as those given

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in the opinion of the *Chief Justice, I am of the opinion that the judgment of ouster upon the information should be sustained, and the writ of error dismissed.

WILLARD, A. J., concurred.

WRIGHT, A. J., dissented.

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P. J. COOGAN, Plaintiff in Error, v. THE STATE ex relatione THE ATTORNEY GENERAL, Defendant in Error.

M. CHAMPLIN, Plaintiff in Error, v. THE SAME.

G. ADDISON, Plaintiff in Error, v. THE SAME.

(Columbia. Nov. and Dec. Term, 1869.)

[*Municipal Corporations* ¶155.]

Under Section 1 of the Act of August 15, 1868, "regulating the tenure of certain offices," &c., the City Council of Charleston had power, in May, 1869, to vacate, by Ordinance, municipal offices whose incumbents held under elections by the City Council, and appointments by the Commanding General of the District, held and made in 1866 and 1867, and to fill the vacancies thus created by the election of their successors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 343, 344; Dec. Dig. ¶155.]

[*Municipal Corporations* ¶155.]

Municipal officers, elected by a City Council, during the existence of the Provisional Government, were within the terms of the Act, as municipal officers elected under the late Provisional Government.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 342-345; Dec. Dig. ¶155.]

[*Municipal Corporations* ¶149.]

The Act itself, on and after its passage, became the authority by which the incumbents of the offices embraced within its terms held their respective offices, and, as that authority empowered them to hold only "until their several offices are filled," &c., upon any one of the offices being filled by the appointment, or election, and qualification of a successor, the incumbent, ipso facto, ceased to hold.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 327-332; Dec. Dig. ¶149.]

[This case is also cited in *Caulfield v. State ex rel. Attorney General*, 1 S. C. 463, as to facts and pleadings.]

Before the Chief Justice, at Chambers, Sumter, September, 1869.

These were writs of error to the Circuit Court for the County of Charleston.

The facts out of which the application in Coogan's case arose, the pleadings therein, and the questions of law involved, fully appear in the judgment of the Judge below. That judgment is as follows:

Moses, C. J. An information in the nature of the quo warranto, on the relation of the Attorney General, was filed on the 3d day of

September, 1869, against Patrick J. Coogan,

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requiring him *to show cause by what authority he exercises the office of Assessor of the city of Charleston.

The information sets forth the election of William N. Hughes, by the City Council, on the 11th day of December, 1867, to fill the unexpired term of David C. Gibson, deceased, who had been elected to the office on the 20th of November, 1866, for four years, the term affixed by the Ordinance of December, 1858, (3 C. O., 78.) and the appointment, vice the said Gibson, on the 24th of December, 1867, by the General then commanding the Second Military District, by authority of the Reconstruction Acts of Congress; that he entered on the discharge of the duties, and continued therein until the 19th day of July, 1869, when the office, and all the books and papers pertaining thereto, were taken possession of, and he, the said William N. Hughes, excluded therefrom by the said Patrick J. Coogan, who has since continued to exercise the duties of the said office in violation of law, and in derogation of the rights of the said William N. Hughes.

The return of the said Patrick J. Coogan submits:

1st. That, by Section 2 of an Ordinance entitled "An Ordinance to declare vacant certain offices, and to provide for an election for the same," ratified by the City Council of Charleston, on the 20th day of May, A. D. 1869, the office of City Assessor, then, and prior to that time, filled by William N. Hughes, was declared vacant.

2d. That, on the 6th day of July, A. D. 1869, public notice thereof of ten days having been given in a city newspaper, the City Council of Charleston, at a regular meeting, did proceed and duly elect to the office of City Assessor the said Patrick J. Coogan.

3d. That, on the 10th day of July, A. D. 1869, the said Patrick J. Coogan, having first given bond, with good security, approved by the City Council, in the penal sum of one thousand dollars, conditioned for the faithful discharge of the duties of his office, was duly qualified, by taking the oath of office required by law, and commissioned as City Assessor for the city of Charleston.

4th. That, on the 15th day of July, A. D. 1869, the said Patrick J. Coogan made due and formal demand upon William N. Hughes, late City Assessor, to vacate and surrender the said office of City Assessor to him, said Patrick J. Coogan, and all property, books and papers pertaining thereto; and the Hon. Gilbert Pillsbury, also, on said 15th day of July, A. D. 1869, as Mayor of the city of Charleston, notified and directed the said William N. Hughes to vacate and surrender

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the office of City Assessor, with all the *property, books and papers pertaining thereto, to

said Patrick J. Coogan; that the said William N. Hughes, utterly disregarding the said demand of the said Patrick J. Coogan and the said order of the said Hon. Gilbert Pillsbury, Mayor of the city of Charleston, did neglect and refuse to vacate and surrender said office of City Assessor for the City of Charleston, and the property, books and papers pertaining thereto, to said Patrick J. Coogan.

5th. That, on the 19th day of July, A. D. 1869, the said William N. Hughes being absent therefrom, the Hon. Gilbert Pillsbury, Mayor of the city of Charleston, instructed and directed said Patrick J. Coogan, City Assessor, quietly and peaceably to take possession of the public office of the City Assessor (the same being the property of the City of Charleston, heretofore occupied by the City Assessor,) and all the public property, books and papers pertaining to said office of City Assessor, and to enter upon and discharge the duties of said office; that, pursuant to said instructions of the Mayor of the city of Charleston, and by virtue of his said office of City Assessor, the said Patrick J. Coogan did, peaceably and quietly, take possession of the public office, property, books and papers pertaining to said office of City Assessor, and did enter upon and discharge the duties of said office, and the same hitherto and now continues to do, as by law he is entitled to do.

To this return the relator demurred, and the respondent has joined in the demurrer.

The manner of the actual taking possession of the office, books, &c., is not involved in the question before me. I am alone to consider and determine whether the respondent is entitled to the office, and the administration of its functions, by virtue of law.

The City Council, under the powers conferred by the Act of 1783, (7 Stat. at Large, 99,) "was authorized to appoint such officers as shall appear to them requisite and necessary for carrying into effectual execution all by-laws, rules and Ordinances they may make for the good order and government of the city."

In 1842, the officer theretofore known as City Inquirer and Assessor, was, by Ordinance, to be called and designated as City Assessor, and, by Ordinance of December 7, 1858, the term thereof was fixed for four years.—1 C. O., p. 13; 3, p. 78.

On the 10th of October, 1826, the Council passed an Ordinance subjecting any of its officers to removal by the votes of seven or more of its members, "for such cause as to them shall seem sufficient, after full hearing of the case." By the Ordinance of October

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*19, 1859, the number was extended to nine, and the words "for such cause as to them shall seem sufficient, after a full hearing of the case," were repeated and retained.—1 C. O., p. 26; 2, p. 90.

On the 20th May, 1869, an Ordinance was passed entitled "An Ordinance to declare vacant certain offices, and to provide for an election for the same." The second Section includes the office in question, and is in the following words: "That all offices now filled by military appointment, or by election of any provisional Council, are hereby declared to be vacant, and the same shall be filled by election at the time hereinafter designated." The fifth Section repeals all Ordinances or parts of Ordinances inconsistent with the same.

It is by force of this Ordinance, and the subsequent election of Mr. Coogan, that he now claims the office.

It will not be questioned that, to the extent conferred upon the corporation of Charleston by its charter, the Council has the right to legislate in all matters incident to the due and proper execution of the power delegated to it by that instrument. Nor will it be disputed that, where an office is created by statute, it is within the control of the Legislature. A corporation, in relation to its officers, may exercise the same power. In other words, the election to an office (not established by the Constitution of the United States or a State) confers no vested interest in the sense that such an interest is understood as resulting from a personal obligation or contract. The authority which calls the office into existence may add to, diminish, vary and modify its duties, compensation, and all the incidents attaching to it. Nay, it may abolish the office itself, and thus terminate it. These are all acts of legislation, incident to the power of appointment, which implies that of removal, in the absence of constitutional limitation or restriction. I do not understand the case, *ex parte Hennen*, as going farther.—13 Peters, 330 [10 L. Ed. 136].

A mere ministerial officer, appointed *durante bene placito*, may be removed without any other cause than that the pleasure of those who appointed him is determined; and it is unnecessary to resort to notice and formal assertion, for the appointment of another to office is sufficient. The right in these cases to remove is incidental to that of appointment.—Wilcox, 253.

There is a difference to be observed where the time is limited by law. If it is to continue solely at the pleasure of the appointing power or the officer, (as in *Hennen's case*;) it may be terminated at the will of either, even

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without notice. If the period of its duration is prescribed, its tenure may be changed, either, by extension or diminution, by the authority which originally fixed it.

In *Smith v. Latham*, the Court clearly recognized the distinction between offices, the term of which was to exist only at pleasure and those where the tenure was fixed to a determinate period—and the fact as to the duration was to be gathered from the lan-

guage of the statute creating the particular office.—9 Bing., 679.

In *Avery v. Inhabitants of Tyryingham*, Parsons, C. J., says: "It is a general rule that an office is holden at the will of either party, unless a different tenure be expressed in the appointment, or is implied by the nature of the office, or results from ancient usage."—3 Mass., 177.

In the case of *Butler v. Pennsylvania*, the question before the Court was whether the original appointment for a certain period entitled the party, during his continuance in office, to the compensation originally fixed, and which was afterwards reduced by the Legislature. The right of the Legislature to transfer the appointment from the Governor to an election by the people, was not one of the points submitted in the cause. In fact, while the Act of 18th April, 1843, changed the compensation, it was not to go into effect, by its provisions, until the second Tuesday in January following. The term, therefore, of the officers remained virtually untouched.—10 Howard, 402 [13 L. Ed. 472].

In *Conner v. New York*, it was held that the term, the mode of appointment and the compensation may be altered at pleasure, by the Legislature, where the office was created by statute.—2 Sandf., 355.

These are all legitimate acts incident to legislative power. The term and the compensation may be changed, the office may be abolished before the expiration of the period for which the incumbent was appointed, if no constitutional inhibition prevents. To vacate an office during the term, and provide for an election to supply the vacancy thus made, is not an alteration of the tenure. That remains fixed. The duties present continue as they existed before, and the object and effect of the Act is to remove the officer.

The removal of an officer, therefore, is a judicial act, and where he holds (and is in the exercise of the office, (as admitted here by the return,) he cannot be displaced without a due observance of those safeguards which the law has provided as a check and restraint against unlawful authority, on the part of

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power, against one to some extent occupying an inferior position, because a position originally bestowed from favor.

If the Ordinance fixes the term of office, although an incident to the appointment, the right of removal is, by implication, reserved; yet, as this is a judicial act, it must be exercised in due conformity with the rules and regulations which attach in the conduct of a controversy, having in its attendants and consequences the characteristics of a trial. It is not to be understood that the same precision and nicety are to be exacted in the mode and form in which the allegation is to be preferred, or in the manner of conducting the investigation, as are demanded and observed in Courts of justice but the character of the

charge should be made known to the accused, and the opportunity of defence afforded. The Council appear to have recognized and appreciated this obligation, for, by the Ordinance heretofore referred to, while every officer was regarded as subject to removal, at any time, by the votes of nine or more members of the Council, for such causes as to them shall seem sufficient, it was not to be ordered without a full hearing of the case. The technical word "case" is employed, and a hearing implies a consideration of the facts on which the same ground may be based—the testimony and the defence—and this is in nature of a judicial proceeding, with all the incidents belonging to it.

If this condition, in favor of the officer, had not been expressed in the Ordinance, and if, in fact, it had contained no provisions in regard to removal, I should yet hold that the assertion, in the manner in which it was attempted to be enforced, was against law and common right.

A corporate officer cannot be removed without cause, though the charter says, generally, "he may be removed."—Com. Dig., Franchise E., 32.

In *Murdoch v. Phillips' Academy*, it was held "that the removal of a professor is a judicial proceeding, and, to render it binding on him, there must be a notice to appear—a charge—opportunity to submit testimony and defend himself."—12 Pick., 241.

An expulsion of a member, without notice to him, was held unlawful, though the charter provided that, if any member should, for three months, neglect to pay his arrearages, he should be expelled.—*Commonwealth v. Penn. Ben. Society*, 2 S. & R., 141.

"In general, the rule is that every officer, before amotion, shall be summoned and heard in his defence, before the body in whom is vested the power of amotion; but this rule

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is subject to various necessary exceptions arising from the presence of circumstances which would make it useless to apply it."—*Grant on Corporations*, 245.

"As where the party has abandoned the office, or were present at the meeting of the removing body called for the purpose of removing him, and he defends himself before it, and where, generally, the circumstances show that the party has waived it."—*Grant*, 246; *Wilcox*, 265.

In the *King v. Gaskin*, a return (to a mandamus, to restore,) was held insufficient, because it did not state that the party had been summoned to answer the charge before he was removed.—8 T. R., 209.

Lord Kenyon, C. J., said: "If we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice: 'Audi alteram partem.' It is to be found at the head of our criminal law, that every man ought to have an opportunity of being heard before he is condemned, and I

should tremble at the consequences of giving way to this principle." Grose, J., said: "The offences charged are abundantly sufficient to warrant the removal; but the present proceeding is informal, and the return to the mandamus insufficient."

It is contended, on the part of the respondents, that this rule, if it exists at all, is not applicable, "because the cause of removal is entirely disconnected from the person of the officer, his reputation, character or conduct," and that "it existed in the fact that the officer was elected in derogation of the rights of the Board in office at the date of the Ordinance."

Even if this applied to Mr. Hughes, (who, in fact, was elected in 1867,) it cannot change the principle. Any officer, no matter by what Council elected, then representing the corporation, had the right to a hearing before amotion.

It is possible he might not have been able so to impress the body charged with a decision as to lead to a conclusion different from that which they attained, nor is it likely that, in such an event, a resort to the Court would have resulted in any remedy which could have inured to his benefit; but still I am not satisfied that I can sustain the proceeding in a public body, acting in at least a quasi judicial character, which condemns a citizen without the opportunity of a hearing and defence.

In my judgment, the respondent gains no strength from the Act (No. 6) "regulating the tenure of certain offices, and appointments

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*thereto, and for other purposes," passed on the 15th August, 1868. Acts of 1868, p. 4.

It is not necessary that I should express, here, my opinion whether the said Act was intended rather to extend than to restrict the tenure by which the various offices to which it refers were held, nor whether it is to be considered as referring alone to officers whose "election or appointment" is provided for under the new Constitution, nor what effect is to be given to the words "election or appointment and qualification according to law," therein used. If the relator was removed without authority of law, there was no vacancy to be supplied, and, in my view, the State is entitled to judgment of ouster against the respondent.

It is therefore, ordered, that the respondent, Patrick J. Coogan, do not in any manner further intermeddle with, or concern himself about, the said office of City Assessor for the city of Charleston, or with the duties, rights, books and property of the said office, but that he be absolutely adjudged and excluded from exercising or using the same, or any of them, for the future, and that he do abstain from doing or performing, or assuming to do or perform, any act or acts whatsoever in any manner pertaining to the said office, on pain of contempt of the Court.

Let all the papers be filed in the office of the Clerk of the Court for Charleston County.

In the cases of Champlin and Addison the facts, pleadings and judgment of the Chief Justice were the same as in Coogan's case, except that in Champlin's case the office in question was that of Assistant Assessor of the city of Charleston, and that, at the time of Champlin's election, it was filled by Charles P. Frazer, and, in Addison's case, the office was that of City Sheriff, and that, at the time of Addison's election, it was filled by P. C. Guerry, and in each case the incumbent was elected by the City Council on the 20th November, 1866, to hold for the term of four years.

Corbin, for plaintiffs in error.
Lesesne & Miles, contra.

May 12, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The three cases above entitled involve the same question. In each there has been judgment of ouster in quo warranto. Coogan claims to hold the office of Assessor of Charleston, Champlin that of Assistant Assessor of Charleston, and Addi-

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*son that of City Sheriff for the city of Charleston, each having been elected to the respective offices claimed by them on the 6th day of July, 1869, by the City Council of Charleston. The authority for the election, in each case, was an Ordinance of the City Council, ratified May 20, 1869, declaring such offices vacant. At the time of the adoption of such Ordinance, the offices in question were respectively filled as follows: That of Assessor, by W. N. Hughes, elected by the City Council, on the 11th of December, 1867, for four years, and also appointed to the same office by the military commander of the Second Military District; that of the Assistant Assessor, by C. P. Frazer, elected by the City Council, November 20, 1866, for four years; and that of City Sheriff, by P. C. Guerry, elected by the City Council, November 20, 1866, for four years. Inasmuch as, in each case, the term of the former incumbent was unexpired as it existed at the time of his election, the question is presented whether the Ordinance declaring vacant such offices was passed with competent authority; whether the act of election that ensued from its provisions, and under which the plaintiffs in error—the defendants below—claim to retain their offices, was valid and effectual.

The cases were originally heard before the Chief Justice, sitting at Chambers, under the authority conferred upon the Justices of the Supreme Court by the sixth Section of the "Act to organize the Supreme Court."—Spe'l Ses., 1868, 73. The judgment in the cases established the right of such former incumbents as against the plaintiffs in error, and ordered the plaintiffs in error to vacate such offices, of which they were in possession, in favor of such former incumbents.

It will not be necessary to consider the question whether, in the absence of special authority, the City Council, in virtue of their authority and control over purely municipal offices, created and regulated by Ordinance alone, could, by the declarations of an Ordinance, put an end to the terms of the incumbents of such offices, so as to create a vacancy before the expiration of the time for which they were originally elected.

Under the view taken of the "Act regulating the tenure of certain offices and appointments thereto, and for other purposes," passed August 15, 1868, (Special Session, 1868, p. 11,) authority to adopt such an Ordinance and to proceed to election of successors to the offices in question was given.

Passing, for the present, the question

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whether the Legislature possessed competent authority in the given case, and we come directly to the consideration of the construction and effect of the Act regulating tenures as bearing on the case in hand. This Act declares as follows (Sec. 1): "That all State, District and municipal officers appointed by the General commanding the late Second Military District, in pursuance of, and under the authority of, the reconstruction laws of Congress, or appointed or elected under the late Provisional Government of South Carolina, and not removed by said General commanding, and whose places have not been filled by election or appointment, under the new Constitution, shall continue in office until their several offices are filled by the election or appointment and qualification, according to law, of the proper State, County and municipal officers, or until the duties of such offices have devolved, by authority of the General Assembly, upon other officers duly elected or appointed and qualified, according to law, under the new Constitution." The succeeding Sections of this Act relate to the time of filing official bonds; to validating the elections held in April and June, 1868; to provisions to secure the transfer of such offices to the persons entitled to them; and to the Court of Equity.

The offices in question are within the terms of the first Section. They are municipal offices. Those of Assistant Assessor and City Sheriff were filled during the Provisional Government that preceded the Military Government established under the Acts of Congress, commonly known as the Reconstruction Acts; the office of Assessor was filled under the authority of the Military Government. Although the act of election was performed by the City Council, yet, as it was political in its character, it must be referred to the then supreme authority within the State. Powers, rights and obligations resting in grant derive their force and effect from the nature and extent of the right and capacity of the grantor at the time of executing the grant; but political powers are referable

to the present authority and consent of the supreme power of the State. Nor is the nature or limits of political power changed, whether reposed in the hands of an individual or body politic. It is evident, from the fact of municipal officers being included in Section 1, that the Legislature intended that the provisions of the Act should reach to persons holding office under appointment or election by municipal bodies, for, otherwise, the words of inclusion would be senseless and nugatory.

It is, in the sense so well conveyed by the

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maxim, *qui facit per alium facit per se*, that the Legislature referred to elections and appointments by municipal bodies, as embraced in the general terms employed, to wit: "appointed by the General commanding," and "appointed or elected under the late Provisional Government."

The question then arises whether the Act under consideration must be deemed to have intended an immediate exercise of the appointing power in reference to the offices embraced in the first Section, as unfilled under the new Constitution; and the further effect, that the term of the former incumbent should cease and determine upon such appointment being duly made, and qualification of the appointee thereunder.

The argument against such a construction must rest mainly upon the idea that the Legislature, not having so declared in terms, this Act ought to be read in connection with previous legislation, and so construed that whatever had been done thereunder might continue to stand. This is the ordinary rule of construction in the absence of repeal or repugnancy, but it admits of its exceptions.

This rule, to be applicable, must be found within the reasonable intent of the statute to which it is sought to apply it.

The general object of the statute must be first sought for in order to direct the implication as to its intent, and then the special purpose must be considered in order to ascertain the limits of such intent. The general object is best illustrated by the occasion that called it forth. The historic events with which the policy of this statute is interwoven are extraordinary beyond precedent. The domestic government was overturned by the military power of the United States. Martial government succeeded, based upon the laws of war, and the orders emanating from the military head of the nation. This was followed by a government professedly provisional, authorized by the National Executive, and resting upon an elective basis, incompatible with the pre-existing Constitution of the State, and emanating from the National Executive. Under this Government, a Constitution and laws, and election and appointments to office, succeeded. This was, in turn, displaced by a military government, established under the authority of the National Legisla-

ture. To this Government, succeeded the present Constitutional Government of the State. The Act in question was one of a series of measures intended to effect this last named change in the exercise of public authority. Its provisions are sweeping, and reach to all offices held under State authority

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not provided for under the Constitution of 1868, including the offices created under municipal charters. It found many offices filled under an authority foreign to the domestic system of the State, and it is a necessary inference that it designed to bring back those offices, as to their incumbency, to proper relations to the sovereignty residing in the State, and now restored to full exercise. The most natural mode of doing this was to remove those officers who derived their authority under the pre-existing governments of the State, and to choose new officers through appropriate forms and proceedings. The general intent, thus inferentially drawn, is in harmony with the policy evinced by the Constitution itself, and by all the legislation that ensued under that Constitution.

The special object and intent of the Act, as included in the words "shall continue in office until their several offices are filled," &c., obviously was to substitute this Act as the authority for the continuance of such persons in office, in the place of the authority under which they had held previous to the passage of this Act. They would thus no longer hold as of the original tenure, by which they took the office, but under the Act as a provisional means of supplying the office with incum-

1 S. CAR.—15

bents until there might be a due exercise of the proper electing or appointing power. Regarding this statute in this light, a vacancy existed, as it respects the formal tenure of the office, sufficient to warrant the exercise of the electing or appointing power, in whatsoever hands it might be lodged.

In some instances, as in the case of charter officers elected by the people, further legislation was needed to provide for the holding of a legal election, and that legislation was subsequently provided. The City Council not being limited as to the time or mode of proceeding to fill the offices thus declared vacant by any statute, no further legislation was requisite to enable them to proceed in the manner contemplated by the statute in question.

According to the view that has been taken of the effect of the Act regulating tenures, no doubt can exist as to the competency of the Legislature to act in the mode under consideration. In the absence of any constitutional limitation of their authority, in that respect, they could act upon the term of the incumbent, either by way of increasing or diminishing it. This is, in effect, what they have done.

It appears, therefore, that the plaintiffs in error are entitled to the respective offices claimed by them.

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*The judgment of onster must be set aside and the proceedings dismissed.

CARPENTER, J., sitting by appointment of the Governor in place of MOSES, C. J., and WRIGHT, A. J., concurred.

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REPORTS OF CASES

HEARD AND DETERMINED IN

THE SUPREME COURT
OF
SOUTH CAROLINA

VOLUME II

FROM APRIL TERM, 1870, TO APRIL TERM, 1871, INCLUSIVE

BY J. S. G. RICHARDSON
STATE REPORTER

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1872

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUSTICES OF THE SUPREME COURT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

HON. J. J. WRIGHT, ASSOCIATE JUSTICE.

JUDGES OF THE CIRCUIT COURTS.

1ST CIRCUIT—HON. R. B. CARPENTER, (a.)

2D “ “ Z. PLATT.

3D “ “ J. T. GREEN.

4TH “ “ J. M. RUTLAND.

5TH “ “ S. W. MELTON.

6TH “ “ W. M. THOMAS.

7TH “ “ T. O. P. VERNON, (b.)

8TH “ “ J. L. ORR.

ATTORNEY GENERAL.

D. H. CHAMBERLAIN, Esq.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

(a.) Resigned in 1870, and was succeeded by Hon. R. F. Graham.

(b.) Resigned in 1871, and was succeeded by Hon. M. Moses.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

AT COLUMBIA—APRIL TERM, 1870.

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

HON. J. J. WRIGHT, ASSOCIATE JUSTICE.

2 S. C. *1

*HENRY McIVER, President, and JOHN McIVER, Treasurer of the Cheraw and Darlington Railroad Company, Plaintiffs in Error, v. THE STATE ex relatione B. D. TOWNSEND and Others, Defendants in Error.

(Columbia. April Term, 1870.)

[*Mandamus* ⚡141.]

Courts of General Sessions have no power to issue writs of mandamus, that power being vested by the Constitution in the Courts of Common Pleas.

[Ed. Note.—Cited in *State v. Fillebrown*, 2 S. C. 408; *State ex rel. Bull v. County Treasurer*, 10 S. C. 42; *State v. Glenn*, 14 S. C. 133.

For other cases, see *Mandamus*, Cent. Dig. § 276; Dec. Dig. ⚡141.]

[*Mandamus* ⚡1.]

[Cited in *State ex rel. Douglas & Jackson v. Gaillard*, 11 S. C. 313, to the point that mandamus is an ordinary process.]

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 1-3; Dec. Dig. ⚡1.]

This case was brought here from the Court of General Sessions for Chesterfield County by writ of error.

The transcript of the record showed that it was an application to the Court below for a writ of mandamus to compel the plaintiffs in error (defendants below) to transfer stock of the Cheraw and Darlington Railroad Company on the books of the corporation. The Circuit Judge granted the writ, and the only question considered here was that made by the third assignment of error, as follows: "That, by the Constitution and laws of the State of South Carolina, in force at the date

of the order directing the writ of mandamus in this case to issue out of the Court of

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Sessions, no jurisdiction or power to issue writs of mandamus resided in said Court of General Sessions."

Barker, for plaintiffs in error.

Memminger, Harlee, Chamberlain, Townsend and Hudson, contra.

April 13, 1870. The opinion of the Court was delivered by

MOSES, C. J. The third ground taken by the plaintiffs here assigns as error the exercise of jurisdiction by the Court of General Sessions for Chesterfield County in issuing the writ.

This submits a question which we prefer to decide as preliminary to the other points; for if the Court was without authority, all enquiry into the merits of the cause is precluded. We are sensible of the importance of the issue thus presented, and of the interest which it excites. We would have preferred a full opportunity to consider the argument and examine the authorities; but to defer a decision might seriously prejudice the parties by delay, when they are entitled to a prompt judgment on the merits of the case by some Court of competent jurisdiction.

The rule to shew cause, and the order for the mandamus, issued from the Sessions side of the Circuit Court for Chesterfield County, and the question which we propose to consider and determine is, whether the Court of Sessions, as now organized, has jurisdiction

of the writ and the incidents which attach to it.

Whether the writ, so highly prized as affording a remedy, convenient and beneficial, by reason of its immediate and efficient action, directly operating to prevent a wrong or enforce a right, is to be regarded as a prerogative writ, said by Lord Mansfield to flow from the King "himself sitting in the Court of King's Bench," or whether, according to modern practice, it is recognized as nothing more than an action between the parties, "an ordinary process in cases to which it is applicable," will, in no manner, affect the question we are to meet. Whether viewed in the one light or the other, it is accepted as a common law writ, and will be deprived of none of its functions or attributes, although a State Constitution or Legislature may empower some Court to entertain it which was not before supposed to have the common law right to take cognizance of it.

It may be conceded that, up to the ratification of the Constitution of 1868, the writ, although issuing in matters touching civil

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rights, *was regarded in South Carolina as a criminal proceeding. The Court of Sessions entertained jurisdiction of it to the exclusion of all other Courts. This admission, however, can be of no avail, if, by the terms of the new Constitution, or of any Act of the General Assembly, not inconsistent with it, the right has been so vested in another Court as to deprive all other tribunals of the exercise of it.

By the 18th Section of the 4th Article of the Constitution it is declared that "the Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." If, as contended by the counsel for the defendants, the writ is a criminal process, then the said Court may grant it, unless "otherwise provided for by law."

The Constitution did, however, by the 15th Section of the same Article, confer the power, in express words, on the Court of Common Pleas, and thereby did provide a different jurisdiction from that which before had entertained cognizance of the writ of mandamus. It is reasonable to suppose that, by vesting in the Court of Common Pleas the right to issue it, the Convention regarded the writ, contrary to what had been the received and accepted opinion in South Carolina, and intended, in the language of Tappan, p. 7, "to assimilate it, both in its direct and incidental proceeds, to an action."

It cannot be contended that, although the Constitution has conferred the power on the Circuit Court of Common Pleas, it has not deprived the Court of General Sessions of the right which attached to it by reason of its succession to all the jurisdictional pow-

ers of the King's Bench on the criminal side. The argument might have carried force with it but for the fact that the Constitution takes from the Court of Sessions jurisdiction in all criminal cases wherever it gives it to another Court. The words, "which shall not be otherwise provided for by law," negatives the idea that a concurrent power was to be exercised by the two tribunals. There appears to have been a purpose to place beyond question the idea of concurrent jurisdiction by the very terms employed. It may be doubtful, that if the Constitution, after giving the right to the Common Pleas, had used no words which, by plain expression, shew that it was to be exclusive, whether the Court of Sessions could also exercise it.

Judge Butler, in *Righton v. Wood*, Dud., 167, says: "The remark may be made, generally, that where a new forum has been created for the trial of cases that belonged to another, it has a superseding and paramount jurisdiction, and thereby deprives the old tribunal of all authority."

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*The Convention was competent to clothe any of the Courts with a jurisdiction which never before had been exercised by either, or to allot to one of them a power which before had been exercised by another.

Holding that the Circuit Judge was without jurisdiction to entertain the motion, sitting in the Court of Sessions, the order granting the writ is vacated and annulled.

To guard against any misapprehension, it may be proper to add that we are not to be understood as intimating any opinion on the point made under the fourth ground, to wit: "That the power to issue writs of mandamus, conferred by the 15th Section of the 4th Article of the Constitution on the Court of Common Pleas, resides in the Court at its sittings, as appointed by law, and is not exerciseable at Chambers."

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 4

Ex parte FRIDAY NIXON.

(Columbia. April Term, 1870.)

[*Habeas Corpus* ⚡20.]

A prisoner who has been convicted of murder, and sentenced to be executed, will not be discharged on habeas corpus because the Sheriff has permitted the day assigned for the execution to elapse. A new day will be assigned.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 24; Dec. Dig. ⚡29.]

The petitioner, having been brought before the Supreme Court on writ of habeas corpus, moved for his discharge. The facts of the case, and grounds of the motion, appear in the judgment of the Court.

April 22, 1870. The opinion of the Court was delivered by

MOSES, C. J. The petitioner was brought before the Court on a writ of habeas corpus.

The Sheriff returns the following as the cause of his caption and detention: "That he was committed to his custody, charged with the murder of one Dick Richards; that he was indicted and tried at the last November Term of the Court of Sessions for the

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County *of Charleston, found guilty, and sentenced to be hanged on the 25th day of February following; that, on the 23d day of that month, the execution was respited by the Governor for thirty days; that, on the 25th day of March last, during the absence of that officer from the State, the Hon. D. T. Corbin, President of the Senate, pro tem., and acting Governor, respited the execution of the prisoner until the 22d of April of the current year."

His discharge is moved for on the ground that the said D. T. Corbin was not the Governor of the State, in fact, not President of the Senate, and was without authority to act, as he assumed to do, in the premises, and that the day of execution, deferred by the respite of Governor Scott, having passed, without fault or action on the part of the prisoner, he was held in unlawful custody.

The material question for our consideration can be decided without any inquiry as to the duty of the Sheriff to obey the precept directed to him, signed by Mr. Corbin as "President of the Senate, pro tem., and acting Governor."

We are not inclined to pass upon a matter involving so much importance and interest to the State, unless its connection with the issue made on the application before us renders its consideration indispensable. Although incidentally drawn into the argument, it in no way affects the rights of the prisoner. Whether the paper recognized by the Sheriff as a respite was or was not in virtue of the Constitution and the law, the prisoner has not been prejudiced by its extension to him. It is claimed that he is entitled to his discharge because the day on which he was to be hanged, under the respite of Governor Scott, having elapsed, his detention is without legal authority.

No matter how this result has been accomplished, we find him in the hands of the Sheriff, and the judgment of the Court rendered against him has not been enforced.

The first question which naturally arises is what authority could intervene to avoid that judgment?

If it has not been superseded or set aside, then it stands as all other judgments of criminal Courts having jurisdiction over the offense and the party; and if the person charged is in custody by its effect, the Court, at least, has not the power to discharge him.

The judgment pronounced was final and conclusive, unless set aside for error by some competent Court, or the execution by which it was to be enforced prevented by the inter-

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position of the Governor *of his constitutional right to pardon. No order of any such Court, or pardon by the Governor, has been alleged.

The mere statement of the proposition might be enough to show that this Court is without authority to interpose. In a matter, however, of so much importance to the prisoner, it is, perhaps, proper that we should present our views more at large.

The judgment of the Court was, "that he be hanged until he be dead." The very application shows that it has not been enforced or superseded by lawful authority. The time was nothing more than a direction to the officer that he should enforce it on a particular day. If he failed in the duty on the day he might be amenable to the law, but the force of the judgment would still remain.

Concede the proposition contended for on behalf of the petitioner, and the result would be that the failure of a Sheriff to perform a duty at the time assigned by the Court would destroy the force and validity of the judgment or order under which he was directed to act. A power which the Court which sentenced had not the right to exercise could be thus assumed by its own officer to the actual destruction, in effect, of its judgment. Suppose that, without complicity on the part of the Sheriff, circumstances should interpose which would prevent the execution on the day appointed—the sickness of the Sheriff, his abduction by force, the occurrence of a storm—would it follow that the judgment of the Court would be thereby vacated or annulled, and the prisoner freed from the penalty which the law affixed to the crime?

If we were without authority on the point, the proposition contended for is so much at variance with the conclusions of sound judgment and common sense, on which it is the boast of the law that all its principles are founded, that, unless we are forced by the weight of precedent, we would feel bound to disregard it.

As long ago, however, as the case of the Earl of Ferrers, Hawk. P. C. Bk., 2 Ch., 21, § 1, "it was resolved by all the Judges that if a peer be convicted of murder before the Lords, in Parliament, and the day appointed by them for execution, pursuant to 25 Geo. 2, should elapse before such execution done, a new time may be appointed for the execution."

Our own Courts, in *State v. Fuller*, 1 McC., 178; *State v. Smith*, 1 Bail., 283 [19 Am. Dec. 679]; *State v. Addington*, 2 Bail., 516 [23 Am. Dec. 150]; *State v. Kitchens*, 2 Hill, 612 [27 Am. Dec. 410]; *State v. Chan-*

cellor, 1 Strob., 350 [47 Am. Dec. 557], following the same ruling, leave no doubt on the question.

The motion is refused.

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*Let the prisoner be remanded and a certified copy of this order filed in the office of the Clerk of the Circuit Court for Charleston County.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 7

W. R. BURGESS, Plaintiff in Error, v. W. R. CARPENTER, Defendant in Error.

(Columbia. April Term, 1870.)

[*Master and Servant* ⇨336.]

Plaintiff hired laborers to make a crop on his farm, under a contract, by which the laborers were to have one-third of the crop for their services, the plaintiff retaining two-thirds for himself. In June, one of the laborers was shot and so severely wounded that he was disabled from working in the crop for several weeks, and, in consequence thereof, as it was contended, the crop made was much less in quantity than it otherwise would have been: *Held*, That plaintiff had sustained no legal injury which gave him a right of action against the party who inflicted the wound.

[Ed. Note.—Cited in *Daniel v. Swearengen*, 6 S. C. 304, 24 Am. Rep. 471.

For other cases, see *Master and Servant*, Cent. Dig. § 1281; Dec. Dig. ⇨336.]

[*Master and Servant* ⇨337.]

The common law gives the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except where the servant is a menial one—semble.

[Ed. Note.—Cited in *Huff v. Watkins*, 15 S. C. 86, 87, 40 Am. Rep. 680.

For other cases, see *Master and Servant*, Cent. Dig. § 1282; Dec. Dig. ⇨337.]

[This case is also cited in *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680, and distinguished therefrom.]

Before Green, J., at Manning, January, 1870.

The case was brought up by writ of error. It was an action on the case brought to recover damages, which plaintiff sustained by reason of loss of service of a hired servant, a colored man, named Henry Burgess, employed as a ploughman by plaintiff for the year 1866, the said servant having been disabled by reason of a gunshot wound, charged to have been inflicted by defendant.

Dr. T. L. Burgess, witness for plaintiff, testified: That Henry Burgess was wounded about 7th June, 1866, by a gunshot, and that he took him to his house and nursed him for several weeks, and supported him while he was unable to work; that Henry Burgess was unable, in consequence of his wound, to do any work until some time in August. It was worth two or three dollars per month to furnish food for him. Henry

Burgess was a ploughman, and, in consequence of his being unable to work, the crop was seriously damaged, and cut short at least \$400, the plow being stopped during his sickness. Plaintiff did not hire, or try

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to hire, any one *in his place. Scarcely a living was made that year. Henry Burgess was hired for what was known as a share in the crop; one-third of the crop being divisible amongst the laborers as their pay—plaintiff furnishing stock and provisions, and receiving two-thirds of the crop, and the laborers one-third amongst them.

The horse used by Henry Burgess was not worked in the crop while he was sick and disabled, and was fed by plaintiff.

At this stage of the trial, His Honor held that it was useless to go on and connect the defendant with the shooting, because the contract to pay Henry Burgess a share in the crop made him a copartner, and not a servant; and that plaintiff had no right of action against defendant; and he ordered a non-suit.

Plaintiff assigned the following grounds of objection to the ruling of His Honor:

1. Because, it is respectfully submitted, His Honor erred in ordering a non-suit upon the ground that the plaintiff had no right of action against defendant, because plaintiff's servant was to receive a portion of the crop for his services.

2. Because His Honor erred in holding that the plaintiff and the servant, for the loss of whose services the action was brought, were co-partners, it not having been clearly established what were the terms of the contract under which the said servant was employed.

3. Because His Honor erred in ordering a non-suit when plaintiff had examined but one witness, and before he had been permitted to go to trial.

4. Because His Honor ordered a non-suit when, it is respectfully submitted, he had no right to do so for any cause.

Fraser, for plaintiff in error.

Galluchat, contra.

May 16, 1870. The opinion of the Court was delivered by

WRIGHT, A. J. This was an action brought to recover damages which plaintiff claimed to have sustained by reason of a gunshot wound, charged to have been inflicted by defendant upon one Henry Burgess, who was a contractor with plaintiff, in common with other persons, for a share of the crop, which all parties to the contract were laboring to raise at the time the gunshot wound was said to have been inflicted upon the said Henry Burgess.

It was claimed, by plaintiff, that the said Henry Burgess was his servant, inasmuch as he had contracted with him to raise a

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crop. *The relation of master and servant, as it existed in England, was wholly different from the relation of employer and employed as it exists in this country. At common law, in England, the master might bring an action for damages against a third party for any loss he might have sustained by reason of such party unlawfully injuring or interfering with his servant or servants; but this power, given the master, was only to be exercised toward menial servants—domestics *infra mœnia*. It was a relation which the common law classed with the relation of “parent and child.” The master was held to stand in *loco parentis*. No such relation existed between plaintiff and Henry Burgess. In Pennsylvania, in a case under the intestate law of April, 1794, in which a preference is given to the wages of servants, the Courts have restricted the term “servant” used in the Act to “persons employed in the house and about the intestate’s person,” in order that when disease had rendered the master helpless, there might be an additional reason to attention on the part of the domestic or menial. A case arose in which a bar-keeper brought suit for his wages, and Chief Justice Gibson and Justice Duncan, of the Supreme Court, decided that he had preference, under the law, because his position as bar-keeper brought him within the term “servant,” as his duties as such made him a domestic.—*Boniface v. Scott*, 3 S. and R., 352.

Chief Justice Gibson says, in Pennsylvania none are called “servants whose persons are not subjected to the coercion of the master, whether the business in which they are employed be servile or not. No person to whom wages could be due for his services would endure the name, as it would be considered offensive, and a term of reproach. I take all who are employed for hire in the domestic concerns of the family, in whatever station they may be, to be servants, entitled to a preference under the Act. Neither do I apprehend it to be necessary that the occupation of such persons should be exclusively confined to the family.

“The clerk in a counting house, &c., is exclusively concerned with the occupation or trade by which his employer gets his living; and there being nothing of a domestic cast in the nature of his services, he would not fall within the Act. If, in this country, a tavern were a separate establishment, unconnected with the domestic scene, I should suppose the plaintiff not entitled to a preference; but the contrary is the fact; with, perhaps, the exception of one or two large establishments in Philadelphia, the concerns of the family are so blended that it is impossible to separate them,” &c., &c.

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*In the same case, Justice Duncan says:

“The term ‘servants,’ whose wages, under the Act of 1794, are ranked with physic and funeral expenses, to be paid out of the intestate’s estate, has received a judicial construction in *ex parte Measan*, 5 Binn., 167. It has been held to embrace those only who, in common parlance, are called servants; that is, as I understand the opinion of the Court, hirelings, who make a part of a man’s family, employed for money to assist in the economy of the family, or in matters connected with it.”

Henry Burgess being exclusively concerned in the cultivation of the soil and the proceeds arising therefrom, and there being no domestic cast within the nature of his service, he does not fall within the class to which the term “servant” can, in any sense, be applied. He was a party to the contract, and liable for any breach of good faith on his part to comply with the terms of that contract; and plaintiff being also a party to the same contract, sustained the same relation to Henry Burgess that Henry Burgess did to him; therefore, each was *sui juris*, and neither the servant of the other.

Henry Burgess being a free man, and competent to make a contract, is responsible for his own actions, and has the legal right of action against defendant for any private injury he has sustained at his hands. As each of the parties to the contract contributed his special portion of the means necessary to the production of the crop, and each was to receive his special portion after an equitable division, if there was a loss it was a common loss; and if the defendant committed an unlawful act which was the cause of such loss, then the parties to the contract, severally, have the legal right of action against the defendant for damages.

This Court, holding that on the statement of the plaintiff he had no cause of action, it made no difference at what stage of the case the Judge below ordered the non-suit, and his interposition, stated in the brief, did not prejudice the plaintiff.

The motion is dismissed.

MOSES, C. J., concurred.

WILLARD, A. J. I concur with the majority of the Court in their judgment on the ground that if the rule of the common law, sanctioning a suit by the master for an injury to the servant, is at all applicable as those relations exist in this country, still it would be necessary to extend the scope of the rule in order to embrace a case of one performing agricultural labor for a compen-

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sation fixed, *to consist of a definite portion of the crop to be raised by the aid of such labor. In such a case the master has not an entire interest in the services of his laborer, but the latter has an interest in the

ratio of the share of the crop due him by the contract of employment. In this respect the relation is not such as can warrant the application of the rule of the common law contended for in this case. I do not regard the present case as rendering any expression necessary as to whether that rule is applicable in this country to a case of hiring for wages, nor as to the class of persons properly falling within the designation of servants hired for wages.

2 S. C. 11

WM. GUNTER v. ELLEN L. GUNTER and
J. B. SUBER.

(Columbia. April Term, 1870.)

[*Executors and Administrators* ◊418.]

A decree, in a suit for distribution among creditors of the assets of an insolvent intestate estate, which ascertains the amount of assets then realized, and that they are sufficient to pay the judgments, specialty debts, and 12 $\frac{3}{7}$ ths per cent. of the simple contract debts, and directs that they be so applied, does not bar the specialty creditors of their right to priority of payment out of assets afterwards realized—those realized at the time of the decree having been lost without fault on their part.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1655; Dec. Dig. ◊418.]

Before Johnson, Ch., at Newberry, April, 1868.

This case came before the Court on exceptions to a report of the Commissioner, dated September 2, 1867, which is as follows:

"The Commissioner, being required by the order of the Court, 6th July, 1866, to report, particularly, in 'what the funds of the estate (of the intestate, Edwin L. Gunter,) consist,' and the proper application of the same to the payment of debts, respectfully submits the following:

"The report in this case, 14th June, 1860, shows the estate then to consist of the proceeds of real estate in the hands of the Commissioner, amounting to \$2,749.13, and personal estate in the hands of the administrator, amounting to \$978.37, beside some uncollected accounts, amounting to \$68.70. The debts established in that report were: Judgments, \$105.80; specialty debts, \$2,761.05; and simple contract debts, \$7,485.44. The report ascertained that the estate would pay

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the judgments and specialty debts in *full, and twelve and three-sevenths per cent. of the simple contracts. The report also brought to the attention of the Court an award in the case of J. H. Suber, Adm'r, v. A. L. Lark, in Common Pleas, with which the administrator had not charged himself, in which the arbitrators direct that the plaintiff and defendant in that action should contribute equally to the payment of the debts of the intestate, Dr. E. L. Gunter, deceased, to the

extent of two thousand dollars each, provided so much be necessary for the full payment of said debts, after first having exhausted the whole of the assets of said estate, both real and personal.

"The Commissioner deposited the proceeds of the realty in the Branch Bank of the State at Columbia, after having paid only \$568.48 on the decree—the balance has been invested by the said bank in six per cent. bonds of the Confederate States. The administrator, so far as the Commissioner has been informed, has never paid any of the decrees as established—nor has he paid into Court, as he has since been ordered, the funds ascertained to be in his hands. The only fund now remaining for apportionment among the creditors is the award above mentioned, for which, by order of the Court, 7th December, 1866, the creditors have their decree. Lark has paid the sum assessed against him, which will be apportioned under the report. Suber has not yet paid any part of the award against him.

"The estate, heretofore in the hands of the Commissioner and administrator, having been set apart to pay the specialty debts in full, and twelve and three-sevenths per cent. on the simple contracts, such funds of the estate as may be now, or hereafter, on hand, should be applied to the satisfaction of the remaining eighty-seven and four-sevenths per cent. of the simple contracts.

"Andrew L. Lark has paid \$2,966.42, his proportion of the award. Deduct one per cent. commissions to the Commissioner, \$29.66, and \$300 counsel's fee to Mr. Baxter, solicitor for creditors, and \$17 additional taxed costs, and there will remain \$2,936.86 for apportionment amongst the simple contract creditors. This sum will pay an additional thirty-five per cent. of the debts by simple contracts as established by the report of the Commissioner, dated 14th June, 1860."

The specialty creditors excepted to the Commissioner's report of 2d September, 1867, on the ground:

First. Because the Commissioner recom-

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mends that the money *paid into Court by A. L. Lark, and the amount due by the administrator, be applied to the payment of the simple contract debts, to the exclusion of sealed demands to the amount of between two and three thousand dollars.

Second. J. H. Suber excepts to said report, because the Commissioner did not report that the demands under seal and preferred against the estate of the said E. L. Gunter, deceased, should be set off against the amount due by him to said estate.

The decree of His Honor the Chancellor is as follows:

Johnson, Ch. Upon hearing the report of the Commissioner, the exceptions thereto, and the arguments of counsel, it is ordered

and adjudged that the exceptions be overruled, and that the report be confirmed and adopted as the judgment of the Court.

J. H. Suber and the specialty creditors appealed, and now moved this Court to set aside the decree, on the grounds:

First. Because His Honor erred by overruling the exceptions to the Commissioner's report, in deciding that the money paid into Court by A. L. Lark, and the amount due by the administrator, be applied to the payment of the simple contract debts, to the exclusion of sealed demands.

Second. Because His Honor did not decree that the sealed demands, established in favor of J. H. Suber, should be set off against the amount due, by him as administrator, to the estate of his intestate.

Jones, for the motion.

Baxter, contra.

June 29, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The main question brought up by the appeal, in this case, grows out of a decree directing the distribution of an insolvent intestate estate among creditors. The assets, at the date of the decree, June, 1860, consisted of the proceeds of realty, personalty and choses in action, including an award of arbitrators, under which the defendant, J. H. Suber, and one A. L. Lark, were bound to contribute, equally, to the payment of the debts of the intestate to the extent of \$2,000, provided so much was necessary for the full payment of said debts, after first having exhausted the whole assets of the estate, both real and personal.

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*The decree of distribution merely confirmed the report of the Commissioner, on which it was based, and ordered the dispositions recommended thereby.

The Commissioner's report sets forth an insufficiency of assets to pay debts, also, that there were unsatisfied judgments, specialty and simple contract debts outstanding, and estimated that the assets, exclusive of the award, would pay the judgment and specialty creditors and twelve and three-sevenths per cent. on account of the simple contract debts. The award not having been realized, was not included in the estimate, but was set forth as part of the assets of the estate.

The Commissioner, after paying the sum of \$568.48 on the decree, deposited the balance of the proceeds of the realty, as realized, in the Branch Bank of the State, at Columbia. The bank invested the deposit in six per cent. Confederate bonds, and it was accordingly lost. Lark has paid the sum awarded against him, but Suber has not yet complied with the terms of the award.

Under an order of July 6th, 1866, to ascertain what funds remained to be distributed, and the proper application thereof, a controversy arose between the specialty and simple

contract creditors as to the proper application of the balance of the assets. The former contended that, as the proceeds of the realty had been lost and their demands still remained unsatisfied, they were entitled to be paid out of the proceeds of the award, preserving their priority in the order of payment.

The simple contract creditors, on the other hand, contended that the portion of the assets lost was specifically appropriated, by the decree of distribution, to the payment of the judgment and specialty creditors, and to the simple contract creditors to the extent only of 12 3-7ths per cent. of their demands, and that it was placed in the hands of the Commissioner at the risk of such creditors; and, having been lost, they are not entitled to recourse against the balance of the estate, but that the entire proceeds of the award ought to be devoted to the payment of the simple contract creditors to the extent of 87 4-7ths per cent. of their demands not provided for, to the exclusion of the specialty creditors. The Commissioner sustained the view of the case contended for by the simple contract creditors, and, on exceptions, the Chancellor sustained the Commissioner's conclusions, and decreed accordingly. The specialty creditors now appeal.

An attempt was made, in argument, to

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charge the specialty creditors with responsibility for the loss, through want of diligence in not withdrawing the fund from the hands of the Commissioner; but the case before us presents no foundation of fact for such a conclusion. We must assume the loss to have occurred without fault on the part of any of the creditors, as the case now stands before us. The question then arises, whether the original decree of distribution operated so as to separate the particular fund in bank, and lost from the body of the estate, devoting it to special objects, namely, the payment of specialty creditors and a certain per centum of the simple contract debts, and withdrawing it wholly from the necessity of contribution to other general objects. A decree of this kind, accepted by the parties affected by it, might operate as payment of the demands provided for by it, even while the fund was still in the hands of the Commissioner, and might throw the risk of loss entirely upon such creditors. Such a decree would have to be regarded as exceptional, and, in general, inconvenient; and, accordingly, such intent cannot be made out constructively from the terms of a general decree. We find no warrant for such a conclusion in the present case. The report of the Commissioner, which, by confirmation, became the decree of the Court, should be regarded rather as an estimate for the information of the Court than as an appropriation for the specific benefit of any of the parties interested under it.

The fact that the simple contract creditors

were recognized as having an interest in that fund to the estimated extent of 123-7ths per cent. of their demands, shows that there was no such appropriation intended as is asserted by the simple contract creditors. At most, all the advantage that the specialty creditors enjoyed, in regard to this particular fund, over the simple contract creditors, was that of priority of payment—precisely what they enjoyed in reference to the entire assets of the estate; and as they gained nothing by the special designation of that fund, they should lose nothing by the disaster which occurred to it without their fault. The decretal order of the Chancellor is erroneous in that it did not admit all the creditors of the intestate to participate in the balance of the assets according to their respective legal priorities.

The second ground of appeal was conceded on the argument by the appellees, and is sustained.

It is ordered, adjudged and decreed, that the decretal order of April 20th, 1868, overruling the exceptions to the report of the Commissioner, and confirming and adopting

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the same as the judgment of the Court, be in all things reversed and set aside, and that the appellants' exceptions to the report of the Commissioner, of the 2d of September, 1867, be sustained.

And it is further ordered and decreed, that this case be remanded to the Circuit Court for further orders and proceedings. And it is further adjudged, that the specialty creditors are not chargeable with, nor, as to their legal priorities, affected by, the loss of assets mentioned and set forth in the report of the Commissioner, dated April 2, 1867.

MOSES, C. J., and WRIGHT, A. J., concurred.

2 S. C. 16

C. BRUCE WALKER v. LEWIS COVAR
and Others.

(Columbia. April Term, 1870.)

[Mortgages ⇨304.]

On the 1st January, 1857, C. gave a mortgage of lands and slaves to secure the payment of a debt. The mortgage was duly recorded, and C. afterwards sold the lands. On the 4th March, 1861, the Sheriff, under executions against C., some senior and some junior to the mortgage, sold one of the mortgaged slaves for a sum sufficient to satisfy the senior executions and the balance of the mortgage debt. On bill to foreclose against C. and the purchasers of the land, *held*, that the mortgage debt was not satisfied by the sale made by the Sheriff.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 872; Dec. Dig. ⇨304.]

[Mortgages ⇨287.]

Held, further, That a purchaser of part of the lands had no equity, in 1868, to compel the holder of the mortgage to resort to his claim

against the Sheriff before enforcing his lien upon the lands.

[Ed. Note.—Cited in Thomas v. Kelly, 3 S. C. 212, 16 Am. Rep. 716.

For other cases, see Mortgages, Cent. Dig. § 783; Dec. Dig. ⇨287.]

[Mortgages ⇨274.]

The purchaser's remedy was to pay the mortgage debt, and be subrogated to the rights of the mortgage creditor—*semble*.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 718-724, 728; Dec. Dig. ⇨274.]

[Marshaling Assets and Securities ⇨6.]

The rule that a creditor having a lien on two funds may be compelled to resort, in the first instance, to the one on which the subsequent claim of another does not attach, is never applied where injustice may be done to the prior creditor as, for instance, where the fund to be resorted to is dubious, or is one which can be reached only by litigation.

[Ed. Note.—Cited in Dabney, Morgan & Co. v. Bank of State of South Carolina, 3 S. C. 162; Clark v. Wright, 24 S. C. 534.

For other cases, see Marshaling Assets and Securities, Cent. Dig. § 7; Dec. Dig. ⇨6.]

Before Johnson, Ch., at Edgefield, June, 1868.

On the 1st January, 1857, the defendant, Lewis Covar, gave to George A. Addison a mortgage of a lot in Edgefield village and some slaves, to secure the payment of three promissory notes for \$1,000 each, payable in one, two and three years, with interest. There were on the lot a hotel, some stables, and three law offices. The mortgage was recorded the next day, and, on the 13th June, of the same year, it was assigned by Addi-

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son to the plaintiff. Some time in 1857, Covar sold the law offices to George W. Landrum, deceased; and, about the same time, he agreed, for valuable consideration actually paid, to sell the rest of the lot, with the hotel and stables, to Mrs. Susan Ann Bulkeley, then a widow, and gave her a bond, conditioned to make title. On the 4th March, 1861, the Sheriff of Edgefield sold, under executions against Covar, some of which were older and some younger than the mortgage, one of the mortgaged slaves. Before this sale, the greater part of the mortgage debt had been paid, but there remained a balance thereof, then due, amounting, with interest, to about \$500. The slave was sold for \$1,120, and this sum satisfied the executions against Covar, which were older than the mortgage, and left in the Sheriff's hands a balance of \$600, and upwards, more than sufficient to satisfy the amount of the mortgage debt then due and unpaid.

The Bill in this case was filed to foreclose the equity of redemption, and for a sale of the land to satisfy the mortgage debt. Besides Covar, the heirs of Landrum and Mrs. Bulkeley, with her husband, were made parties defendant.

Mrs. Bulkeley alone defended the suit. Her answer was filed in May, 1868, and the prin-

principal grounds of her defense were substantially as follows: (1) That the sale by the Sheriff satisfied the balance then remaining of the mortgage debt; (2) that the plaintiff was barred of his remedy against the land by his laches in not pursuing the fund in the Sheriff's hands; or, at any rate, (3) that the plaintiff should be compelled to go upon the Sheriff for payment before enforcing his lien upon the land.

The facts of the case, in reference to the sale by the Sheriff, the balance in his hands, and the amount of the mortgage debt, were stated in the report of a Referee, and the case was heard on that report and exceptions thereto by Mrs. Bulkeley.

His Honor the Chancellor overruled the exceptions, and made a decree of foreclosure, directing the lands to be sold on the first Monday in October, 1868.

The defendant, Mrs. Bulkeley, appealed, and now moved this Court to reverse or modify the decree of the Chancellor, on the grounds:

First. That the money arising from the sale of the personal property in said mortgage, on the 4th March, 1861, by the then Sheriff of Edgefield District, was more than sufficient to satisfy the balance then due upon said mortgage.

Second. That the money arising from the

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sale of said personal *property, after satisfying the senior judgments, belonged to C. Bruce Walker, assignee; and that he alone could sue for said funds; and that said defendant could, in no way, control the same.

Third. That after satisfaction of said mortgage, on the 4th day of March, 1861, by the sale of said personalty, the mortgage ceased, by the operation of law, to bind the realty, and should have been marked satisfied at that date.

Fourth. That, by the laches of the complainant, the funds arising from the sale of said mortgaged property have not been properly applied, and that it is in violation of law and equity to make the defendant liable for such neglect.

Gary, for appellant.

Bonham, contra.

June 28, 1870. The opinion of the Court was delivered by

MOSES, C. J. The principles which govern the relative rights of creditors, claiming under mortgages and judgments against the same debtor, have been so fully adjudicated by the Courts of this State, and are so well understood, that no reference is necessary to the particular cases which have established them.

This cause does not directly involve the necessity of deciding as to the priority which attached on the several claims against the property of the defendant, Lewis Covar. The

only question made is as to the satisfaction of the plaintiff's mortgage, through the sale, by the Sheriff, of one of the slaves included in it, under senior executions against the mortgagor, leaving, as is alleged, a balance more than sufficient to satisfy the amount due on the mortgage at the date of the sale, and to which, it is averred by the defendant, Mrs. Susan A. Bulkeley, the plaintiff is entitled in preference to the junior execution creditors.

She sets forth, in her answer, that shortly after the execution of the mortgage, by her father, the said Lewis Covar, she, in consideration of certain moneys paid, received from him a bond for title to the real estate covered by it, of which she took and held possession until her removal to Alabama. That Amanda, one of the slaves conveyed by the mortgage, was, on the 4th of March, 1861, sold by the Sheriff of Edgefield, under executions against the said Covar, and that, after satisfaction of those senior to the mortgage, a balance remained applicable to it, more than sufficient for its payment; and that it is, therefore, to be regarded as satisfied. Did

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the *sale of itself produce such result? The mortgage was not in the hands of the Sheriff—the sale was not under it, but on executions against the mortgagor. Had it been by the Sheriff, as agent of the mortgagee, he would be recognized by the Court in that relation, and his act would bind the principal. The officer, however, in no way represented the plaintiff. It is true he might sue the Sheriff for the balance in his hands, as for money had and received to his use; but such right of action does not amount to satisfaction, for he is not bound to resort to it if he prefers to pursue the other property, which he also holds under the mortgage, as his security.

It is to be remarked that, from the day of the sale to the final hearing in August, 1868, although interested in the application of the said proceeds to the satisfaction of the mortgage, she has never pursued any remedy to that end against the proper parties, nor has she, since made a defendant in this cause, taken any steps to bring before the Court the Sheriff and the junior creditors, so that effective control could be had over the fund, and the relative rights of all interested in it adjudicated and concluded.

The plaintiff was in no way privy to the sale, and yet, with this laches on her part, she now seeks to compel him to look for payment to the Sheriff, by a litigation at his own expense and trouble, and to suspend his right to satisfaction through the land, until the result of it should show whether he realizes anything from the source to which she asks to refer him.

Subject to some qualification to be hereafter referred to, it may be admitted, as a rule of the Courts of Equity, that, if a cred-

itor holds double securities, he shall take his satisfaction out of the one upon which another creditor has no lien; and the rule is applied to other persons standing in a similar predicament.—Story's Eq. Juris., §§ 559, 560. "It is, however, never applied except where it can be done without injustice to the creditor or other party in interest having a title to the double fund, and without injustice to the common debtor."—*Ibid*, 560.

A doctrine based strictly upon principles of equity should not be enforced where it would result to the prejudice of one who, with at least as high an equity, has also a legal right which it is sought to delay. The mortgagee was entitled to collect his demand through the land, or the negroes, or both, and if his endeavor to make it available by a resort to the proceeds of the sale of one of them is beset with difficulties and embarrassments, why should he be forced to encounter

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these for the benefit of a party *who, when she contracted to purchase the land, had full knowledge of his mortgage, and who, even to this moment, has neglected to make parties in the cause those whose presence was so indispensable for the proper adjustment of the claim she now prefers?

Such relief as is here asked is never granted, if the prior creditor is thereby endangered, or his right to raise the money out of both funds the least impaired.—*Everton v. Booth*, 19 John., 493; *Evans v. Duncan*, 6 Watts, 24; *Ramsay's Appeal*, 2 Watts, 220. Or where the fund to be resorted to is dubious, or one which may involve him in litigation, notwithstanding the claims of a junior creditor may be defeated thereby.—*Fowler v. Barksdale*, Harp. Eq., 165; *Goodwyn v. The State Bank*, 4 Des., 393; *Moore v. Wright*, 14 Rich. Eq., 134.

To apply the rule, independent of such restrictions, would convert what was intended for the protection of the creditor into a burthen; and the very benefit which he sought by requiring multiplied securities would be lost, if, for the purpose of enforcing his debt through either, he should first be compelled to incur all the chances of a litigation, by being referred, for his payment, to one of them which he regarded more hazardous and precarious than that to which his own judgment directed him to resort.

The rule, as now understood and enforced, operates no hardship upon this defendant, who claims to occupy a position in which she should be relieved from the operation of the mortgage on the real estate.

If she regards the remedy which the plaintiff may have through the mortgage of the slave, Amanda, for the balance of the proceeds of the sale, she cannot complain if the plaintiff is permitted to pursue the land for his debt, and give her the benefit of any claim he may have to the said proceeds. If

the burthen is not too heavy for him, she cannot complain if the weight is enforced upon her. She may ask that the remedies of the plaintiff, after they have served his purposes by producing satisfaction of his debt, may be subjected to her disposition without restraining him in their use in the first instance.—*Aldrich v. Cooper*, 1 W. and T. Lead. Cas. in Eq., 230, note.

It is ordered and adjudged, that the order of the Chancellor, the subject of the appeal, be affirmed and the motion dismissed; and as the day fixed by it for the sale of the mortgaged land has elapsed, that the cause be remanded to the Circuit Court for the County of Edgefield for all necessary and

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proper orders to carry out the decree for foreclosure, as directed by the Chancellor, and for any other orders not inconsistent with the judgment of this Court, now hereby given.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 21

ANDREW SHUBRICK, Plaintiff in Error, v
THE STATE, Defendant in Error.

(Columbia. April Term, 1870.)

[*Animals* ⇨45.]

An indictment, under the Act of 1861, making it a misdemeanor, willfully, &c., to "shoot, &c., any horse, mule, neat cattle, hog, sheep, goat or other personal property" of another, which charges that the prisoner shot "one sow," &c., is good.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 131; Dec. Dig. ⇨45.]

Before Green, J., at Georgetown, October Term, 1869.

A full statement of the case is contained in the opinion of the Court.

Wilson, Dozier, for plaintiff in error.

Chamberlain, Attorney General, Atkinson, Solicitor, contra.

June 29, 1870. The opinion of the Court was delivered by

MOSES, C. J. The defendant (plaintiff in error here) was indicted in the Court of Sessions for the County of Georgetown, under the Act of 1861, (12 Stat. at Large, 903,) making it a misdemeanor for any person to "willfully, unlawfully and maliciously cut, shoot, maim, wound or destroy any horse, mule, neat cattle, hog, sheep, goat or other personal property the goods and chattels of another."

The act of 1857, (same Vol., p. 605,) by its first Section, provides "that any person who shall willfully, unlawfully and maliciously cut, shoot, maim, wound or destroy any horse, mule, neat cattle, hog, sheep or goat,

the property of another shall be guilty of a misdemeanor, and upon conviction thereof," &c.

The indictment charged "that the defendant, on, &c., at, &c., one sow, of the value of two dollars, one boar hog, of the value of two dollars, and one barrow of the value of two dollars of the goods and chattels of one Leonard D. Bone, then and there being found

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*willfully, unlawfully and maliciously did cut, shoot, wound and destroy, against," &c. The only proof was that the defendant shot a hog of the prosecutor. It was a sow. He was convicted and sentenced, and a motion to arrest the judgment, on the grounds: "1st, Because the indictment does not describe any offence known to the statute law of the State; 2d, because the Act of 1857 is still of force, and the offence of malicious trespass on any of the subjects therein stated must be definite and specific in stating the subject of such trespass in the words of that statute; 3d, because the Act of 1861, in re-enacting the specific terms of the Act of 1857, did not intend thereby to authorize the indictment of a party for one of the specific subjects mentioned in the Act of 1857, under the words other personal property, in the Act of 1861," having been refused by the Circuit Judge, a writ of error brings the question before this Court.

It is contended that, unless the words "other personal property," used in the Act of 1861, are held to refer to some description of chattels, already in terms included therein, this motion is decided by the case of *The State v. McLain*, 2 Brev., 443, in which it was ruled that an indictment charging the stealing of a pig, against the Act of Assembly, was insufficient, because the Act was for the punishment of hog stealing, and pig was not named in it.

If that decision stood unaffected by another which soon after followed, we might be disposed to regard it authority on the point made. In our judgment, it cannot be reconciled with the ruling in the case of *The State v. Dunnivant*, 3 Brev., 9 [5 Am. Dec. 530], where it was held that, under the Statute of 22 and 23, Charles II, Chap. 7, P. L. 80, making it felony, maliciously, unlawfully and willfully, in the nighttime, to kill or destroy any horses, sheep, or other cattle, one indicted for killing a mare could be convicted, the Court holding that "the word horses may fairly be construed to include mares, as *nommen generalissimum*."

The publisher states, in a note, that "*The State v. Garey*, Newberry, F. T., 1833, was decided in conformity to the case of *The State v. Dunnivant*."

Rex v. Welland, 1 Russell & Bryan, (British Crown Cases, 494.) which decided that, under the Statute of 2 and 3, Edward 6, evidence of stealing a mare filly, supported on

indictment for stealing a mare, "as foals and filleys are within the statute, and included in the words horse, gelding, or mare," is consistent with the conclusion of the Court in *The State v. McLain*.

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*It is true that this last was referred to in the opinion of the Court in *The State v. Major*, 14 Rich., 83, and yet, in *The State v. Alexander*, 14 Rich., 247, in the same volume, where the defendant was convicted under the Act of 1867 for malicious mischief in shooting a mare, the same Judge, delivering the opinion, made no reference to the discrepancy between the charge and proof, as held in *McLain's* case, though the statute, by word, included horse, and did not name mare.

Wharton, in his 1 Criminal Law, 377, citing the cases, says, the general term sheep, standing alone in the statute, may include "a ewe" or "lamb," but otherwise, if "ewes" or "lambs" are specified.

The works on natural history, as well as the dictionaries and lexicons, to which we have had access, all refer to "sow" as the female of the "hog kind or swine," and, as the term is understood in common parlance, it would probably be difficult, when it is used, to suppose that it was received in any other acceptance.

An indictment for bestiality, describing the animal as "a certain bitch," was held sufficiently certain, although the females of foxes and some other animals, as well as of dogs, are so called.—*Reg. v. Allen*, 1 Carr. & Kir., 47 E. C. L., 699.

There is a class of cases in which a different rule of construction must be applied, as where the statute enumerates and specifies various animals, all belonging to the same genus, for then the presumption arises that the terms were not intended to be synonymous, and the animal must be stated in the indictment as of the description particularly designated, as in the *King v. Birbet*, Car. & P., 14, 19, E. C. L., 357; *Cook's Case*, 2 East. P. C., 616; *Loomis' Case*, 1 Moody, 160; *Puddifoot's Case*, 1 Moody, 247; *King v. Douglass*, 1 Camp., 212. So, under our Act of 1830, providing "that any person who shall be indicted and found guilty of stealing a horse, mare, colt, filly, mule, ox," &c., a charge of stealing a horse could not be sustained by proof of the stealing of a colt.

The rules of pleading in criminal cases require that the charge should be so presented in the indictment that the party may know what he is called on to answer, and the character and nature of the offence are to be set out so distinctly that he is not to be surprised as to the mode or manner by which he is to meet it with his defence. It must allege specific violation of some law. Another and no less important reason demands a com-

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pliance with these requisitions. The rec-

ord must show the particular charge on which the defendant has been tried, that he may be in no danger or risk of being again held to answer for it. It must be complete for his protection against a trial for the same offense, of which he may have already been either acquitted or convicted.

Lord Hale, in his *Pleas of the Crown*, Vol. 2, 241, says, in relation to the plea of "autrefois acquit," "that it consists of two matters: (1) Of record, namely, the former indictment and acquittal, and before what Justice, and in what manner, by verdict or otherwise; and (2) matter of fact, namely, that the prisoner is the same person, and the fact of which he was acquitted the same."

The plea of autrefois convict is, in general, open to the same remarks as that of autrefois acquit.—1 Chit. Cr. Law, 462; 2 Hale P. C., 251.

Mr. Justice Buller, in *Vandercomb's case*, 2 East P. C., 519, ruled "that a plea of autrefois acquit cannot be pleaded, unless the facts charged in the second indictment would, if true, have sustained the first."

Chief Justice Parker, in *Commonwealth v. Goddard*, 13 Mass., 458, says that "whenever it is made to appear, substantially, by the record of a trial, that the second prosecution of the same party is for the same offense, and that, on the first prosecution, judgment has been awarded and actually executed, the Court passing the first judgment having jurisdiction over the person and the offense, the second prosecution must be barred."

If the plaintiff (in error) should be hereafter indicted under the same statute for cutting, shooting, &c., one hog, of the goods and chattels of the same prosecutor, and it was shown to be the same transaction, the animal a sow, he would be entitled to an acquittal, under his plea of former conviction.

So far from having just cause of complaint that the indictment did not sufficiently inform him of the character of the offense, he seeks to arrest the judgment because the allegation was too particular in specifically setting forth the offense which made him liable under the statute.

Though penal laws are to be construed strictly, and are not to be extended beyond the effect of their express words, unless by an implication too plain and necessary to be disregarded, they must be enforced according to the intent apparent on their face, and the will of the Legislature must not be avoided

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ed except by the force of those *principles which the law acting for society extends, in a very liberal degree, to all who are charged with its violation.

The motion is dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 25

THE STATE ex rel. B. D. TOWNSEND, President Cheraw and Salisbury R. R. Company, WILLIAM T. WALTERS and BENJAMIN F. NEWCOMER v. HENRY MEYER, President, and JOHN H. MEYER, Secretary and Treasurer Cheraw and Darlington R. R. Company.

(Columbia. April Term, 1870.)

[Courts ⇨207.]

The Supreme Court has power, under Sec. 4, Art. IV, of the Constitution, to issue writs of mandamus upon original applications having no connection with any suit or action in an inferior Court, or with any writ of error or appeal pending before the Supreme Court.

[Ed. Note.—Cited in State ex rel. Suelling v. Turner, 32 S. C. 350, 11 S. E. 99.]

For other cases, see Courts, Cent. Dig. § 736; Dec. Dig. ⇨207.]

[Mandamus ⇨136.]

A railroad company, chartered by the State, is so far a public corporation that its officers owe duties to the public, which they may be compelled to perform, by writ of mandamus, and among them are their duties relative to the capital stock of the company and their control of the transfer thereof.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 270, 273; Dec. Dig. ⇨136.]

[Corporations ⇨130.]

Parties seeking a transfer of the stock of a corporation must comply with the rules of the corporation, relative to such transfers, but where that is done, the officers of the company have no right to withhold their assent, because, in their judgment, the motives and purposes of the parties are improper, or because the transfer may affect, injuriously, the interests of the company itself, or those of some other company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 489; Dec. Dig. ⇨130.]

[Corporations ⇨114.]

In the absence of any by-law, or other law, of a corporation, regulating the mode in which its stock shall be transferred, transfers must be made in the manner prescribed by the usages of the company, or set forth in the certificates of its stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 470; Dec. Dig. ⇨114.]

[Corporations ⇨130.]

A mere notice to the officers of the company, from parties having a beneficial interest in the stock sought to be transferred, that the right of the party having the legal title to make the transfer is questioned and will be contested, will not justify the officers in a persistent refusal to make the transfer, after a reasonable and sufficient time has elapsed to enable the parties giving the notice to institute legal proceedings to contest the right to make the transfer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 489; Dec. Dig. ⇨130.]

[Corporations ⇨406.]

The acts of one holding the office of President of an incorporated company, and claiming to have been duly elected, will be valid and binding on the company until he is ousted, by proceedings instituted for that purpose—semble.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. ⇨406.]

[Corporations ⇨132.]

Mandamus to compel a transfer of stock will not be granted where there has been no demand and refusal to make the transfer; but

where the rules of the company required that the certificate of stock should be transferred "in person or by attorney at the office" of the company, and it appeared that a demand had been made by letter and that the officers of the company had peremptorily refused to permit the transfer to be made: *Held*, That it was not necessary to show that the useless ceremony of appearing at the office and there demanding the transfer, had been observed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 487; Dec. Dig. ☞132.]

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[Corporations ☞131.]

*Where the stock sought to be transferred is owned by a corporation whose Directors, being vested with the necessary power to that end, authorize its President to sell it, a contract of sale by him shows a sufficient legal and equitable title in the purchaser to entitle him to the writ of mandamus to compel the officers to transfer the stock to him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 490; Dec. Dig. ☞131.]

[Mandamus ☞149.]

It is no ground of objection to the issuing of a writ of mandamus to compel the transfer of stock, that the purchasers have joined with the sellers in the application for the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 290; Dec. Dig. ☞149.]

[Mandamus ☞3.]

Though it be true that mandamus will not lie, unless the duty to be performed is one in which the public have an interest, and not even then, where the party demanding the writ has another plain and adequate remedy, yet the duty of the officers of a railroad corporation to permit the transfer of its stock is one in which the public has a sufficient interest to warrant the Court in issuing the writ of mandamus to compel its performance, and the remedy by action against the officers of the corporation to recover damages for their refusal to permit the transfer is too doubtful and uncertain in its character to supersede the specific and speedier remedy by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 34; Dec. Dig. ☞3.]

This was an original application to this Court to compel the respondents to permit certain shares in the capital stock of their company to be transferred, and to issue new certificates to the purchasers. As the case is one of novel impression in this State, it is deemed expedient to report the proceedings almost in full, so as to enable the reader to see clearly the practice adopted, as also to understand, fully, the points of law made and decided. The petition, after giving the names of the State and the Court, and the address "to the Chief Justice and the Associate Justices of the Supreme Court of the State of South Carolina," proceeded as follows:

The humble petition of Benjamin D. Townsend, a citizen of the State of South Carolina, and resident of Darlington County, in the said State, and, also, of William T. Walters and Benjamin F. Newcomer, of the State of Maryland, respectfully sheweth unto your Honors that, on the day of May, A. D. 1866, at a meeting of the stockholders of the Cheraw and Coalfields Railroad Company,

held in the city of Charleston, S. C., B. D. Townsend was unanimously chosen President of the said company, which had been duly chartered by the Legislatures of the States of North and South Carolina, and continued in the discharge of the duties of said office until the next annual meeting of the said stockholders, in the month of May, A. D. 1867, held at the same place, when he was again elected unanimously to the same office. At the regular annual meeting in 1868, a majority of the stock of said company not being represented, and there, hence, being no quorum, there was no election for officers, consequently your petitioner, B. D. Townsend, and his Board of Directors, in default of an election, held over and continued in the

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discharge of their duties until the next *regular annual meeting of the said stockholders, held on the 12th day of May, A. D. 1869, in the town of Cheraw, S. C. By effort and zeal, on the part of some of the stockholders, a full attendance upon this meeting was secured, and there was almost if not an entirely full representation of the stock of said company, either in person or by proxy. The meeting was a large and enthusiastic one, and your petitioner, B. D. Townsend, was again almost unanimously elected President, and the following persons Directors, viz: A. F. Ravenel, L. D. Mowry, A. J. White, S. J. Townsend, W. H. Robbins, L. Green, D. Ingraham, R. J. Donaldson and D. Malloy. At this meeting the stockholders adopted sundry resolutions, and among them one authorizing and empowering your petitioner, B. D. Townsend, and the Board of Directors elect, to use all the funds and assets of the said company, as they, the said President and Directors, might deem best for the interest of the said road, the name of which was then changed from that of the Cheraw and Coalfields Railroad to the Cheraw and Salisbury Railroad, the northern terminus changed from Coalfields, in the State of North Carolina, to Salisbury, in the said State, and all the provisions of the last Acts of the Legislature of the said States amendatory of previous ones were then and there fully accepted by the said meeting. Since that time, your petitioner, B. D. Townsend, as President, has worked and labored as zealously in the discharge of his duty, and in the interest of the said company, as his ability would enable him to do, enjoying the co-operation of the Directors aforesaid, but has experienced great embarrassment in forwarding this enterprise of public importance, from want of funds sufficient to carry on the work. The company was the owner of four thousand and thirteen shares of the stock of the Cheraw and Darlington Railroad, which your petitioner, B. D. Townsend, regarded as proper to be sold, as otherwise it could prove of poor service to the company. Accordingly,

at an adjourned meeting of the said Board of Directors, held on the 11th day of August last, (1869.) B. D. Townsend submitted a report in full concerning the affairs of the said road, its present condition and future prospects, and, among other things, recommended the sale of said stock, and gave his reason for so doing. All the Directors were present except three. The report was fully considered, and adopted by the unanimous voice of those present, who also passed a resolution authorizing, empowering and instructing your petitioner, B. D. Townsend, as their

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President, to sell the said stock *as soon as he could secure therefor ten dollars per share, less brokerage, or twenty per cent. of its par value. Your petitioner, B. D. Townsend, under this resolution of the said Board, and the aforesaid resolution of the stockholders, on May 12th, 1869, deeming his authority to make the sale unquestionable, and knowing the Cheraw and Darlington Railroad to be greatly embarrassed, and deeming the aforesaid price exceedingly fortunate to his company, if the same could be secured, succeeded in effecting the said sale of this stock to your petitioners, Messrs. Walters & Newcomer, of Baltimore, with whom he had been previously negotiating, who paid your petitioner, B. D. Townsend, two thousand dollars in cash, and gave their written obligation to pay him the balance, about thirty-eight thousand dollars, so soon as the proper and lawful transfer thereof could be made upon the books of the Cheraw and Darlington Railroad Company, at their office in Cheraw. This sale occurred on the 13th day of August, and, to consummate the same, the purchasers thereof dispatched one Mr. R. R. Bridges, as their agent, to proceed in company with your petitioner, B. D. Townsend, to the office of the Cheraw and Darlington Railroad Company, in Cheraw, S. C., for the purpose of having the said certificates of stock properly transferred upon the books of the said company, as the rules and by-laws, and the certificates themselves, required, a complete transfer requiring not only the receipt and transfer of your petitioner, B. D. Townsend, but the signatures of the President and Secretary of the said Cheraw and Darlington Railroad Company. The aforesaid R. R. Bridges, as agent of the said purchasers, Messrs. Walters and Newcomer, being prepared, upon the delivery of the certificates of stocks signed, as aforesaid, to pay your petitioner, B. D. Townsend, the balance of the said purchase money, as per terms of sale. But your petitioner, B. D. Townsend, and the said Bridges, having made a demand upon Henry McIver, Esq., President, and John McIver, Esq., Secretary and Treasurer of the said Cheraw and Darlington Railroad Company, to make the proper entries in the books of said company, and permit your petitioner, B. D. Townsend, to enter the

proper receipts and transfers, as their rules and by-laws and the terms of the said certificates require, in order to a lawful sale and transfer, to your petitioner's (B. D. Townsend's) great surprise, they positively refused to do and permit the same to be done, and still persist in so refusing, alleging, as an excuse therefor, that the attorney of certain stockholders of the said Cheraw and

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Salisbury Railroad have *notified them that legal proceedings are about to be instituted to prevent the said transfer of stock from being consummated, and alleging sundry other frivolous and unfounded excuses and pretexts for their declining and refusing to do this plain act of duty. Your petitioners respectfully shew unto your Honors that this refusal of their just and reasonable demands is unjust, unlawful, directly and immediately damaging to the interest of themselves and the said company, and may work irreparable injury to them and the public, who are interested and concerned in the completion of the said road. The right and authority of your petitioner, B. D. Townsend, to make the sale cannot soundly be questioned; the title of the said purchasers is good in law—the immense advantage of the sale to the said company is too manifest to be gainsaid, and this conduct of the said officers in refusing to allow the transfer to be properly recorded, and to issue new certificates to the purchasers, may, and probably will, by its delay, cause and necessitate the rescission of the sale or contract. Without this money, your petitioner, B. D. Townsend, cannot proceed with the work on the said road; the engineers and other employés will not labor without pay, and there being no money in the Treasury, all such employés and subordinates will be compelled to quit and seek employment elsewhere. The public along the line, who are now much encouraged and becoming willing to subscribe, will again become lukewarm and discouraged, and will withhold the proffered and promised aid. The Legislatures of the two States will probably be loth to aid a company thus blocked in its progress; and, in fine, the labors and efforts of years be lost by a forfeiture of charter, and the State damaged by the loss of a splendid sale of bad stock. Your petitioners further shew that, if the parties thus offending were the representatives of a perfectly solvent corporation, they would still be without any adequate and complete remedy by ordinary suit for damages at law, specific performance in equity, or similar proceedings, because of the slow and tedious progress ordinarily of such suits, during the pending of which the work on the said road must, from necessity, be at a standstill for want of funds, as it now is and has been.

But your petitioners further shew, that the said Cheraw and Darlington Railroad Com-

pany is, from the best of their knowledge and belief, totally insolvent, and could not respond in damages at all adequate to the loss inflicted, should your petitioners elect an action with a view of recovering dam-

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ages. The said Henry McIver, Esq., and John McIver, Esq., are, therefore, the representatives of a road, under heavy existing liens and incumbrances, unable to answer in damages, while the said Cheraw and Salisbury Railroad is, in its infancy, greatly and absolutely in need of this fund immediately, and in danger of forfeiting its charter, unless the work is soon begun, which cannot be conveniently done without this fund.

Therefore, your petitioners respectfully submit that this refusal is not only an injury to themselves, personally, and the stockholders of both of said roads, but it is an injury to the public, by checking the construction of an important highway, and violating and infringing the chartered rights and privileges conferred by the Legislature upon the stockholders of the said Cheraw and Salisbury Railroad Company, and Cheraw and Darlington Railroad Company, and entitles your petitioners to invoke the most speedy, adequate and complete remedy and relief within the power of this Honorable Court.

In view of these facts, the necessitous condition of the Cheraw and Salisbury Railroad Company, its present indebtedness, the insolvency of the Cheraw and Darlington Railroad Company, in consideration of the premises, and entire absence of any adequate remedy, at law or in equity, your petitioners humbly and respectfully pray your honors to grant unto them a rule issuing from this Honorable Court, directed to Henry McIver, Esq., President of the Cheraw and Darlington Railroad Company, and John McIver, Esq., Secretary and Treasurer, commanding them, and each of them, to show cause before your Honors, at a time and place therein to be specified, why a writ of mandamus should not issue, enjoining, directing and commanding them, and each of them, to sign the necessary certificates of stock upon the books of the said company, at their office in Cheraw, and to suffer and permit your petitioners to have access to the books, and to sign thereon all necessary receipts and transfers of stock to the said Messrs. Walters and Newcomer, of Baltimore, or their assigns, and commanding them to issue new certificates of stock to the said purchasers, and to do and perform all and every act necessary upon the books of said company to complete and perfect the sale of stock made by your petitioner, B. D. Townsend, to the purchasers aforesaid, according to the terms thereof.

And your petitioners, in confirmation and verification of the statements, allegations and charges upon which the prayer of the

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*petitioner is based, respectfully submit for reference, as exhibits to this petition and part thereof, the books of this said Cheraw and Coalfields, and Cheraw and Salisbury Railroad Company, containing the Journal or Minutes of the meetings of the stockholders and Directors thereof. Also, the Acts of the Legislatures of North and South Carolina, incorporating the said company, and those subsequently amending the same. The copy of the written contract of sale to Messrs. Walters and Newcomer. All of which they pray may be taken as part of the petition for all necessary reference. And upon this array of facts, your petitioners humbly pray the rule above craved. And they will ever pray, &c.

The petition was signed by the attorneys of the petitioners, and verified on the 13th April, 1870, by the oath of B. D. Townsend, one of the petitioners. It was filed in the Supreme Court on the 13th April, 1870, and was supported by an affidavit as follows:

The State of South Carolina, }
Richland County.

Personally appeared before me, B. D. Townsend, of Darlington County, State aforesaid, who, being duly sworn, deposes and says: That he is, and has been, a Director of the Cheraw and Darlington Railroad Company for the last ten years, and as such has become familiar with the financial condition of that corporation; that, at one time, he was Chairman of the Finance Committee of the Board of Directors, and in that capacity enjoyed extraordinary opportunities for ascertaining the pecuniary standing of the Board: that the Company owes, according to information he has derived from authentic sources, \$150,000 of first mortgage bonds, which mature on or about the first of next April; that there is a second mortgage bonded debt of \$75,000, which was extended for twenty years, perhaps, some two years ago; that there are some \$40,000 or \$50,000 of certificates of indebtedness having some five or six years to run, funded upon the past due coupons, which matured during and immediately after the war; that some \$10,000 to \$15,000 of these past due coupons were held by parties who declined to fund them, and are still held, part of them in judgments and some of them without suit, up to this time; that, in addition to these matured obligations, other debts are due for land damages, damages to persons and property, &c., &c.; that,

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in the well-founded opinion of *this deponent, all these debts of the Cheraw and Darlington Railroad Company, upon which current interest has to be paid, will probably amount to but little short of \$300,000; that the current interest upon this debt absorbs about all the revenue derived from the operation of the road, leaving nothing for the stock-

holders, who hold nearly \$400,000 of its stock; that for the funded and judgment creditors to press their claims under present circumstances would probably involve the Cheraw and Darlington Railroad Company in bankruptcy, and the stockholders' interest would become worthless; that this deponent is familiar with the road-bed, superstructure, equipment, and indeed the entire property owned by said corporation, and does not hesitate to express the opinion and belief that a suit to recover damages from the officers of said corporation, should they become liable on account of the obstacles they are throwing in the way of a sale of the four thousand and thirteen shares of the Cheraw and Darlington stock, sold to Messrs. Walters & Newcomer, would be inadequate, and probably amount to nothing, on account of the insolvency of the corporation, incumbered, as it is, with so many heavy obligations secured by liens, most of them in a position to be speedily enforced.

B. D. Townsend.

Sworn to and subscribed before me, this 14th day of April, A. D. 1870.

D. H. Chamberlain.

Notary Public.

A rule properly entitled, dated 13th April, 1870, and signed by the Chief Justice, was issued, as follows:

"Whereas, it has been suggested by the petition of B. D. Townsend, as President of the Cheraw and Salisbury Railroad Company, William T. Walters and Benjamin F. Newcomer, of Baltimore, and the affidavits accompanying: That the said Benjamin D. Townsend, as President of the Cheraw and Salisbury Railroad Company, under and by virtue of authority conferred upon him by the Board of Directors of the said company, at their meeting of August 11th, A. D. 1869, did, upon the 16th day of August, 1869, sell to Messrs. Walters and Newcomer, of Baltimore, Maryland, according to negotiation closed by telegram on the 13th day of said month, four thousand and thirteen shares of the capital stock of the said Cheraw and Darlington Railroad Company, held and own-

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ed by the said *Cheraw and Salisbury Railroad Company, for the sum of forty thousand dollars, less commissions and brokerage, two thousand dollars of the same being paid in cash, and the balance to be paid to the said Townsend, as President as aforesaid, as soon as the transfer thereof could be made upon the books of the Cheraw and Darlington Railroad Company, at their office in Cheraw;

"And whereas, it is further suggested that the said Townsend, as President as aforesaid, and one R. R. Bridges, as Agent of the said purchasers, did soon thereafter demand of Henry McIver, Esq., President, and John H. McIver, Esq., Secretary, of the said Cheraw and Darlington Railroad Company, in Cheraw, to permit the necessary transfers of the

said shares to the said Walters and Newcomer to be made upon the books of the said company, in Cheraw, S. C., and to issue new certificates of stock in lien thereof to the said purchasers; and that the said officers did then, and do now, refuse to permit the said transfer to be made, and to issue the said new certificates, and do refuse to do or permit to be done any and all acts upon their books requisite, under their by-laws, rules and regulations, to complete the transfer of the said stock;

"And whereas, it is suggested that the said Townsend, as President of the said Cheraw and Salisbury Railroad Company, and the said company, the said Walters and Newcomer, are damaged by such refusal, and are without specific and adequate remedy at law in the premises;

"It is, therefore, ordered: That the said Henry McIver, Esq., President, and John H. McIver, Esq., Secretary, of the said Cheraw and Darlington Railroad Company, do, on the 14th day of April, A. D. 1870, at 10 o'clock A. M., show cause, before the Supreme Court, why a writ of mandamus should not issue forthwith from the said Court, commanding, enjoining and compelling them, and each of them, to permit the transfers of the said four thousand and thirteen shares of the capital stock of the said Cheraw and Darlington Railroad Company, at their office in Cheraw, to the said Messrs. Walters and Newcomer, the purchasers, and to issue them new certificates in lien thereof, and further to do, and permit to be done, any and all acts upon said books in said office necessary to a complete transfer of said capital stock, in compliance with the by-laws, rules, regulations and charter of the said Cheraw and Darlington Railroad Company."

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*A second rule, dated April 14th, 1870, was issued, as follows:

"A rule in the above entitled cause having issued from this Court, returnable on the 14th instant, at 10 o'clock A. M., and it now appearing that the defendants have not been personally served with notice of said rule, it is now ordered, on motion of Messrs. Harlee and Chamberlain, attorneys for the relators, that the rule to show cause in the above entitled matter be made returnable on Thursday, the 21st instant, at 10 o'clock A. M., and that service be made upon the defendants by copy of the rule, with the petition and accompanying affidavits."

The petition, affidavits and rules were served on the defendants, personally, by delivering to each of them copies thereof. The service was made by the Sheriff of Chesterfield County, on the 15th April, 1870, and his certificate of service was verified by his oath.

The defendants made a return to the rule, which, after the usual caption and address to the Court, proceeded as follows:

Henry McIver, President, and John H. McIver, Secretary, of the Cheraw and Darlington Railroad Company, upon whom has been served a rule, issued by this honorable Court, ordering them to shew cause before it why a writ of mandamus should not issue forthwith from the said Court, commanding, enjoining and compelling them, and each of them, to permit the transfer of certain shares of the capital stock in the Cheraw and Darlington Railroad Company, at their office in Cheraw, to Messrs. Walters & Newcomer, alleged to be purchasers, and to issue to them new certificates in lieu thereof, and further to do, and permit to be done, any and all acts upon said books in said office, necessary to a complete transfer of said capital stock, in compliance with the by-laws, rules, regulations and charter of the said Cheraw and Darlington Railroad Company, for return and answer to said rule, and for cause why a writ of mandamus should not issue, as suggested, do say:

That they are advised that the writ of mandamus, when sued out by a private individual, is "assimilated both in its direct and incidental proceedings, to an action," and, considered as a civil suit, properly falls within the "civil jurisdiction," which, by the first Section of Article Fourth of the Constitution, is vested in the Circuit Court of Common Pleas, and is expressly vested in said Court by the fifteenth Section of said Article.

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*That the Supreme Court of the State is clothed by the Constitution with appellate jurisdiction, and constitutes a Court for the correction of errors at law, occurring in the judgment of the Circuit and Inferior Courts, and has no jurisdiction, in mandamus except as such Appellate Court.

That, as such Supreme Court, it is empowered to issue mandamus, and other remedial writs, in such cases only "as may be necessary to give it a general supervisory control over all other Courts in the State."

That, to allow private suitors in mandamus to institute an action in this Court, would be to extend to them a special privilege not accorded to suitors in civil actions generally in the State, lowers the dignity of this, as a Supreme Court, to the level of the inferior Courts, in the exercise of jurisdiction, and destroys its character as a Court of review and final resort.

That the Constitution contemplates a uniform system in the course of proceedings for enforcement of civil remedies, and the right to the modes of defence and to the usual and appropriate rules and forms of pleading and practice, existing in Courts of Common Pleas, is one of which the respondents should not be deprived.

That the machinery and rules of the Supreme Court are not adapted to the conduct of a suit between individuals involving common law pleadings and issues of fact.

These respondents, further answering, say: That they are merely the officers and agents of a private corporation; and, as to the shares of the capital stock in said company, they owe no public duty whatever, properly the subject of mandamus.

That these respondents have, as agents of the company, a duty and responsibility to the said company, in preserving the proper registry of the titles of the legal owners of the stock, and likewise to said owners, but not to the public; and there exists no by-laws of the company whatever, nor are there any specific rules or regulations on the subject.

That no clause of the charter of said company, nor any statute law of the State, prescribes a specific duty in the transfer of title to the shares of stock to said corporation, nor to its officers, nor either of them, enforceable by mandamus.

That, by the nature of the said joint stock company, the Cheraw and Darlington Railroad Company is, as to the shares of said stock, and, as to the registry and certificates

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thereof, a trustee for the *owners of said shares, accountable therefor in equity, and bound to recognize and protect the registered owners thereof, respectively, as the only true and lawful owners, until satisfactory proof has been furnished, in every case, to the above named officers, that the complete legal and equitable title to said stock has been properly transferred, by one duly authorized to make such transfers, and until the certificate of ownership, duly assigned, shall have been produced at the office of the Secretary of the company, or its loss regularly accounted for; and that, for any breach of its said trust, the company is answerable in equity.

That by the terms and conditions contained in the certificates, and the endorsements thereon, and by the issuing of said certificates, the said Cheraw and Darlington Railroad Company enters, in every case, into a contract with the holder of said certificate, and owner of the share or shares of stock, whereby it undertakes and assumes that its officer or officers shall not and will not suffer or permit a transfer of the title to such share or shares of its stock to be entered upon the books of the company, except to one who has obtained the complete legal and equitable title, and who shall produce, at the office of the Secretary of the company, in evidence thereof, the certificate of stock, properly assigned, by one duly authorized to transfer the property. That for any violation of the terms of such contract, the said Cheraw and Darlington Railroad Company, and its officers above named, are liable, in actions at law, for damages.

And these respondents shew that, as to the four thousand and thirteen shares in the capital stock of the said Cheraw and Darling-

ton Railroad Company—referred to in the petition of Benjamin D. Townsend, and in the rule issued thereon—the owner thereof is the Cheraw and Coalfields Railroad Company, as appears by the registry on the books of the corporation of which these respondents are the officers; and that the said Cheraw and Darlington Railroad Company are trustees of said stock for the said Cheraw and Coalfields Railroad Company, or its lawful assigns, accountable to it for the care thereof, responsible to it and them for the lawful transfer of said shares, according to the terms of its contract, and liable in damages for the transfer of said shares, according to the terms of its contract, by order of any party not legally authorized to order such transfer, or to any party who has not acquired, in good faith, the legal and equitable title thereto.

And these respondents shew, that only the

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party having the legal *and equitable title complete in himself, and producing at the office of the company the certificates of stock properly assigned, by one duly authorized, can legally demand the transfer of the stock. That, as to the four thousand and thirteen shares above mentioned, no such demand has ever been made, nor have the certificates of stock, properly assigned, ever been produced at the office of the company, by Walters and Newcomer, or any purchaser holding the legal and equitable title to said stock, nor has any refusal been made to such lawful demand.

These respondents deny that Benjamin D. Townsend and R. R. Bridges, as alleged in the petition, did ever make demand, as required by law, and deny that these respondents have made refusal to their lawful demand.

These respondents admit that a letter was received from the said Benjamin D. Townsend, as President of the Cheraw and Salisbury Railroad Company, the contents of which are as follows:

Office of Cheraw and Salisbury R. R. Co.,
Society Hill, S. C., August 30, 1869.

To Messrs. Henry Melver, President, and John H. Melver, Secretary and Treasurer of the Cheraw and Darlington Railroad Company:

Gentlemen: In a personal interview I informed you both, upwards of a week ago, that in obedience to instructions from the Board of Directors of the Cheraw and Salisbury Railroad Company, I had sold to Messrs. Walters & Newcomer, of Baltimore, the four thousand and thirteen shares (4,013) owned and held by the said Cheraw and Salisbury Railroad Company, in the capital stock of the Cheraw and Darlington Railroad Company. By the terms of this sale, as you both saw, in papers exhibited to you, two thousand dollars were paid in cash, and the residue, amounting to upwards of thirty-

eight thousand dollars, is to be paid as soon as the proper transfer is made on the books of the Cheraw and Darlington Railroad Company, according to the terms of the certificates. The object of this communication is to formally demand, what I understood you both to decline, that the proper transfer be made immediately to the bona fide purchasers, Messrs. Walters & Newcomer, of Baltimore, Maryland, and to notify you that, in the event of your refusal to perform this official act, which is only necessary to complete the transaction, I, in the name of the corporation I represent in the matter, will hold

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you, jointly and individually, both *privately and officially responsible for all losses, injury and damages that may result from such refusal, to either myself, the Cheraw and Salisbury Railroad Company, or the purchasers, Messrs. Walters & Newcomer. An early and explicit reply to this demand, in writing, will oblige

Your obedient servant,

B. D. Townsend,

President Cheraw and Salisbury R. R. Co.

These respondents refused to accede to the demand contained in the above letter for many cogent reasons, which governed them in the exercise of their official discretion, and in the discharge of the responsibility which attached to them as agents of the Cheraw and Darlington Railroad Company, and to their company as trustees of the said shares of stock belonging to the Cheraw and Salisbury Railroad Company. The demand was irregular, informal and illegal. The letter of Mr. Townsend declared that he had sold the stock, and that Walters & Newcomer, of Baltimore, Maryland, were the purchasers. If this were true, then the sole right to demand the transfer was in said purchasers, who, as all other transferees in like case, were bound to produce the certificates of stock, duly assigned, at the office of the company; and, moreover, if required, to satisfy the officers of the entire legal and equitable title being complete in the purchaser, of the authority of the person ordering the transfer, and of any other matter or thing affecting the transfer of title. Without the production of such certificates and proof, these respondents had and have no right or power to make any transfer. The demand was not even made in the name of the pretended purchasers, Walters & Newcomer, nor by any warrant from them, but in the name of "B. D. Townsend, President of the Cheraw and Salisbury Railroad Company."

The letter further contained the distinct notice that the stock had not been paid for; that the agreement for sale was executory; the sale, if sale at all, merely inchoate, and the legal title still in the Cheraw and Salisbury Railroad Company, and not in the proposed transferees.

In the face of such notice, these respond-

ents could not consent to transfer the title of the Cheraw and Salisbury Railroad Company.

These respondents further shew that, before the receipt of the letter of the said B. D. Townsend, these respondents had received

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*notice from stockholders of the Cheraw and Salisbury Railroad Company not to transfer said shares; that the attempt to sell the said stock would be resisted; that the title of said Benjamin D. Townsend, as President, and that of the Directors of the Cheraw and Salisbury Railroad Company was disputed, and the authority of the relator to carry on the attempted sale, and to order the transfer of the stock was denied; that legal proceedings would be instituted to test the questions. These respondents are informed that such proceedings were soon thereafter instituted, are now pending before the Courts, and that Messrs. Walters and Newcomer have long since had notice thereof. These respondents are also informed that the authority claimed by the said Benjamin D. Townsend, under resolution of said Board of Directors, directs and empowers him to sell said shares for a stated price, to receive the purchase money, and thereupon to make the transfer; but that neither under said resolutions, nor by virtue of his office as President, has said Benjamin D. Townsend, under an executory agreement, any authority to deliver said certificates, or to order the transfer of said shares. These respondents, in good faith, as officers of the Cheraw and Darlington Railroad Company, declined to accede to Mr. Townsend's demand, not feeling themselves called on to assume the grave responsibility to themselves and to the corporation, of deciding the questions raised as to said sale, and as to the title and authority of the said Benjamin D. Townsend and his Board of Directors, and regarding themselves as wholly without authority, by making the transfer, to determine the matter in dispute between Mr. Townsend and his constituents, who are the real owners of the stock. And these respondents deny that the said Townsend, as President of the said Cheraw and Salisbury Railroad Company, are damaged by such refusal, but, on the contrary, these respondents are informed, and believe, that the object of the attempted sale is to give to the said Walters and Newcomer, and the said R. R. Bridges, a controlling interest in and over the affairs of the said Cheraw and Darlington Railroad Company, thereby seriously damaging the interest of the said Cheraw and Salisbury Railroad, and its allied roads, incorporated by the State of South Carolina, and built by the State as a continuous line for the benefit of the citizens of the State. That the said R. R. Bridges and the said Walters and Newcomer are deeply interested in the Wilmington and Weldon Railroad Company, and the Wilmington and Manchester Railroad, and that they desire to pur-

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chase *said stock, and to control the said Cheraw and Darlington Railroad and Cheraw and Salisbury Railroad, for the purposes of their own rival line by way of Wilmington, for their own interests, and for the benefit of interests foreign to the interests and policy of the State, as expressed by the Statute Book of South Carolina.

These respondents are informed, and believe, that a large majority of the stockholders of the said Cheraw and Coalfields, or Cheraw and Salisbury Railroad Company, protest against the attempted sale of their stock by the said Benjamin D. Townsend, acting as President; that they have authorized legal proceedings to be instituted in their names as relators, disputing the validity of his election, and that of his said Board of Directors, and have done everything in their power to repudiate said action.

These respondents are further informed, and believe, that the action of the Board of Directors of said Company was procured by the said Benjamin D. Townsend for the purpose of effecting the sale of said stock to the relators, in the interests of said purchasers, and not in the true interest of the Cheraw and Salisbury Railroad Company.

That it was hurried on precipitately by the said Townsend, against the earnest remonstrances of a portion of said Board, as will appear by affidavits accompanying this return.

These respondents, further answering, say, that the sale to rival interests of the stock in question, giving the relators a controlling interest in the Cheraw and Darlington Railroad Company, would operate to the lasting injury of the said company, which is closely allied in interest to the Cheraw and Salisbury Railroad, and by its location, under State charter, is in natural antagonism to the Wilmington line, in which the relators are interested.

These respondents, further answering, deny the allegation of insolvency of the Cheraw and Darlington Railroad Company, so loosely and unfairly made by the said Benjamin D. Townsend, and, in support of their denial, refer to the fact of the sale of the stock of said company at ten dollars a share as proof of its solvency. In justice to said corporation and its stockholders, these respondents pray that this Court, at least, will not assume such insolvency, without the same being judicially established, after fair investigation by a jury of the country.

These respondents deny that there are any by-laws of the Cheraw and Darlington Railroad Company in existence, nor is there any statute of the State prescribing a specific

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duty to them in the trans*fer of stock; and, reiterating, say, that they are not public officers, nor officers of a public corporation, and that no public duty devolves upon them

in their custody of the books of the company and of the stock of the individual shareholders, who are mere private corporators; that, as officers of a private corporation, they exercise the authority and discretion of the company in the discharge of its duties as trustee for the owners of its stock, and in the performance of its contract obligations as a private individual with other private individuals, in reference to a mere matter of private property: that these respondents, and their company, are amenable to the law, by civil remedy, for abuse of such authority and discretion, for breach of trust, or for violation of contract obligations, but are not liable to be proceeded against by mandamus in the Supreme Court of the State for a mere refusal to transfer stock to a supposed purchaser; and they are advised and humbly submit to your Honors that the high prerogative, public writ of mandamus, is not the proper remedy for the alleged grievances complained of by the relators, nor issuable upon their demand, nor under the circumstances of this case as presented.

Wherefore, these respondents, having fully answered, pray that the said rule against them may be discharged with costs.

No evidence was given before the Court, and the case was heard upon the pleadings and affidavits accompanying the petition.

Townsend & Hudson, Harlee, Memminger, Chamberlain, for relators.

Simonton & Barker, Corbin, for respondents.

June 28, 1870. The opinion of the Court was delivered by

MOSES, C. J. The Court, in *The State, Ex Rel., The South Carolina Railroad Company v. The Columbia and Augusta Railroad Company*, (January, 1869, 1 S. C., 46,) held that, by virtue of the power conferred by the 4th Section of the 4th Article of the Constitution, it had authority to issue writs of prohibition in cases properly cognizable by it.

So holding for the reasons there given, the right cannot be doubted, as to the writ of mandamus, by express words granted in the same Section.

It is not necessary to discuss so much of the return of the respondents as affirms "that they are not public officers, nor officers of a public corporation." Conceding this, still

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there are duties incumbent on them, outside of those, which devolve upon them as trustees for the corporations.

Neither can they sustain their claim, that, in respect to the shares of the capital stock of their company, they owe no public duty whatever, and that, as to these, they are not subject to the writ of mandamus.

There is a marked difference between charters granted by the legislative power, which exact no public duties, and those under which the public acquires such rights that it can

compel the corporation to respect them. A distinction has always been observed between companies chartered as trading associations, or scientific societies, or others of that character, "aiming only at objects of their own, and not contemplating any benefit to the public, or taking upon themselves any public government, duty or responsibility," which are exclusively private, and those where, although the inducement to their creation is individual gain, yet the interests of the community are so inseparably connected with them that what affects the one will be sensibly felt by the other.

Indeed, so much do railroad companies partake of the nature of public corporations, that Mr. Grant, in his work on corporations, at page 9, includes them in that class, "because they are established to secure great purposes of State, and holding out advantages and benefits, either to the public without restriction, or to every one who chooses to comply with their conditions."

Mr. Redfield, in his *Law of Railways*, (1 Vol. 53,) divides corporations "into eleemosynary, and those which are mere civil or political bodies, entrusted with certain rights, or duties, and required to perform certain functions more or less connected with the polity of the State or nation," and among the last he places railway companies.

According to the authorities of this country, the respondents may properly claim to be the official agents of a private corporation. This position, however, affords them no exemption from the liabilities which attach, by reason of the "great purposes of State," which, doubtless, to no small extent, induced the grant under which their company enjoys the large immunities conferred upon it.

Such has been the rapid increase of railroad companies, with the extended and exclusive privileges which they enjoy, that the material interests of the country are, to no small degree, influenced and controlled by them. The great facility which they afford for the transportation, not only of passengers,

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but of freights, has prevented all rivalry by other means, and given them almost a monopoly of the whole carrying trade. If the State, through the Courts, has no power over them by a short and speedy remedy, the injury they may inflict, on not only private, but public interests, might be so prejudicial and detrimental as to counterbalance all the benefits derived from their establishment. From their number, and the magnitude of their capital and operations, without the means of an adequate check to their encroachment on private rights, they might, indeed, become a power which the State itself might have cause to fear.

The ground of the respondents, in this regard, cannot be maintained. Carried out to the extent proposed, any of the members who desired to abandon their company, by

selling out their shares, might be beset with difficulties and embarrassments, and the management of their own private interests, against their will, subjected to the guidance and control of their associates.

It is very true that whatever rules they may have adopted for the transfer of their stock must be observed, but when a compliance with them is offered, the officers are not at liberty to inquire into the motives of the seller and the vendee, the purpose which prompts the sale, or what will be the effect either on their own road or some friendly one. Nor, if the formalities which they have prescribed as the law which is to govern on such transfer are complied with, can they withhold the proper action demanded of them, no matter what may be the equitable interests of others, who, with notice of the sale, have yet not taken any legal measures to prevent it.

The fact that this company, with a charter granted in 1849, and an organization soon after following, has, up to this time, governed its direction without any by-laws or specific rules and regulations, although the power to make them is expressly granted, does not show much foresight or care on the part of those so deeply interested in the proper management of their own investments.

It is not necessary, in the absence of all by-laws, with respect to the sale of stock in an incorporated company, to inquire if anything more is necessary than a mere written assignment or transfer of the certificate by the holder to the purchaser, to vest the latter with the title. Such an inquiry here is not required, for it appears that this company has, in effect, (not in the form of a by-law,) a regulation as to the transfer of its stock, which, not only from long established usage, but from its incorporation into the certificate, may well be recognized as its own law in the matter.

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*"This certificate is transferable in person, or by attorney, at the office in Cheraw, South Carolina, on the surrender thereof."

The mode of the transfer has thus become a part of the contract with the holder.

The certificate of the shares in question was held by the Cheraw and Salisbury Railroad Company, of which the relator, Townsend, was the acting and ostensible President. The return seeks to justify the course of the respondents in refusing the transfer, on the ground of a notice by some of the stockholders of the said company, that the title and the right of Townsend and the Directors were disputed, and that legal proceedings would be instituted to test the questions. This might have been sufficient to suspend the act demanded by the relators, so that proper opportunity might be afforded for the course proposed, but cannot operate to justify a denial, still persisted in, when, after full time allowed for access to the Courts, it has

not been made to appear that any process to enjoin has been granted or even asked for. Townsend was, for all purposes necessary to the safety and security of the respondents in dealing with them in transactions affecting the Cheraw and Salisbury Railroad Company, its President, claiming to have been so elected, and must be so recognized and regarded. Whether he was elected in due form, was not a question for the relators. He filled the office, and was so accepted and received, and until an act of ouster, by competent authority, he was the President, presumed to be rightfully in office.—*Bank of U. S. v. Dandridge*, 12 Wheat., 79 [6 L. Ed. 552]; *All Saints Church v. Lovett*, 1 Hall, 191; *Mohawk R. R. Co.*, matter of, 19 Wend., 135.

To entitle the relators to the writ, it is necessary to shew a demand and refusal. It is not essential, however, that "the word 'refuse,' or any equivalent to it, should be used, but there should be enough from the whole of the facts to shew the Court that, for some improper reason, compliance is withheld, and a distinct determination not to do what is required."—*Tapping on Mandamus*, 285; 3 Stephens, N. P., 2292; *Angel and A. on Corp.*, 104.

Whatever obligation there may have been on the relators to appear at the office, and there demand the transfer, was removed by the notice of the respondents that it would not be made. It is not indispensable to a complete right to the remedy they ask, that so useless a ceremony should have been performed. It would have been a mere idle form, after the peremptory refusal by the President of the Cheraw and Darlington

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Railroad Company, for, without his *sanction, the transfer could not be made, and he had expressed his conclusion in plain and positive terms.

It is true, as alleged by the respondents, that to entitle a party to this writ, he must be clothed with a clear legal and equitable right to the thing which is withheld.—*Tapping on Mandamus*, 28; *Moses on Mandamus*, 115.

Is the claim of these relators founded on such right?

The stock is held by the Cheraw and Salisbury Railroad Company. Its Directors, having its control, and vested with sufficient power to dispose of it, authorize their President, the relator Townsend, to make the sale, and so carry out the purpose of those who, to that end, represented the whole company. He contracts to sell it to his co-relators, Walters and Newcomer, at the price fixed by the Board of Directors; part of the purchase money was paid, and the balance stipulated to be paid "as soon as the proper and lawful transfer thereof could be made on the books of the Cheraw and Darlington Railroad Company, at their office in Cheraw." The fact that the transfer was prevented by the act

of the respondents in no way affected the clear legal right of Townsend to make the sale, or that of Walters and Newcomer to be vested with the title to the stock on the payment of the money promised. The thing withheld was the stock, that was the subject of the contract; unless the transfer was had, its end could not be consummated, and the design of the parties would be entirely disappointed. Were not the terms of the undertaking sufficient, if its performance had not been prevented by the respondents, to vest the title in Walters and Newcomer?

The President of the Cheraw and Darlington Railroad Company had been informed of the sale by Townsend, and by Bridges, the agent of the other relators, previous to the letter of August 30, 1869, and the objection urged against the application for the transfer was not any impression on his own mind as to their legal right, but was the consequence of the notice of some of the stockholders of the Cheraw and Salisbury Railroad Company, above referred to. From regard to it, he refrained from the performance of the ministerial duty imposed on him through the contract of his company with that of the Cheraw and Salisbury Railroad as to the shares so held.

Why, in the absence of all legal proceedings, to which his company was a party, he undertook to favor, or protect the said stockholders of the Cheraw and Salisbury Railroad Company against the act of its President and Directors, directly representing

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them, is not *consistent with any obligation which he owed to the one company or the other. Whether the money was paid before the transfer, did not enter into the duty imposed on him by virtue of his office to transfer the stock. The seller and the buyer (by his agent) were both present, and it was for them to prescribe the terms of their contract—their terms became the law of it.

That Walters and Newcomer are joined in the writ, cannot prejudice the remedy to which Townsend may be entitled, had they not united with him. "Where two or more persons join, whose interests and cause of complaint are entirely distinct, it may well be doubted whether a joint application for the writ prayed for can be sustained."—*Moses on Mandamus*, 198. This proceeds on the general rule of pleading applicable in all actions, that several distinct rights, held by separate persons, cannot be included in the same writ. As in the instance put in the book, from which we have last above quoted, "where a record shews a certain sum awarded to Doe, and another to Blackwell, as damages severally sustained by them by reason of a road laid out across their lands, they have no such common interest as would authorize them to join in an application for a mandamus to compel payment."

The object of the writ is to compel the

transfer of the stock, and in this the parties have a common interest. The right to it has grown out of a contract which they desire to complete, and occupying this position, they have a common purpose to be effected through the remedy which they claim. It might have been a cause for comment, if the persons who had contracted to buy the stock had not united in the application through which they were to become vested with its title.

The most important question remains to be yet considered.

Do the facts set forth in the suggestion, taken in connection with the statements of the return, entitle the relators to the writ which they ask?

It is urged "that it comprehends the execution of the common law and of statutes, Acts of Parliament, or of the King's charter, in all cases for which there exists no legal remedy; but not applicable, however, as a private remedy to enforce simple common law rights between individuals, as to compel payment of money due on a bond, or the restitution of chattels, still less to command a party to abstain from a tort or the abuse of his office."

Although it is difficult to lay down the precise line which separates the rights which an individual may demand from a railroad

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*company, growing out of the obligations which it owes to the public, from the fact of its being constituted for public purposes, and those which, as a separate and distinct individual, he may demand, proceeding from relations in which other members of the community are not directly concerned, yet such a distinction does exist, and is well founded.

The Courts do interfere by mandamus to compel the discharge of their duty by corporate officers. *Angel & A. on Corp.*, 646, 651. Such interposition, however, could only be demanded where the act is enjoined by law, and must be of the character of the duties pertaining to the public. Any individual may become a member of the corporation by the purchase of its stock, and would be entitled to all the rights and privileges conferred by the charter, to the extent of the shares he might hold. It is a right given by the charter to the public, and to whichsoever office of the company appertains the duty to execute the new certificate which is to follow the transfer, as the evidence of the title, such officer is in violation of the statutory duty required if he refuses.

The duty, although a public one, will not be enforced by mandamus, if the party claiming the right to its performance can (in the language of the argument) have recourse to any "other specific remedy adequate to enforce that right."

While the general principle, thus affirmed, may be conceded, yet the rule, as now under-

stood and acted on by the Courts, does not deny the writ, where, formerly, it would not have been allowed, because a remedy, affording compensation in damages for the wrong committed, might be found in a resort to an action on the case. "The remedy for satisfaction must not only be adequate, but it must be for complete satisfaction, equivalent to a specific relief."—Tapping on Mandamus, 20.

"If the remedy be not equally convenient and efficacious, the Court will grant the writ."—*Ibid*, 19. "And it must be specific and adequate to enforce the right."—Angel and A. on Corp., 653.

"Mandamus lies to compel an officer to execute the duties of his office, though he be liable to penalties, or an action on the case for the neglect of them."—*Ibid*, 653.

Notwithstanding these principles, which would seem to require the other remedy to be "specific, and adequate" to the purposes sought by the writ, many authorities, both in England and this country, may be adduced to shew that, although the compensation

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*in damages will not accomplish the end proposed by, and consequent on the writ of mandamus, yet, if recourse can be had to an action, through which it may be had, the writ will be refused.

Can it, therefore, issue where the purpose is to require the transfer of shares in a railroad company?

Various cases have been cited, where, for the same object, it has been refused against banking corporations, on the ground that a recovery of damages may compensate for the loss; but yet, in *Rex v. Worcester Canal Company*, 1 M. and R., 529, it was held that the writ could issue to compel the entry on the books of the defendant of the probate of the will of a deceased shareholder under which the executrix was the proprietress of his shares, leaving any question as to its validity and effect to be raised by the return.

So, too, in *Regina v. The Liverpool, &c., Railway Company*, 11 Eng. C. L. R., 408, where a mandamus was applied for against the company to command them to enter a memorial of transfer of shares, though it was refused, on the ground that the relator was not proceeding bona fide, in answer to the argument that the writ would not lie to permit a transfer of stock to be made on the books of the company, Lord Campbell, C. J., said, "In an action, only damages could be recovered, and the full object of the party would not be answered."

In *Harris v. The Irish Land Company*, 3 Ellis and B., 512, the same C. J. said: "But where there is a duty, in the fulfillment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is clearly a case

within the intention of the Legislature, and it is precisely this case. The plaintiff is entitled to the shares, the company refuse to register his name; before the act, in such a case, a prerogative writ would have been granted." Coleridge and Wightman, J. J., both concurred.

Mr. Moses, in his work on mandamus, page 108, says: "It seems unquestionable that a right of action for damages generally exists against public officers who refuse or neglect to perform their duty in favor of those persons whose rights are injuriously affected by such neglect of duty. But this remedy, by action against the officers, is of such doubtful and uncertain character as not to supersede that of mandamus. The unliquidated damages to be assessed by a jury would not necessarily be the amount due the party."

At page 161, he says: "That a writ of

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mandamus will lie in such case, seems to be sustained by the weight of modern authority." Mr. Redfield, in his work, before referred to, at page 144 of 1st Vol., says: "There can be no question, probably, in this country, that where the company refuse, on reasonable request, to make the proper entry on their books, of the transfer of shares, whereby the owner is liable to be deprived of any legal right or pecuniary advantage, the company may be compelled to do their duty, in the premises, by writ of mandamus."

And at page 281, of his 2d Vol., he says: "And this is the proper remedy to compel a corporation to allow the transfer of stock upon their books, or the company may be compelled to pay damages for such refusal by an action at law."

In the case of the *State v. Lehre*, 7 Rich., 234, which has been referred to in the argument, it was not decided that mandamus would not lie, because the relators might be indemnified through an action if they were wronged: but the writ was refused because "of the legal inability of the Commissioners and the practical difficulty, if not impossibility, of their compliance with the required demand."

In the *State v. N. E. R. R. Co.*, 9 Rich., 253 [67 Am. Dec. 551], Judge Glover, in delivering the opinion of the Court, says, "the general rule has been restricted to cases where the specific remedy is equally convenient, complete and beneficial."

What did these relators propose to accomplish by the writ? Townsend, on his part, desired to make available the shares of his company in the Cheraw and Darlington Railroad Company, through his contract with his co-relators, while they sought to obtain them, that, through their possession, they might have an interest and influence in the company. What damages recoverable for the alleged breach of duty would vest them with the stock? That, with the proceeds

of a verdict, they might supply its place by another purchase, is no answer, for it might follow that, on an application for the transfer and certificates of the new bought shares, they might encounter the same difficulty, and the result would be that the Cheraw and Darlington Railroad Company could compel the Cheraw and Salisbury Railroad Company to hold their stock against their will, and forever exclude Walters and Newcomer from becoming members of their corporation. Suppose, however, the Cheraw and Salisbury Railroad Company brought their action and recovered; then, being owners of four thousand shares, they would be called on to contribute to the payment of a judgment debt due in part to themselves. Suppose it brought by the other relators, and

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a verdict *had, then they would hold a money demand against a company with which they were seeking association, and which demand, by increasing the liabilities against it, might affect the very stock which they sought to purchase.

The return of the respondents illustrates the fact that, besides the market worth of railroad stocks, they may have a value which might recommend them by reason of the power and patronage which they might command. Their chief objection to the transfer of the shares appears to be the purpose to which they are to be devoted in the hands of the purchasers, "to control the said Cheraw and Darlington Railroad, and Cheraw and Salisbury Railroad, for the purposes of their own rival line by way of Wilmington, for their own interests, and for the benefit of interests foreign to the interests and policy of the State, as expressed by the Statute Book of South Carolina."

With what was so often alluded to in the argument, "as the politics of the case," the Court has no concern. It decides on the rights of parties involved in the issue before it, without regard to the extrinsic circumstances which may be the consequence of its adjudication.

The jurisdiction under this writ has been so "amplified," since it was first known as a "mere letter missive from the sovereign power, commanding the performance of some particular act or duty, to which no return was allowed, and disobedience of its command was punishable by attachment," that it can only be accounted for by the fact, that its prompt and speedy action, and the specific relief which it affords, recommended it to adoption as one of the favorite remedies of the law. While its limits have been extended in England, there has never been an attempt by the Legislature of any State in the Union to contract them.

If, in those rude days, when commerce

scarcely existed, and the improvements, of the time in which we live, if they could have been then even imagined, would have been received as the vagaries of a lunatic, or the pictures of a dream, the writ was regarded with favor, and preference over those forms of action which were attended with so much uncertainty and delay, is it surprising that the beneficent ends it was designed to attain should be so increased as to keep pace with the enlarged trade and business of the country? No insignificant portion of these are carried on by corporations, which have so multiplied in number and enlarged in capital that they have become a power so strong in the country as to render necessary a remedy through which their breaches of

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duty to the public may be *the more speedily met than through the slow progress of an action at law. This necessity has not been confined to the remedies at law. The jurisdiction of equity, by the force of the same circumstances, has been enlarged to meet the exigencies demanded by the material changes which the intelligence of the day is effecting.

It was for a long time held that Courts of Equity would not decree specific performance of a contract for the sale of personal chattels. The necessity, however, for the prompt process of that Court, in cases where damages were uncertain, and might not be adequate compensation for the thing withheld, so by degrees extended the jurisdiction, until at last it was held, in *Adderly, v. Dixon*, 1 S. and S., 607, "that it would be decreed at the suit of the vendor, of a contract for the sale of debts proved under a commission of bankruptcy."

The extent and use of railroads have outstripped the anticipations of even the most hopeful and visionary of their friends. Charter after charter is granted, and the whole country is almost connected by the roads upon which their trains are run.

They were granted as well for public purposes as individual profit. Combined, they form a power that, unrestricted by law, could control the State.

They owe duties as well to the community at large as to their stockholders; and by reason of its prompt, speedy and decisive action, and the adequate service it is calculated to render where breaches of duty are committed by those companies, there seems to be no well sustained reason why the writ of mandamus should not be called into requisition.

The order granting the application has been filed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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*AMOS COOKE v. ALFRED R. MOORE
and Others.

(Columbia. April Term, 1870.)

[Partition ⚡84; Subrogation ⚡19.]

Upon proceedings in equity for partition of an intestate estate, consisting of personalty, as well as realty, two tracts of land and some personalty were allotted to a married woman, one of the distributees, and she and her husband, who were parties to the proceedings were decreed to pay a certain sum of money to another distributee, for equality of partition. The husband afterwards, and before the death of his wife, paid this sum; and, after her death, he sold one of the tracts to C., with warranty. On bill for partition of the two tracts of land between the heirs of the wife and C.: *Held*, That the husband, by paying the sum of money assessed for equality of partition, did not become subrogated to the rights of the distributee in whose favor it had been assessed as against the two tracts of land, and, consequently, that C., as representing the husband, had no lien upon said tracts for the money thus paid.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 232; Dec. Dig. ⚡84; Subrogation, Cent. Dig. § 7; Dec. Dig. ⚡19.]

Before Thomas, J., at Lancaster, Spring Term, 1869.

Willis Gregory, Sr., died intestate, leaving real and personal estate and eight children, two of whom were Mary Ann, wife of Alfred R. Moore, and Martha J., wife of Joseph Terrell. In 1852 proceedings were had in the Court of Equity for partition of the estate of the intestate between his children; and, in those proceedings, two tracts of land, appraised at \$1,885, and some personalty, including advancements, appraised at \$1,445, were allotted to Mrs. Moore. The property thus allotted to her exceeded in value her share of the estate by \$507.37½, and that sum Moore and wife were decreed to pay to Terrell and wife, for equality of partition. Moore paid it, and the interest thereon, in 1854 and 1855. In 1865, Mrs. Moore died, leaving as her heirs her husband and seven children and one grandchild. On the 10th August, 1867, Moore sold one of the tracts of land to Amos Cooke, the plaintiff, at the price of \$1,500, and gave him a deed of conveyance therefor, with the usual covenant of warranty. The plaintiff afterwards discovered the defect in Moore's title, and he then purchased the interests of the adult children of Mrs. Moore in the tract of land he had purchased from Moore; and, on the 30th April, 1868, he filed this bill against Moore and the children and grandchild of Mrs. Moore, praying partition of the tract of land in which he had acquired the shares of Moore and the adult children of Mrs. Moore, and claiming that Moore, by his payment to Terrell and wife of the sum of money and interest thereon which was decreed to be paid to them, for equality of partition, became subrogated to the rights of Terrell and wife as against the tracts of

land, and that, to the extent of the amount due to him, the plaintiff, because of the

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breach of Moore's covenant *of warranty, he was entitled to stand in Moore's place, and be paid out of the proceeds of the lien to which Moore had become subrogated.

The bill was first heard by His Honor Johnson, in June, 1868, who sustained the plaintiff's claim, and ordered a sale of both tracts of land, and a reference to ascertain the amount due to the plaintiff on his covenant of warranty, and "what amount, if any, of the proceeds of the sale of the lands, to be made as aforesaid, is properly applicable to the discharge of the lien on the lands acquired by the said Alfred R. Moore by payments made to effect equality in the manner" before stated.

The Referee submitted his report, dated 31st May, 1869, wherein he set forth the sales of the two tracts of land, and reported that the net proceeds of both sales amounted to \$1,508, and that Moore's lien, by reason of his payment for equality of partition, to which the plaintiff had become entitled, amounted to \$918.77, leaving a balance of \$589.23 subject to distribution.

To this report the minor defendants excepted, on the same grounds substantially as those taken by them on their appeal. They, also, in pursuance of notice given, moved, under the Act of 1868, to set aside the decree made in June, 1868, for error in establishing the lien.

His Honor, the presiding Judge, refused the motion to set aside the decree. He also overruled the exceptions, and made a decree confirming the report.

The minor defendants appealed, and now moved this Court to reverse the decision of his Honor the Circuit Judge, as well that upon the motion to set aside the decree as that upon the report and the exceptions thereto, and stated their grounds of appeal, as follows:

1st. Because Alfred R. Moore, by his payments to Terrell and wife, acquired no lien on the real estate of his wife.

2d. Because, if any lien was created by him by reason of such payments, it was not wholly chargeable on the real estate, and, so far as chargeable upon the personal property, it was extinguished by the payments.

3d. Because, if any such lien was acquired by him, interest was not chargeable upon the amount during the coverture of the said Moore and wife.

4th. Because the minor defendants were entitled to set off against the amount of said lien their share of the rents and profits in the land after the death of their mother.

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*Kershaw, for appellants. There was no lien. The title did not vest in Moore and

wife until the money was paid.—*Burris v. Gooch*, 3 Rich., 7; 5 Stat., 163. If this had been a mortgage, it was Moore's own debt, so far as it rested on the personality. A gift to the wife is presumed.—1 Rep. on Hus. and Wife, 54. At any rate, he was not entitled to interest during coverture.—1 Hilliard on Mort., 8; *Warley v. Warley*, Bail. Eq., 398. And was bound to account for rents and profits afterwards.—*Harley v. Dewitt*, 2 Hill, 367; *Hancock v. Day*, McM. Eq., 301.

Moore, contra, cited *Railroad v. Clagborn*, Sp. Eq., 546; *Shultz v. Carter*, Sp. Eq. 543; *Ex parte Ware*, 5 Rich. Eq., 473.

June 29, 1870. The opinion of the Court was delivered by

WRIGHT, A. J. On proceedings in the Court of Equity for partition of the estate of Willis Gregory, who died intestate, the proportion allotted to Mary Ann, one of his daughters, who had married Alfred R. Moore, exceeded the share to which she was entitled, by the sum of \$507.37½, and this amount her husband and the said Mary Ann were adjudged to pay to Joseph Terrell and wife, also distributees, for equality of partition.

The estate of the said intestate included both real and personal property, a portion of each having been allotted to Mrs. Moore, including two tracts of land, the one consisting of 108½ acres and the other of 339 acres.

During the coverture, Moore, the husband, paid and satisfied the amount due Terrell and wife, and, after the death of Mrs. Moore, sold and conveyed, with the usual covenants, the smaller tract so on partition allotted to her, to the plaintiff Amos Cooke, in fee, who, having purchased also the shares of the adult children in the same, filed his bill for partition of her real estate, claiming, also, that the payment by Moore to Terrell and wife of the sum so due them, for equality of partition, created a lien on the land in favor of Moore, to which he, the plaintiff, as his grantee, should be subrogated, and to which he could resort by reason of the breach of warranty of his deed. The Court below sustained the claim, and it is now sought here to reverse the decree in that regard.

The Act of 1791, 5 Stat., 163, which directs that where, on partition, property is allotted to one of the distributees, and he is required to pay some other of them a certain sum for equality, does not create a mortgage in the usual sense in which that term is

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understood. No title vests till the money assessed is paid.—*Burris v. Gooch*, 5 Rich., 1.

On the payment directed to be made to Terrell and wife by Moore, the title as to the personal property vested in Moore, and as to the real, in himself and wife, during the coverture, and on its termination, in her.

Did Moore, by such payment, acquire any right against his wife, and if so, how could he have enforced it? and if he could not, how can the plaintiff aver an equity which would entitle him to be subrogated to the rights of Terrell and wife?

The doctrine which exists in regard to sureties who pay a creditor holding collaterals for the protection of the same debt has no application here, for Moore did not stand in that relation to his wife. The decree of the Court, which Moore, the husband, paid, was a judgment against him, as well as against her, and when he satisfied it, the title to the land vested, and not till then.

It was, in fact, clearing an incumbrance on the land over which he had dominion during the marriage, and the act enured as well to his own benefit as to that of his wife.

Assume, however, that it was but the debt of his wife, can his voluntary payment of it, during coverture, create a charge against her? Could he, as against her, by reason of it, claim to be subrogated to whatever rights Terrell and wife might have had against the land as a security for the amount due them? and if he could have acquired no such right against his wife, how can Cooke, his grantee, through him, acquire any?

There is, however, another view conclusive against the plaintiff who seeks in this way an indemnity for the breach of warranty on the part of Moore, instead of pursuing his estate exclusively.

Personal property, as well as the two tracts of land, were assigned to Mrs. Moore, and the \$507.37½ was the excess of her own share, which she and her husband were directed to pay to Terrell and wife. Until the payment of the whole amount the title to no part of the assigned share vested. On its payment, however, not only the land, but the personal estate, was free from any claim, in the shape of lien or otherwise, and the title to the latter then vested absolutely in him.

How much of the amount was in excess of the share of the real estate, and how much in excess of the personal, does not appear by the brief; and yet it is asked to treat the payment as if in exoneration only of the land, when the amount was the representa-

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tative of the value of the whole excess, having relation both to the real as well as the personal property, which made up the share of Mrs. Moore.

The appeal is only on the part of the minor children of Mrs. Moore, and the judgment of this Court will be regarded alone in reference to their rights as adjudicated by it.

In relation to the claim on their behalf of the rents and profits to be paid them out of the share of the said Moore, before its application under the decree to the payment of the plaintiff, there is not sufficient of the

facts before the Court to justify a judgment. If an inquiry into that matter is desired on behalf of the appellants, it is ordered that they have leave to apply to the Circuit Court for such direction as may bring up the question for its adjudication.

It is further ordered and adjudged that so much of the decrees of the Chancellor and the Circuit Judge as subject to the payment of the claim preferred by the bill for the said breach of warranty by the defendant, Alfred R. Moore, the shares of the appellants, the minor children of the said Mrs. Moore, in her estate sought by the bill to be partitioned, be set aside, and that the cause be remanded to the Circuit Court with directions for such orders as may fully carry out the judgment of this Court now pronounced.

MOSES, C. J., and WILLARD, A. J., concurred.

2 S. C. 56

S. MORSE and Wife v. E. P. ADAMS, Executrix, and Others.

(Columbia. April Term, 1870.)

[*Vendor and Purchaser* ⚡254.]

What is known in England, and some of the States of the Union, as the vendor's lien for unpaid purchase money of land sold, where no mortgage or other instrument creating a lien is taken, does not exist in this State.

[Ed. Note.—Cited in *Lavender v. Daniel & Harmon*, 58 S. C. 135, 36 S. E. 546.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 641; Dec. Dig. ⚡254.]

[This case is also cited in *Roof v. Railroad Co.*, 4 S. C. 62; *Rogers v. Huggins*, 6 S. C. 364, without specific application.]

Before Johnson, Ch., at Edgefield, August, 1868.

The decree of His Honor the Chancellor is as follows:

Johnson, Ch. On or about the 3d day of February, 1863, the complainant sold to James S. Adams a tract of land containing two hundred and eighty-eight acres, and took from the said Adams, in payment for the same, his sealed note for five hundred dollars, payable at one day, and a sealed note for fourteen hundred dollars, made by A. A. Glover and W. F. Durisoe, and payable to James S. Adams, and dated 7th January, 1863.

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*James S. Adams, since that time, died, and his widow has administered upon his estate, which is insolvent, and it is supposed that the note on Glover and Durisoe can never be collected.

The bill, in this case, is filed, amongst other things, to enforce the lien of the vendor for the payment of the purchase money. This lien is recognized by the English Courts and by some of the American Courts, but

has never been recognized by the Courts of this State, though they have frequently been applied to for the purpose. In a late case, the question was made before the Appeal Court, and it declined to recognize the right of the vendors on the express ground that it had never been done by our Courts.

It is adjudged and ordered that the complainants, as vendors, have no lien upon the land described in the pleadings, and, also, that they have no right to claim a rescission of the contract of sale.

The complainants appealed against the decree of His Honor, and now moved this Court to reverse the same, on the grounds:

1. That there has not been made, by the Courts of this State, any authoritative decision adverse to the vendor's lien.

2. That if such decision had been made, it is not founded on principles of sound equity—is not entitled to weight as a precedent, and should not control the Supreme Court in this case.

3. That the decision is, in every respect, contrary to equity.

Bonham, for appellants, submitted that *Wragg v. The Comptroller General*, 2 Des., 506, and *McCorkle v. Montgomery*, 11 Rich. Eq., 114, 132, do not conclude the question; and he cited *Mackreth v. Symmons*, 1 Lead. Cas. Eq., 235; 15 Ves., 329; *Bayley v. Greenleaf*, 7 Wheat., 46; 1 *Hilliard on Mortgages*, 470, and other authorities, to show that the vendor's lien existed in England and some of the States of the Union, and contended that it should be treated as existing in this State.

June 29, 1870. The opinion of the Court was delivered by

MOSES, C. J. We are left by the brief without the particular circumstances which attended the contract of sale by the plaintiffs to Adams, further than that the vendee gave his own note, and that of Glover and Durisoe, as the consideration of the purchase.

Lord Eldon, in *Mackreth v. Symmons*, 15 Ves., 349, (a leading case,) says: "The more modern authorities upon the subject have brought it to this inconvenient state, that the question is not a dry question upon the fact whether a security was taken, but it de-

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*pends upon the circumstances of each case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken." Here the transfer and acceptance of the note of third persons for almost two-thirds of the price might go far to shew the intent of the parties that no lien was to be retained by the vendor.

We propose to deal with the general question submitted by the appellant, whether in South Carolina the vendor, by the mere fact

of the sale, has an equitable lien on the land for the purchase money?

While it is not to be denied that in the English Chancery, and the Courts of several of the States of the Union, the vendor is held to have a lien on the land as a security for the purchase money, without any mortgage or other instrument creating it, in the case of *Wragg v. Comptroller General* [2 Desaus. 509], as long ago as 1808, the application of the doctrine in this State was repudiated. The decision there was declared to be in conformity with the law prevailing in South Carolina for the past sixty years, and in 1859 the Court, in *McCorkle v. Montgomery*, 11 Rich. Eq., 132, emphatically endorsed it.

It would require circumstances of a strong and controlling character to induce us to reverse a rule so long existing in regard to property, against which no complaint has been made, and which the Legislature, by its silence, and the Bar, by its acquiescence, have approved. So well has it been understood that a sale of real estate is seldom made on credit without the execution of a mortgage to secure the promised consideration.

It would ill comport with the province of the Court, whose duty it is to administer the law as it is found to exist, by rash changes to unsettle rules of property, and undertake to annex conditions to sales of real estate which never entered into the conception or understanding of the contracting parties.

The decree of the Chancellor is affirmed, and the motion dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. *59

*ROBERT A. PRINGLE and Others v. BELA SIZER and Others.

(Columbia. April Term, 1870.)

[*Fraudulent Conveyances* ⚭30.]

A principal may secure his sureties against loss by a confession of judgment, and the mere fact that actions, by some of his creditors, are pending against him at the time, is not proof of fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 73-75; Dec. Dig. ⚭30.]

[*Principal and Surety* ⚭175.]

Where such a confession is given to indemnify the sureties against their liability on certain determinate and specified securities, the plaintiffs can hold the judgment as indemnity against their liability on those securities only. If there should be a surplus after satisfying those securities, they will not be allowed as against junior judgment creditors, to apply such surplus to other securities on which they were liable at the time as sureties, but which were not mentioned as among those to secure which the judgment was given.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 509; Dec. Dig. ⚭175.]

[*Execution* ⚭327.]

Where the plaintiffs in such a judgment bid off, at Sheriff's sale, the debtor's property to an amount exceeding the sum of their liability on the securities to protect which the confession was given, and satisfied their bid by giving to the Sheriff a receipt on their execution for the amount of the bid: *Held*, That they were liable to account to junior judgment creditors of the principal debtor for the surplus of their bid, after satisfying the securities, and that for such surplus the junior judgment creditors had a lien on the property purchased by them.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 975; Dec. Dig. ⚭327.]

[*Abatement and Revival* ⚭58.]

At the common law a suit, when abated, is absolutely dead, but in equity an abatement signifies only a present suspension of all proceedings in the suit from the want of proper parties capable of proceeding therein.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. § 299; Dec. Dig. ⚭58.]

Before Thomas, J., at Lancaster, October Term, 1869.

This was a creditors' bill exhibited by Robert A. Pringle and Otis J. Chafee, (the last named styling himself as "being a partner in, and representing herein, the late mercantile firm of Chafee, St. Amand & Croft,") plaintiffs, against Bela Sizer, Robert C. Potts, Samuel B. Massey, Benjamin A. Culp and Judson A. Hasseltine, and George W. Williams, Benjamin J. Cureton and Charlotte R. Cureton, executors and executrix of William J. Cureton, deceased, defendants, and its object was to obtain a decree setting aside a judgment confessed by Sizer to his co-defendants, Potts, Massey, Culp and Hasseltine, and the decedent, Cureton, or, failing in that, to compel the defendants to account for certain purchases at Sheriff's sale of property of the defendant, Sizer.

It appeared from the pleadings and the evidence that, on the 27th September, 1858, the defendant, Sizer, gave to the said Potts, Massey, Culp and Hasseltine, and the testator, William J. Cureton, his, the said Sizer's bond, in the penal sum of \$8,863.33, with a condition thereunder written, that if he, the party obliged, should pay, or cause to be paid, certain specified and described bonds and notes by which he, the party obliged, was indebted as principal, and on each of which at least one of the obligees above named was indebted as his surety, and should save, harmless and indemnified, the

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*said obligees against their liability as his sureties on said bonds and notes, then the above obligation to be void, &c.; and that, on the same day, he gave them a confession of judgment on the said bond, "according to the intent and meaning" thereof, and that judgment was duly entered on said confession and fi. fa. issued thereon, and lodged with the Sheriff, all on the same day.

That on the 28th September, 1858, James H. Witherspoon recovered and entered up

two judgments against Sizer, in the aggregate sum of \$541.95, besides costs; that on the 28th October, of the same year, Chafee, St. Amand and Croft, entered judgment and issued execution against him in the sum of \$188.46, besides costs, and on the same day, E. D. Williams, Hyatt, McBurney & Co. and James E. Cureton, severally, entered judgments and issued executions against him. That, on the 28th March, 1859, Robert A. Pringle also entered judgment and issued execution against him, and that, on the day last named, several other judgments were entered against him.

In January, 1859, the Sheriff of Lancaster District levied the execution of Hyatt, McBurney & Co. on two tracts of land, five slaves, and some horses, cattle, wagons, &c., being all the property Sizer owned, and advertised the land and slaves for sale at the Court House, on the 7th day of February, then next, and the horses, cattle, wagons, &c., for sale the day after, at the residence of Sizer.

The plaintiffs, in the execution of Potts and others, agreed to bid on the property, and, if necessary, to purchase the same for their joint benefit, and appointed Potts to do the bidding. He accordingly attended at the Court House on the 7th February and bid off the tracts of land and the slaves. On the same day, the plaintiffs in the execution of Potts and others, and James H. Witherspoon, who held the executions next in order, drew up and executed an instrument, under seal, whereby, after reciting the judgments and executions of Potts and others, Witherspoon and James E. Cureton, against Sizer, and the purchases that day made by Potts at Sheriff's sale, they ratified the acts of Potts in the purchase of the lands and slaves, authorized him to attend the sale on the next day and purchase any property that should not bring a fair price, and further agreed that Potts should take titles in his own name to all the property purchased by him, take possession thereof and sell the same, and apply the proceeds of the sale to the execution of Potts and others against Sizer to "the extent they"

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(the plaintiffs therein) "may be damnified as sureties for said Sizer, and to the extent they are secured by said judgment and fi. fa. founded thereon," and if any surplus should remain to apply such surplus to the executions in favor of James H. Witherspoon, and the balance, if any, to the execution in favor of James E. Cureton.

Potts attended the sale on the 8th February and purchased all the property offered for sale. His purchases, on both days, amounted to \$8,457.12, and he satisfied his bids by giving the Sheriff a receipt on his execution for that amount, less the costs, which he paid.

The case was referred to a Referee to take testimony and report upon the facts. He submitted a report, as follows:

"In compliance with the order of Court, in the above case, the Referee respectfully reports that he has taken testimony, at the instance of the parties and their counsel, on the various points made in the pleadings, and submits the following as the result of his investigation:

"On the 27th of September, 1858, the date of the confession sought to be vacated by the complainants, the Referee finds that Bela Sizer was largely indebted, by numerous bonds and notes, on which the persons secured by the said confession, or some of them, were liable as sureties for the said Sizer. The debts for which his said sureties were so liable are embraced in the writing obligatory upon which the confession was based, and which is exhibited in the bill of complaint; and, also, three of the said sureties were liable as surety for the said Sizer on three or four other bonds not embraced in said writing obligatory.

"The surety liabilities not embraced in the paper above described, as developed by the testimony, at the date of the confession of judgment, were as follows, viz.: An administration bond of Bela Sizer, administrator of A. A. Gillespie's estate in the penal sum of about twenty five hundred dollars; and an administration bond of the said Sizer, administrator of Wm. J. Gillespie, deceased, in the penal sum of about six thousand dollars; and, also, two guardianship bonds for the children of A. A. Gillespie, deceased—each bond in the penal sum of three thousand dollars.

"It appears that the estates of the two Gillespies (A. A. & Wm. J.) were both in an unsettled state at that time, and that R. C. Potts, out of the sales of Sizer's property, and the rents and profits thereof, paid debts, to a very considerable amount, which were outstanding against both their estates. The Referee is entirely satisfied that, at the date of the confession of judgment, Bela Sizer was

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*indebted in actual liabilities, for which his said sureties were then liable as surety for him, in an aggregate sum equal to, if not greater, than the amount of said confession. And in all the circumstances of the case, and the facts deposed to by the witnesses, the Referee has been unable to detect fraud in the said confession of judgment, but, on the contrary, believes the same to be a bona fide transaction.

"The Referee further reports that the levy and sale were made by virtue of an execution against the said Sizer, in favor of Hyatt, McBurney & Co., the bona fides of which is not questioned in this Court. The sale was a fair, open and public one; and, from the testimony, the property brought fair prices. It appears that the property was bid off by R. C. Potts, by arrangement between the sureties aforesaid and James H. Witherspoon, a junior execution creditor, entered into in writing on the evening of the first day's sale. Bela

Sizer does not appear to have been a party to this agreement in writing. The property, or a portion of the same, was rented and hired out by R. C. Potts, after the purchase by him, to Anson Sizer, a son of Bela Sizer, for which he gave his obligation yearly, and paid the money for the same. Some two or three of the obligations have been produced in evidence which corroborates the testimony of the witnesses. It also appears that Bela Sizer lived on the place with his son, Anson Sizer. The Referee calls attention to the agreement in writing, made on the day of the sale, as showing the authority conferred on R. C. Potts.

"The circumstances relied on by the complainants to show fraud are, that the sureties, as complainants allege, were not liable to the full extent of the confession of judgment; that a large amount of the property, after the sale by the Sheriff, remained in the possession of Bela Sizer; and that the written agreement shows some advantage intended for Bela Sizer. But, according to the judgment of the Referee, it was incumbent on the complainants to make proof of the actual existence of these facts, and that they could not be presumed. And, if the testimony be true, the opposite is true.

"The Referee shows that Exhibit A, which forms a part of this report, shows the aggregate amount of the numerous bonds and notes of Bela Sizer, upon which his sureties were liable as such. In this the penal amount of the bonds are given.

"Exhibit B of this report shows the actual liabilities of the sureties at the date of the confession, as gleaned from the testimony.

"Exhibit C of this report shows the surety

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liabilities still unpaid, *as appears from the testimony. All of which, with the testimony taken on the reference, is respectfully submitted."

It is not deemed necessary to report the Exhibits, nor the evidence, documentary and oral, which accompanied the report of the Referee; and it is sufficient to state that the exhibits and evidence showed that the aggregate amount of Potts' purchases at the Sheriff's sales exceeded, by about \$792, the amount for which the plaintiffs, in the judgment of Potts and others against Sizer, were liable at the time of the sales on the bonds and notes specified in the bond on which the confession to said plaintiffs was based; that the judgments in favor of James H. Witherspoon amounted, at the time of the sales, to \$586.15, and, therefore, that there remained a small balance of about \$206, arising from the sales of Sizer's property, which was applicable to the executions next in order to Witherspoon's, unless Potts and his co-plaintiffs could maintain the position taken by them, and sustained by the Referee, that they had the right to apply that balance to debts of Sizer not specified in the bond on which the

confession was based, for which they were liable as his sureties.

Various exceptions were taken by the plaintiffs, and one by the defendants, to the report. It is not necessary that they should be stated.

His Honor the presiding Judge held, that the judgments against Sizer which were recovered before March, 1859, had been paid; that the plaintiffs had failed to show fraud in the confession of judgment; and that the plaintiffs in said judgment had the right, as against creditors of Sizer, whose judgments were recovered after the sales of his property, to apply the surplus arising from said sales, after satisfying the amount due on their own judgment, to any demands against Sizer for which they were liable, as his sureties, and he ordered that the bill be dismissed.

The plaintiffs appealed, and now moved this Court to reverse the decree of His Honor, on the following grounds:

1. Because, it is respectfully submitted, His Honor erred in not setting aside the confession of judgment made by Bela Sizer to his co-defendants for fraud.

2. Because, inasmuch as the defendants took possession of the property bid off by them at the Sheriff's sale, upon the trusts expressed in the deed, dated February 7th, 1859, copied in the testimony, His Honor erred in holding that liens of the judgments and executions subsequently obtained could not bind

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that portion of said property which still remained unsold in their hands; and that they might apply the excess of the sales money, after discharging the surety obligations embraced in the confession, to the payment of other debts of the said Bela Sizer not in judgment and not mentioned in said deed.

3. Because, in point of fact, as shown both by the pleadings and testimony, the judgment of Chafee, St. Amand & Croft in the bill had been obtained, and the execution thereon lodged with the Sheriff previous to said sale; and for this reason, and because this is a creditor's bill, even according to the principles of the decree, His Honor erred in dismissing the bill.

4. Because, inasmuch as the answer of the defendants and the testimony in the cause show that after all the surety liabilities on account of the said Bela Sizer, embracing even those outside of the confession of judgment, had been paid off and discharged out of the avails of the property bid off at the Sheriff's sale, there still remained unsold and unapplied, in the hands of the defendants, of said property, the two tracts of land described in the proceedings and testimony, and a very large portion of the personal property; and, it is respectfully submitted, His Honor erred in not decreeing a sale of said property, and an application of the proceeds to the payment of the debts of the said Bela Sizer, according to their legal priorities.

5. Because of other errors in fact and in law contained in said decree.

[For subsequent opinions, see 3 S. C. 335; 7 S. C. 131.]

Moore, for appellant.
Allison, contra.

June 29, 1870. The opinion of the Court was delivered by

MOSES, C. J. We concur in the conclusion of both the Chancellor and the Referee, that there was no actual fraud in the confession of judgment by the defendant, Sizer, to his sureties. Neither is any to be implied from the transaction between them, which preceded or followed the sale.

There was an existing liability, on the part of the defendants, for their co-defendant, Sizer, to a large amount, and in the course which they pursued to protect themselves from a loss more than probable, from his then pecuniary condition, they do not appear to have violated any of those salutary principles which Courts of Equity enforce to secure fair and honest dealing in the business

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*affairs of life. When they are transgressed, a firm disposition to repair the wrong is always exhibited by the Courts; but fraud is not to be presumed: it must be shown by circumstances so strong as to lead to conviction, and the burden of proof is upon those who seek the aid and interposition of judicial tribunals to set aside and vacate instruments under which legal preferences have been obtained.

A judgment confessed as an indemnity for liabilities incurred by another, as indorser, or security, is good.—Ford v. Elkin, 2 Speers, 147.

The fact that it was given after suits by other creditors had been brought, of itself constituted no fraud. A debtor has a right to prefer one creditor to another, but it must be a preference which secures no benefit or advantage to himself, as the price or consideration, or reserves to himself an interest, to which, of right, his other creditors may be entitled.

If Sizer had remained in possession after the sale, the principle laid down in *Smith v. Henry*, 1 Hill, 16, would not have been a circumstance from which fraud in the original transaction could have been inferred, for it has been held not to apply to the property of a debtor acquired through a Sheriff's sale.—*Pringle v. Rbame*, 10 Rich., 72 [67 Am. Dec. 569]; *Guignard v. Aldrich, et al.*, 10 Rich. Eq., 253.

Here, too, the proof is clear, that the possession was in the son, Anson Sizer, under a bona fide contract of renting and hiring from year to year.

The judgment confessed was for \$8,863.38. It was founded on a bond in that amount, which recited liabilities on the part of the

plaintiffs to whom it was confessed, supposed to be at least equal to the sum expressed, and set out with such reference to them that there could be no misapprehension of the debts, as against which the purpose was to protect the obligees.

All the real and personal estate of Sizer was levied on under an execution junior to the confession, and sold by the Sheriff of Lancaster on sale days in February, 1859. The property brought fair prices, and was purchased by Potts, one of the plaintiffs, (in the confession,) under an arrangement with his co-plaintiffs to attend the sale, make the property bring its value, and, if necessary to that end, to purchase it. To this understanding there was no evidence that Sizer was a party.

The real estate and some slaves were sold on the first day, whereupon a written agreement was entered into between Potts and the

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*other sureties, (the defendants here,) together with J. H. Witherspoon, who held the judgments next in rank, ratifying the purchase, acknowledging the land and negroes so bought to be for the joint benefit of the sureties, and that he (Potts) should hold possession, sell the same, and apply the proceeds to the satisfaction of their fi. fa. to the extent necessary for their indemnity as sureties for the said Sizer, as secured by the said judgment, continuing the agency of Potts as to the farther sales to be made the next day, as to the property he might then buy, with the stipulation that, after satisfying their execution, any balance should be applied to the execution of the said J. H. Witherspoon, and the remainder to that of J. E. Cureton.

The amount of all the purchases so made by Potts was \$8,457.12, which he paid, (except as to the costs,) by giving a receipt to the Sheriff for the sum on the said execution which he and the other sureties held against Sizer, which was senior in date to all which existed against him. If the liabilities covered by the bond reached that amount, then the said purchasers would be the owners of the property so bought at the Sheriff's sale, with no duty to perform except the discharge of the trust which devolved on them through the bond, in favor of the creditors whose debts were referred to in it as those on which the obligees were sureties, and as to which they were to be protected by the judgment, on the same day confessed.

It is alleged, however, by the counsel for the appellants, in the statement which he submitted in his argument, that the liability of the sureties on the bonds and notes intended to be covered by the confession, at the time of the sale, amounted only to \$7,664.33, and that may be accepted as the correct sum, as it is, by \$238.95, in excess of the amount stated by the Circuit Judge in

his decree as the payments then actually made.

Potts and his co-plaintiffs, however, received from the proceeds of the sales on their execution \$8,457.12, and if their liabilities for Sizer, on the debts which the confession was to protect, was only \$7,664.33, then they have received \$792.79, which, after first paying the judgments of J. H. Witherspoon, amounting on day of sale to \$586.15, leaves \$206.64 in their hands. This sum they hold through the property which they purchased and paid for by giving a credit on their execution. It is applicable, however, to the other judgments, in their order of priority, unless Potts and the plaintiffs in the confession can maintain their right to it, on the ground which they assume, and which was sustained by the Circuit Judge.

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*They contend that, as the purpose of the parties interested in the bond was, through it, to secure the obligees against all liabilities on behalf of Sizer, the debts on which they are responsible for him, though omitted in the instrument, are to be regarded as impliedly included.

The very specification and recital of the liabilities against which the sureties were to be protected excluded those which are not by name included in it. The parties themselves have stated, in precise language and terms, the end designed and contemplated by the bond. In addition to this, there is an endorsement on the confession that it is made "to the intent and meaning of the within writing obligatory." It was competent, by the use of more general terms, to have availed themselves of a more enlarged benefit through the bond and the confession, by extending it to all debts for which they might be in any way responsible for the said Sizer. How can they, however, without any allegation of mistake, be permitted, in fact, to change the terms of a sealed instrument, specifically enumerating certain demands, so as to comprehend others which are not referred to, when, too, it is to be assumed that they had knowledge of all the debts on which they were sureties for the said principal? A more legitimate inference is, that, not inserting, they intended to exclude them; and this receives support from the concluding words of their answer: "The confession of judgment aforesaid might have been for a larger amount than that for which it was given, and that, too, on actually incurred liabilities."

It appears, then, that the plaintiffs in the confession have in the property which they so purchased the said sum of \$206.64, which property was liable to the judgment creditors junior to Witherspoon, in the order of their date. This they are bound to pay; and if, by reason of their insolvency, they are not competent to do so, the land must stand

liable to the amount, for they held it in trust for such judgment creditors, having used their funds to that amount in the purchase of it.

Pringle and Chafee are the only creditors before the Court. Pringle, however, has no claim to the \$206.64, because that sum is absorbed by priorities.

Chafee, the other plaintiff, had died before the hearing on Circuit, and the fact is not noticed by the Circuit Judge in his decree.

His representatives, or the firm which (in the rather uncommon language of the bill) he represented, have an interest to the extent already stated, and it will be lost to

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them, if the general order dismissing it is confirmed. The bill as to him abated before the hearing.

The effect of an abatement at law and in equity is materially different. "In the sense of Courts of Equity, an abatement signifies only a present suspension of all proceedings in the suit from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead."—Story's Eq. Pl., § 354.

The order dismissing the bill as to Pringle is confirmed. We do not think it a case for costs, and he should pay only his own, and it is so adjudged. As to Chafee, let the case be remanded to the Circuit Court, that the parties representing him, or the firm, as they may be advised, may have the opportunity of becoming parties to it, and of moving for such orders as may place them in a condition to carry out the views and principles announced in this opinion.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 68

MARCELLUS M. SEABROOK and Others v.
WILLIAM GREGG, Jr., and Others.

(Columbia. April Term, 1870.)

[Wills \hookrightarrow 634.]

Testator devised to his son G, "for and during his natural life, the rents, issues, uses, occupation and enjoyment of" certain lands, and from and after his death "unto the issue" of G, "living at the time of his death, who attain the full age of twenty-one years of age, or die before that time, leaving lawfully begotten issue who shall attain the full age of twenty-one years, living at the time of the death of the said" G with cross remainders among the issue, and with a limitation over to the testator's "right heirs," in case there should be a failure of all such issue. G died leaving issue: *Held*, That the issue took vested remainders, liable to be divested in the event of their dying under the age of twenty-one years.

[Ed. Note.—Cited in *Faber v. Police*, 10 S. C. 391; *Leroy v. City Council of Charleston*, 20 S. C. 75; *Boykin v. Boykin*, 21 S. C. 530.

For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. \hookrightarrow 634.]

[Wills \hookrightarrow 629.]

The Court will always hold a remainder to be vested rather than contingent, when it can do so consistently with the intention apparent in the terms of the limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. \hookrightarrow 629.]

[Infants \hookrightarrow 31.]

It is not a fraud in an infant to avail himself of his infancy to set aside his own grant or covenant, where the grantee or covenantee was not deceived or misled by any misrepresentation or concealment.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 50; Dec. Dig. \hookrightarrow 31.]

[Appeal and Error \hookrightarrow 174.]

To a bill filed by a minor without a next friend, an exception on that ground comes too late, if taken at the hearing of an appeal from the decree. Leave will be given to the plaintiff to move the appointment nunc pro tunc, in the Circuit Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1093, 1094, 1121–1132; Dec. Dig. \hookrightarrow 174.]

[Partition \hookrightarrow 95.]

A decree for the partition of property held subject to limitations should protect the future interests by directing that the shares be held subject to those limitations.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 300–316; Dec. Dig. \hookrightarrow 95.]

[This case is also cited in Walker v. Alverson, 87 S. C. 61, 68 S. E. 966, 30 L. R. A. (N. S.) 115, as to construction of wills.]

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*Before Carpenter, J., at Charleston, June Term, 1869.

This was a bill for partition filed by Marcellus M. Seabrook, Archibald Clark Seabrook and Eliza Sarah Seabrook, plaintiffs, against Wm. Gregg, Jr., and others, defendants.

The plaintiffs, Marcellus M. and Archibald Clark, were the children of George Washington Seabrook, deceased, and the plaintiff, Eliza Sarah, was the only daughter of a son of the said George Washington, who died in the lifetime of his father.

The facts of the case were as follows: William Seabrook, the elder, was seized and possessed, at the time of his death, of the plantation on John's Island hereinafter mentioned. He was the father of the said George Washington Seabrook, and by his will, bearing date the 21st day of January, 1836, he devised, inter alia, as follows: (a)

"I give, devise and bequeath to my son, George Washington Seabrook, for and during his natural life, the rents, issues, uses, occupation and enjoyment of all that one-half of my plantation on John's Island, being a part of Seabrook's formerly Simons' Island, situate, lying and being to the southward of the middle road, agreeably to the plat or plan thereof of the said John Wilson, Surveyor; and also to my said son, George Washington Seabrook, for and during his natural life,

the rents, issues, occupation, and enjoyment of all that plantation or tract of land on Edisto Island, recently purchased by me of Benjamin Whaley, and containing four hundred acres, more or less; and from and after the death of my said son, George Washington Seabrook, I give, devise and bequeath both the said two tracts of land, and the implements thereon, unto the issue of my said son, George Washington Seabrook, living at the time of his death, who attain the full age of twenty-one years of age, or die before that time leaving lawfully begotten issue who shall attain the full age of twenty-one years, living at the time of the death of the said George Washington Seabrook, if one, then to that one, his or her heirs and assigns, absolutely and forever, share and share alike, as tenants in common; and should any or either of the lawfully begotten issue of the said George Washington Seabrook die before him, and before attaining twenty-one years, without leaving lawfully begotten issue, who shall attain the age of twenty-one years, living at the time of the death of my said son,

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then the share or *shares of such issue so dying, whether specifically given or otherwise accruing under this clause in my will, shall go to the survivor or survivors, and to the lawful issue of any of the issue of my said son, who may have previously died, leaving lawful issue living at the death of my said son, George Washington Seabrook, who, to wit, the said issue, shall attain the full age of twenty-one years, share and share alike, as tenants in common; the surviving issue of any of the deceased issue of my said son George Washington Seabrook, taking among them, if more than one, the share or shares to which the parent or parents, if alive, would have been entitled.

"And should my son, George Washington Seabrook, depart this life without leaving lawfully begotten issue, who shall attain the full age of twenty-one years, living at the time of his death, or dying before that time, leave lawfully begotten issue to live until the parent or parents, if alive, would have reached twenty-one years of age, then, and in these cases, on the failure of the issue of the said George Washington Seabrook, within the time hereby limited, I give, devise and bequeath the said two plantations or tracts of land, absolutely and forever, unto the right heirs of me, the said William Seabrook, who shall be living at the time of the failure of the said issue of my said son, George Washington Seabrook, within the time limited, as aforesaid; it being my wish, as I think the lands mentioned in this clause of my will are among the best lands in the State of South Carolina, that they may remain limited in my family as long as the law will permit."

The testator died before the year 1839,

(a) For a copy of the will in full, see Seabrook v. Seabrook, McM. Eq., 215, note.

leaving his son, George Washington, surviving him. On the 15th November, 1863, George Washington Seabrook conveyed, by feoffment and livery of seizin, the plantation on John's Island, devised to him by his father, to the defendant, William Gregg, Jr., and, on the 18th day of the same month and year, his eight children, then living, executed a deed, whereby they released to the said William Gregg, Jr., "all their right, interest, title, claim and demand, whatever, either in law or equity in or out of the plantation" above mentioned. This deed contained a warranty of title, in the usual form, and a covenant that George Washington Seabrook "had in himself good right, power, and absolute authority to grant, convey and enfeoff the said lands and their appurtenances unto the said William Gregg, the younger, his heirs and assigns."

The plaintiffs, Marcellus M. and Archibald Clark, were two of the children of George Washington Seabrook who executed the deed

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*last mentioned, but they were both minors when it was executed, and Archibald Clark is still a minor. The father of the plaintiff, Eliza Sarah, did not execute the said deed, and she was a minor, about ten years of age, when this bill was filed.

George Washington Seabrook being dead, the plaintiff filed this bill, claiming that, under the limitations of the will of William Seabrook, they were entitled to one-third of the said plantation, and praying partition of the same. The principal question argued on the Circuit was, whether the remainder to the plaintiffs was vested or contingent, it being conceded that, if it was vested the plaintiffs were not barred by the feoffment, with livery of seizin of George Washington Seabrook.

His Honor the presiding Judge sustained the construction contended for by the plaintiffs, and ordered that a writ of partition do issue, directing the Commissioners therein named to set apart to the plaintiffs one-third of the said plantation.

The defendant, William Gregg, Jr., appealed, and now moved this Court to reverse the decree, on the grounds—

1. Because the complainants have no right, title or interest in the plantation ordered to be partitioned, and never had any, as the will of William Seabrook created a life estate in George W. Seabrook, with contingent remainders, to take effect only upon his death; and that his feoffment with livery of seizin to the defendant effectually barred all such remainders.

2. Because the decree overturns the law of property in real estate, in this State, and destroys the validity of one of the common assurances of title therein.

Campbell, McCrady, for appellant, cited *Johnson v. Arnold*, 1 Ves., Sr., 169; *Doe dem. Goldin v. Lakeman*, 2 B. & Ad., 42; 2 Jarm.

on Wills, 534; 2 Bl. Com., 169; *Fearne*, 1, 9; 2 Cruise Dig., 261, 263; 4 Kent, 206; 2 Bl. Com., 168, 274; 1 Green. Cruise Dig., 775; 10 Ves., 283; 2 Bl. Com., 294; *Redfern v. Dehon*, Rice, 464.

Sept. 8, 1870. The opinion of the Court was delivered by

MOSES, C. J. To determine the question before the Court, it is not so necessary to inquire into the nature and extent of the interests which George W. Seabrook was to enjoy for life in the real estate referred to in the pleadings under the will of his father, Wm. Seabrook, as to ascertain the effect of the terms by which the remainder is devised to his issue.

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*Whether during his life he had but the bare right "to the rents, uses, issues, occupation and enjoyment of all that one-half of the plantation on John's Island, and the same in the plantation on Edisto Island, purchased of Whaley," or whether he had an estate for life in both, will not affect the rights of the grandchildren (his issue) if they had a vested interest at the death of the testator. A reference to the terms employed might be of avail in contributing to shew the intention of the testator as to the remainder; but conceding that they are "equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein," still if the estate in remainder was vested, by no act of the life-tenant, could he defeat the rights of those upon whom at his death, it was cast?

"When the right is one of present possession, and the party is in possession, whether personally or by substitute, the estate is said to be vested in possession. When it is a present right of having the possession whenever it may become vacant by the determination of the preceding estate, or at some other future time, to which only the possession, and not the ownership, is postponed, the estate is said to be vested in right or interest."—*Smith on Real and Pers. Property*, 228.

A contingent remainder can never vest unless it vests during the continuance of the previous estate, or at the very moment of the determination of it.

As to such estates as vest presently, "though there may be a particular estate to distinguish them to be remainders, yet, as to supporting them, there needs none, because they vest presently and certainly in the persons to whom they are limited."—2 *Crabb on Real Property*, Sec. 2336.

In all the cases of this nature, if there is enough found in the will to make the attaining of twenty-one not a condition precedent, but a condition subsequent, or, in other words, to shew that the age was the period at which, if the person did not reach it, the estate was to go over, the interest will be held to be vested.

"Sometimes a limitation may seem, in terms, to be contingent, although they, in fact, mean no more than would have been implied without them, not amounting to a condition precedent, but only denoting the time when the remainder is to vest in possession."—2 Crabb on Real Prop., Sec. 2335; 1 Fearn, 241. The author last referred to, in his first volume, at page 738, says: "Although there is no doubt that a devise to a

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person, if he shall live to attain *a particular age, standing alone, would be contingent, yet, if it be followed by a limitation over, in case he dies under age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that, at that age, it shall become absolute and indefeasible; the interest in question, therefore, is construed to vest instantaneously."

The annotator, Mr. Perkins, in note 6, at the same page, says, "even independently of this particular rule, it is obvious that a limitation over, disposing of the property to another, in case of the devisee dying under certain circumstances, always supplies an argument in favor of the prior devisee taking an immediately vested interest." He refers to several cases, and adds, "though the contrary is sometimes contended."

Mr. Smith, in his learned treatise on Executory Interests, 2 Fearn, 174, although questioning the soundness of two of the decisions which are usually referred to as authority for the doctrine, nevertheless concedes it and remarks that where the conditional expressions "do not precede but follow the devise, and constitute part of the same sentence in which it is made, and there is a devise over, simply in the event of his not attaining such age, the conditional expressions are not construed as a condition precedent, but as forming a regular special limitation of the indirect kind, or an irregular limitation, amounting to the same as the words, if he should continue to live till, or if he should not die before he attains 21; and the interest, instead of being a springing interest or a contingent remainder, is held to be a vested interest, either immediate or in remainder, as the case may be, subject to be divested as well by the operation of the special limitation as by the operation of the devise over."

The rule so set forth is sustained by numerous authorities, and, though doubts have been expressed by many able Judges, they have been adhered to, as settling rules of construction in regard to devises, which it was to the interest of society should not be changed with the minds of those whose duty it was to enforce them as established.

In Boraston's case, 3 Rep., 19, there was a devise of land to A. and B., for eight years, and, after the term, to the executors, till H.

should accomplish his age of twenty-one years, and then to him and his heirs forever. H. died under twenty-one. It was contended that it was contingent on that event, it be-

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ing uncertain whether he *would ever attain that age. It was held, however, that the advent of time, when, &c., and then, &c., did not make anything necessary to precede the settling of the remainder, and only expressed the time when the remainder to H. should take effect in possession, and not when it should become vested.

In Brownfield v. Chowder, 1 B. & P., 313, the testator devised to A., for life, and, after his death, to B., for life, and at the death of A. and B., or the survivor, to his godson, if he should live to twenty-one; but if he died before, and his brother should survive him, then to his brother, if he lived to attain twenty-one years; but if both of them died before either arrived at age, then to another godson, and his heirs forever. The two life estates determined before the first devisee in fee attained twenty-one, and the heirs-at-law of the testator insisted that the remainders were all contingent and had failed. It was held the godson took a vested estate in fee, regarding words of condition, "if he attained twenty-one," as used only to denote the time when the estate should come into possession. That "the true sense was, that the deviser meant him to take it as an immediate estate in fee, but that it was to go over in the event of his dying under twenty-one."

Edwards v. Hammond, 3 Lev., 132, preceded it, and Sir James Mansfield, C. J., delivering the opinion of the Court (in Brownfield v. Chowder,) said: "The apparent intention, as collected from the whole will, must always control particular expressions. Edwards v. Hammond is not either opposed or weakened by any case. No doubt the general meaning of the word "if" implies a condition precedent, unless it be controlled by other words."

In Doe d. Roake v. Nowell, 1 M. & S., 327, the testator devised his estate to J. R. for life, and on his death, to and among his children, equally, at the age of twenty-one, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs-at-law, at his or her age of twenty-one; and in case J. R. should die without lawful issue, then over. The children were held to take vested remainders, and they recovered against the purchaser of the father, who, during the infancy of two of the children, and before the birth of others, levied a fine and suffered a recovery, and conveyed to the purchaser, and died leaving his children under age. Lord Ellenborough, C. J., said, "he could see nothing to distinguish it from Brownfield v. Chowder, and Doe v. Moore." The judgment was afterwards affirmed by the House of Lords.

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*In *Doe v. Moore*, 14 East., 601, there was a devise in fee to F. M., when he attains twenty-one; should he die before twenty-one, then to his brother when he attains twenty-one, with like remainder over. The decision was reserved until *Brownfield v. Chowder* was disposed of, and the devisee, F. M., was held to take an immediate vested interest, liable to be divested upon his dying under twenty-one, Lord Ellenborough remarking, "according to the decisions on devises of real estate, a devise to A., when he attains twenty-one, to hold to him and his heirs, and if he dies under twenty-one, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him; but the dying under twenty-one is a condition subsequent on which the estate is to be divested."

If any doubts existed as to the want of strict conformity in these authorities with the true and well recognized principles which mark the distinction between vested and contingent interests arising under devises, they were concluded by the case of *Phipps v. Williams*, 5 Sim., 44.

The question there arose under a devise to trustees in trust to convey certain lands to A., the godson of testator, when, and as soon as, he should attain his age of twenty-one years; but in case he should depart this life before he should attain the said age, without leaving lawful issue of his body, then the lands were to follow the disposition of his residuary estate. The V. C., Sir Launcelot Shadwell, held "that A. took an immediate interest under this devise," observing, "that the legal estate here being vested in trustees made no substantial difference." An appeal was taken to the House of Lords, (*Phipps v. Ackers*, 3 Cl. & Fin., 702,) where the case was retained, and seven years afterwards was re-argued in the presence of eleven Judges, who unanimously held that the godson took a vested estate on the death of the testator, subject to be divested in the event of his dying under twenty-one and without issue.

In *Dolley v. Ward*, 9 Adolp. & Ellis, 582, the testator devised freehold to his daughter, Sarah, for life; after her death, to such of her children as she then had, or may have, on their attaining twenty-one. In case of the death of either under the prescribed age, his or her share to the survivors, on attaining the prescribed age in fee. If all the children should die, then over. Held, that the children took vested estates in remainder immediately on the death of the testator.

The Courts of Equity had applied the same

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rule where the words *of the will imported an intention to grant the like estate. As far back as 1713, in the case of *Manfield v. Dugger*, 1 Eq. Cas. ab'd, 195, where a man "devised certain lands to his wife till his son

should attain twenty-one years, then to his son and heirs. The son died at 13." The Chancellor held "that the wife's estate determined by the death of the son, and that the remainder vested immediately in the son on the testator's death." On a rehearing, "his Lordship continued of the same opinion, and grounded himself on the distinctions taken in *Boraston's case*."

In *Bland v. Williams*, 3 Mylne & Keene, 411, the distinction is recognized in those cases where the implication arises from the peculiar form of the limitation over on the death of the prior taker under the prescribed age without issue. Sir John Leach, the Master of the Rolls, said: "Whether, in a gift of this nature, the time of vesting is postponed, or only the time of payment, depends altogether on the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four, without leaving issue."

Chancellor Kent, in the fourth volume of his *Commentaries*, p. 205, recognizes the rule resulting from the cases to which we have referred, when he says: "So a devise to A. in fee, if, or when, he attains the age of twenty-one, becomes a vested remainder, provided the will contains an intermediate disposition of the estate, or of the rents and profits, during the minority of A., or if it directs the estate to go over in the event of A. dying under age."

The Supreme Court of the United States admitted the principle to its fullest extent in the case of *Williamson v. Berry*, 8 Howard, 532 [12 L. Ed. 1170]. There, on a devise in trust "to pay the rents, &c., to Thomas B. Clarke, for his life, and from and after his death to convey the same to his lawful issue, and if he should not leave any lawful issue at his death, then in further trust to convey the premises to testator's grandson and his heirs," the Court concurred with the Circuit Court of the United States for the Southern District of New York in holding "that the first child of Thos. B. Clarke, on its birth, took a vested estate in remainder, which opened to let in his other children to a like estate, as they were successively born, and that their vested remainder became a fee simple absolute in the children living on the death of the father." Was it not as uncertain there which of the issue of T. B. C.

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would survive the life-tenant, as here, *under the devise to George Washington Seabrook, which of his issue would survive him, and reach the age of twenty-one years? In the event of the death, the effect in either contingency would only be to defeat or divest the estate already vested.

In the case of *Rivers, Administrator, v. Fripp et al.*, 4 Rich. Eq., 276, the Court was

called upon to construe a clause in the will of William Edings, which, if not identical in language with that now before us, is in no particular materially different. The testator devised to his wife for life, and after her death to his son, John Evans Edings, for life, "and after the death of both, to the issue of the son living at his death, who shall live to attain the full age of 21, or who, dying before that time, shall have issue to live until the time at which the parent or parents, if alive, would have reached the full age of 21 years." and in default of issue, then over. John Evans Edings survived the testator, leaving two sons, William M. Edings and John Evans Edings. The mother died in 1844. William M. Edings died in 1850, at the age of 20 years, leaving a son who died three months after his father, and before the father would have attained the age of 21. John Evans Edings was 18 years of age in 1851. Before John arrived at age, the personal representative of William M. Edings, filed his bill, claiming a moiety of the rents and profits of the devised and bequeathed estate from the death of the life-tenant to the end of the year in which William M. Edings died. The Court held that William M. Edings took a vested, but defeasible interest, with immediate right to the rents and profits, although he died under 21, without leaving issue which lived until the time at which he, if alive, would have been 21.

Standing alone as a decision of the then appellate tribunal of the State on the terms of a devise, from which that before us does not differ in effect, it would be our duty to sustain it, unless its result did not appear to be consistent with authority and reason. Our examination of the principles involved in its discussion, and on which its conclusion is based, recommend it to our judgment, as carrying out the intention of the testator collected from the whole will.

The intention is to prevail. If technical terms are employed to express and denote this, they must have their legal significance, unless on the face of the instrument it is apparent that an intention was purposed different from that which their use would so intimate.

"The intent of the testator is to be the rule of construction, if the words will bear it out; but if the face of the words be such

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that *the intent cannot be complied with, the rules of law must take place."—*Brownsword v. Edwards*, 2 Ves., Sr., 249.

The purpose of the testator, William Seabrook, was to retain these lands in his family as long as the law would permit, as he declares in the devise. Nay, further, "that they may remain limited in his family," and it is clear that he did not intend these particular plantations set apart for that portion of his own issue through his son, George

Washington Seabrook, to pass to his (the testator's) own "right heirs," while any of the issue of George W. was in existence and could take as purchasers. The clauses by which he devises plantations to his other children use the same words, and in each of them a like intent is manifest.

If the interest of the children of George W., living at his death, was not a vested one, and he had died leaving children, but no one of them then of age, who would have been entitled to the profits, rents and issues, until some one of the children reached twenty-one?

If on the death of the father they in that contingency could not claim them, what was to become of the usufruct of the devise evidently intended by their grandfather for their support and enjoyment?

There needs no reference to authorities to shew that a disposition has always been manifested by the Courts, if possible, to make the remainder vested. It will not be considered contingent unless a conclusion is forced by the whole tenor of the will, shewing that the intention of the testator precludes them from giving it effect as conferring a present interest. The reason is palpable.

It is sufficient, in this connection, to quote the language of Mr. Justice Swayne, in *Croxall v. Shererd*, 5 Wall., 268 [18 L. Ed. 572]: "The struggle with the Courts has always been for that construction which gives to the remainder a vested, rather than a contingent character. A remainder is never to be deemed contingent when, consistently with intention, it can be held vested."

Our judgment is, that the issue of George Washington Seabrook took a vested interest in the real estate referred to in the pleadings, liable to be defeated in the event of their dying without attaining the full age of twenty-one years.

Although not made a ground of appeal for the reversal of the decree, yet it was insisted in the argument, that the plaintiffs are not entitled to the partition claimed under their bill, because if they had an estate which their father, by virtue of his life-interest,

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could *not bar, they have committed a fraud by uniting with the children of the said George Washington Seabrook, of age, in the deed, releasing to Gregg "all their right, interest, title, claim and demand whatever, either in law or equity, in, or out of, the said plantation," so conveyed, with a covenant, "that the said George W. had, in himself, good right, power and absolute authority to convey and enfeoff the said lands," followed with a warranty of title.

This Court will not afford any relief in a matter resting on a fraud, or savoring of it. Where an infant cestui que trust, by misrepresentation of her age, induced a trustee to deal with her in the payment of money, wilfully misleading him as to her age, it was

held that there was proof of her intention to commit a fraud, and the trustee could not be liable to her over again when she came of age. *Overton v. Banister*, 3 Hare, 503.

There the inducement to the payment was the deception practiced by the infant, and this furnished conclusive evidence of her design to perpetrate a wrong. The very deed contained a recital of the falsehood.

It would be carrying the rule thus indicated to an extent which could not be justified by the consideration with which infants are regarded by the law, to apply it to the case in hand. The plaintiffs made no misrepresentation of their age to Gregg, and received no consideration for the release, or any advantage under it. Their mere covenant that their father "had good right to grant, convey and enfeof the said lands," is not, by a presumption of fraud which cannot obtain against an infant, to be ascribed to a motive to mislead and deceive. The very contest over this devise shews, at least, a strong impression on the parties to the release that the remainder was of such a character that it could be barred by the feoffment of their father. If the minors had been even of an age from which full knowledge of their acts could be presumed, they might not be held bound by such a mistake of law. There would scarcely be an act of an infant against his interests which would not be held to conclude him if the argument urged in this regard prevailed. Gregg has his covenant. To that he may look, and we concede enough to him when we say, in relation to it, that our judgment here is not to prejudice any right which he may seek under it in a Court of law.

It is too late for the exception that the bill is filed by Archibald Clark Seabrook, a minor, without the interposition of a next friend. The objection may be more than a

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formal one, but it should have been taken in the Court below. To perfect the record, the said plaintiff is at liberty to move for the appointment, nunc pro tunc, in the Circuit Court.

The order for the partition must, however, be reformed. The plaintiff, Archibald Clark Seabrook, and the defendant, Eliza Sarah Seabrook, are both infants. Although they have a vested interest, still, in the event of their dying under 21 years of age, the right of the one so dying will be divested. They are entitled, therefore, to partition commensurate with the interest each now has, and in consistency with the conditions on which it is held. The writ of partition must, therefore, direct that one-ninth of the plantation mentioned in the pleadings be set apart to the said Marcellus M. Seabrook, and his heirs forever; one-ninth to the said Archibald Clark Seabrook, to be held by him, subject to the conditions and limitations attach-

ing to and on his said interest in the same, under the will of the said William Seabrook, as in this opinion expressed, and one-ninth to the said Eliza Sarah Seabrook, to be held by her on the same terms and limitations as pertain to the share to be allotted to the said Archibald Clark Seabrook, above set forth, and it is so ordered and adjudged.

If the return to the writ of partition should recommend that the share of either of the said parties in the real estate to be allotted to them, severally, be sold, or that payment be made to one or more of them, in substitution of their interest, then, the money arising from such sale or payment shall be held subject to the same conditions and limitations which attach on the shares directed to be allotted to them.

In all other respects the Circuit decree is affirmed, and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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*JOHN ALEXANDER and Others v. JOHN McKENZIE and Others.

(Columbia. April Term, 1870.)

[*Courts* ⇨206; *Submission of Controversy* ⇨3.]

Contesting parties claiming the same office—the one, out of possession, demanding against the other, in possession, judgment of ouster in the nature of a quo warranto—may state a case containing the facts and submit the legal questions arising therefrom to the Supreme Court in the manner authorized by Sec. 389 of the Code of Procedure, and that Court has jurisdiction to hear and decide the case in that form of proceeding.

[*Ed. Note.*—For other cases, see *Courts*, Cent. Dig. § 735; *Dec. Dig.* ⇨206; *Submission of Controversy*, Cent. Dig. § 4; *Dec. Dig.* ⇨3.]

[*Quo Warranto* ⇨2.]

Sec. 4, Art. IV, of the Constitution, declaring that the Supreme Court "shall always have power to issue writs of * * * quo warranto," was not inserted in that instrument for the purpose of perpetuating a mere form, but for the purpose of vesting the Court with jurisdiction in that class of cases where the writ of quo warranto was the proper remedy at the time of the adoption of the Constitution. It was competent, therefore, for the Legislature to abolish the writ itself and substitute a "civil action" in its place, as the form of proceeding, even in a case coming originally before the Supreme Court.

[*Ed. Note.*—Cited in *State ex rel. Barker v. Bowen*, 8 S. C. 385, 401; *State ex rel. Lindsey v. Tollison*, 95 S. C. 60, 78 S. E. 521.

For other cases, see *Quo Warranto*, Cent. Dig. § 2; *Dec. Dig.* ⇨2.]

[*Municipal Corporations* ⇨124, 149.]

Under the Act of September 25, 1868, "to provide for the election of the officers of the incorporated cities and towns in the State," certain persons were duly elected to the offices of Mayor and Aldermen of the city of Columbia, to hold their offices until April, 1872. Under the Act of February 26, 1870, "to alter and amend the charter and extend the limits of the

city of Columbia," certain other persons were on the first Tuesday of April, 1870, elected to the same offices to hold their offices for two years: *Held*, That the election, under the Act of February 26, 1870, was a valid election; that, by a proper construction of the Act, the persons entitled by said election, had the right to the immediate possession of the said offices, and that it made no difference that the office of Mayor was a salaried office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 293, 327; Dec. Dig. ☞ 124, 149.]

[*Municipal Corporations* ☞ 123.]

The offices of Mayor and Aldermen of an incorporated city or town are public political offices, and the power vested in them is political in its nature.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 341; Dec. Dig. ☞ 123.]

[*Constitutional Law* ☞ 102, 140.]

In the absence of any constitutional inhibition, political offices are subject to the entire control of the Legislative power of the State, which may, at its mere will and pleasure, abolish the offices themselves, or change the tenure by which they are held, or remove the officers and put others in their place with or without election.

[Ed. Note.—Cited in *State ex rel. Woodsides v. McDaniel*, 19 S. C. 118.

For other cases, see *Constitutional Law*, Cent. Dig. §§ 356, 357; Dec. Dig. ☞ 102, 140.]

[*Constitutional Law* ☞ 102, 140.]

A political officer does not hold by contract, in the sense of the Constitution, nor has he any vested right of property, in a constitutional sense, in the office, or in the salary thereof, before he has earned it.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 356; Dec. Dig. ☞ 102, 140.]

[*Constitutional Law* ☞ 102.]

Political powers always enure to the beneficial use of the political community, as such, exclusively, and are revocable at the mere will of the government communicating them.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 225, 356; Dec. Dig. ☞ 102.]

This was an original application to the Supreme Court for judgment of ouster. A case containing the facts was agreed upon and submitted without action. It is as follows:

"John Alexander, J. W. Denny, Augustus Cooper, Charles Minort, W. Hutson Wigg, Israel Smith, William Hayne, William Moonney, Joseph Taylor, S. B. Thompson, R. M. Wallace, William Simons and Isaac Goodwin claim to have been duly elected, according to law, to the offices of Mayor and Aldermen of the City of Columbia, in the said State, the former to the office of Mayor, and the latter to the offices of Aldermen of the

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said city, and to be entitled to enter forthwith upon the possession and exercise of the said offices.

"John McKenzie, Clark Waring, James Claffy, Jacob Hussung, R. L. Bryan, O. Z. Bates, W. P. Geiger, W. T. Walter, John Agnew, Edward Hope, R. W. Johnston and G.

A. Shields, the former acting Mayor, and the latter acting Aldermen, of the said city, resist said claim.

"The following are the facts upon which the said controversy depends:

"1. That the city of Columbia is a public municipal corporation, created by the Statutes of the State of South Carolina, and that the offices of Mayor and Aldermen of the said city are also created and established by the Statutes of the said State.

"2. That under and by virtue of an Act of the General Assembly of the said State, passed September 25, 1868, and entitled "An Act to provide for the election of the officers of the incorporated cities and towns in the State of South Carolina," an election was held for Mayor and Aldermen of the said city, on the second Tuesday of November, A. D. 1868, and that at said election the defendants above named were duly elected to the offices of Mayor and Aldermen of the said city, and were duly qualified and entered upon the duties of their respective offices, and have since continued to hold and exercise the duties of said offices.

"3. That by the provisions of said Act last above named the said acting Mayor and Aldermen were entitled to hold their offices up to the regular time fixed by charter for the election of the same, and for one full term thereafter, which term will not expire until April, 1872.

"4. That by an Act of the General Assembly of said State, passed February 26th, 1870, and entitled "An Act to alter and amend the charter and extend the limits of the city of Columbia," the boundaries of the said city were extended to embrace a territory not heretofore embraced within the corporate limits of the said city, and that by the said Act last above named it was further ordered that an election for Mayor and Aldermen of the said city should be held on the first Tuesday of April, A. D. 1870, and on the first Tuesday of April every two years thereafter.

"5. That under and by virtue of said Act of the General Assembly last above named, an election was held on the fifth day of April in the current year, for the offices of Mayor and Aldermen of the said city of Columbia. That on the sixth day of April in the cur-

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*rent year, the Managers of said election did meet and count the votes cast at said election, and did make due and lawful return thereof, together with the ballots, to the acting Mayor and Aldermen of the said city. That on the 12th day of April in the current year the said plaintiffs above named did make due and lawful demand upon the said defendants above named for the possession and enjoyment of the said offices, and that said demand was refused by the said defendants; and that said defendants have, since the time of said demand, continued to hold

and exercise, and do now hold and exercise, the said offices of Mayor and Aldermen of the said city of Columbia.

"6. That the Mayor of the said city of Columbia is a salaried officer, but was made so by the action of the City Council, and has been paid out of the City Treasury for years past.

"7. That at the election held on the 5th day of April in the current year, the Managers of said election received a considerable number of votes, though not sufficient to overcome the majorities, from persons residing within the territory recently, and within less than sixty days before the said election, annexed to the corporate limits of the city, said persons claiming, upon the ground solely of that residence, the right to vote at said election.

"8. That on the 6th day of April in the current year, the said acting Mayor and Aldermen were served with a written paper by many of the citizens, corporators and electors of the city of Columbia, subscribed, contesting the validity of the election of all the persons reported by the Managers as having received the highest number of votes cast for the said offices of Mayor and Aldermen, and charging the Managers of said election with illegal acts in the conduct of the same; and that after due examination and investigation of the charges contained in said written paper, the said acting Mayor and Aldermen, on the 12th day of April, A. D. 1870, did declare and announce, as the result, in fact only, of said election, that the plaintiffs above named had received the highest number of votes for the said offices of Mayor and Aldermen of the said city, but that their said alleged election was invalid in law, for the reasons expressed in the written paper subscribed by the said acting Mayor and Aldermen announcing the result in fact of said alleged election and the grounds upon which they decided the same to be illegal; of which paper, subscribed by said acting Mayor and Aldermen, a copy is hereunto annexed.

"9. That no sentence of annulment from of-

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fice has ever been pronounced against the said acting Mayor and Aldermen of the said city of Columbia, or any of them, nor has any proceeding for that purpose ever been instituted.

"It is also mutually agreed between the parties to this controversy, that the original papers containing the protest, the declaration of the election and the admissions of counsel, may be referred to on the hearing of this case.

"It is further mutually agreed between the parties to this controversy, that the several Acts of the General Assembly referred to in the foregoing statements of the case agreed upon, may be referred to on the hearing of this case as if the same had been set forth, at length, in the foregoing statement, but

none of the admissions herein contained are, in anywise, to affect either party or to be regarded as made, except for the purpose of this submission of this controversy.

"The questions submitted to the Court upon this case are as follows:

"1. Was the election held under the Act of February 26, 1870, a valid election?

"2. Are the plaintiffs entitled, under said election, to immediate possession of the said offices?

"If the first and second questions now submitted are answered in the affirmative, judgment is to be rendered in favor of the parties plaintiff.

"If one or both of said questions are answered in the negative, judgment is to be rendered in favor of the parties defendant."

Tradewell, Chamberlain, for plaintiffs, submitted the following points and authorities:

1. The legislative power of the State, subject only to the limitations of the Constitutions of the State and the United States, is absolute, and cannot be controlled by the Courts.—State Const., 1868; Const. of United States; Paley's Moral Philos., Pt. II, p. 185; Smith's Com. on Const. and Stat. Constr., 239, and authorities there cited, and pp. 259, 260; Bowman, et al., v. Middleton, Bay, 232; Stark v. McGowan, 1 N. & McC., 397.

2. Neither the Constitution of the State or of the United States contains any restriction upon the power of the Legislature over the corporation of the city of Columbia.—Commissioners' Act of 1786: 4 Vol. S. L., 751; 5 Vol. S. L., 318; 5 Vol. S. L., 437; Act of incorporation of town of Columbia: 5 Vol.

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S. L., 505; 8 Vol. S. L., *351; 6 Vol. S. L., 103; Act of incorporation of city of Columbia: 12 Vol. S. L., 333; Acts of 1854; Acts of 1858, p. 719; Acts of 1868, Spec. Ses., p. 106; Acts of 1869-'70, p. 354.

3. The city of Columbia is a public municipal corporation, created by the Statutes of the State for political purposes, and, therefore, with its Mayor and Aldermen, created by the same authority, is subject to change, modification or abolition, according to the pleasure of the Legislature; in no sense partaking of the nature of a contract.—Hope v. Deadrick, 8 Humph., 1; Nichols v. Mayor, et al., 9 Humph., 252; Abbott's Dig. Law Corp., pp. 291, 592; Cooley's Const. Lim., pp. 191, 192, 193, and note 2 on p. 192; 2 Kent Comm., 305, 352; Dart. Coll. v. Woodward, 4 Wheat., 418, 562, 564, 625, 629, 693, 694; East Hartf. v. East Hartford Bridge Co., 10 Howard, 511, 534; Charles R. Bridge v. Warren Bridge, 11 Peters, 538; Satterlee v. Matthewson, 2 Peters, 413; Watson v. Mercer, 8 Peters, 110; Gray v. Portland Bank, 3 Mass. R., 363; Com. v. Bird, 12 Mass. R., 443; 3 Parsons on Contr., 529; People v. Morris, 13 Wend., 325; Philadelphia v. Fox, Opinion of Court by Sharswood, J., Law Times for March, 1870, p. 80.

4. Conclusion.—The Act of the General Assembly, of February 26, 1870, entitled "An Act to alter and amend the charter and extend the limits of the city of Columbia," is constitutional, the election held thereunder for Mayor and Aldermen was a valid election, and the plaintiffs are entitled to the immediate possession of those offices.

Rhett, Pope, Carroll, for defendants.

Sept. 30, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The parties to this suit have united in submitting the controversy to this Court, under Sec. 389 of the Code of Procedure. The formal remedy is in the nature of quo warranto. Section 389 contains the following language: "Parties to a question in difference which might be the subject of a civil action, may without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought." If this Court can adjudicate this case, it is authorized, by the same Section, to give judgment according to the right of the parties, and, if the plaintiffs would, in a for-

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mal proceeding, be entitled to judgment of ouster, that judgment can be rendered in the present case.

The question of jurisdiction, though not pressed, was mooted upon the argument, and it is proper that it should be here considered. The right to adjudicate the case, in its present form, depends upon whether the "question in difference" is "the subject of a civil action." Before the Code, civil actions did not, in a technical sense, include proceedings by quo warranto. Section 443 abolishes the writ of quo warranto, and proceedings by information in the nature of quo warranto, and provides instead thereof, "that the remedies heretofore obtainable in those forms may be obtained by civil actions." The Constitution (Art. IV, Sec. 4.) declares that the Supreme Court "shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other Courts in the State."

Under this grant of jurisdiction, it is to be considered, whether Section 443, so far as it abolishes the writ of quo warranto, is operative as it regards the jurisdiction of the Supreme Court. If the effect of Sec. 4, Art. IV, of the Constitution was to perpetuate the particular forms of legal proceeding particularized in it, then the Legislature could abolish them, if at all, only under Sec. 3, Art. V, of the Constitution, which provides, among other things, "that justice may be administered in a uniform mode of pleading, without distinction between law and equity,

they (the Legislature,) shall provide for abolishing the distinct forms of action, and for that purpose, shall appoint some suitable person or persons, whose duty it shall be to revise, simplify and abridge the rules, practice, pleadings and forms of the Courts now in use in this State."

It is clear that it was not the intent of Sec. 4, Article IV, of the Constitution, to place the writs enumerated beyond the power of the Legislature to abolish them, as to form, and substitute other forms in lieu thereof, so long as the grant of jurisdiction in such cases remains unimpaired in the Supreme Court. The primary end and intent of this Section was to confer upon the Supreme Court general revisory power over the proceedings of other Courts, and original jurisdiction in certain specified cases. The writs of mandamus, quo warranto and habeas corpus are referred to as a convenient and usual means of marking out the limit of jurisdiction intended for the Supreme Court. In legal parlance, the writ or form of action is allowed to personate and stand for the juris-

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diction to which it relates to avoid inconvenient particularization. It is in this sense that the terms are here used. Such writs were then in common use, and furnished the common forms of expression for conveying the sense thus intended by this Section. To separate the expression "shall always have power to issue writs," &c. from the context, might create a doubt whether the conservation of the writ, or the extent of the powers of the Supreme Court, was the object in view, but read by the context it is clear that the technical value of the writs, as remedial means, was not the subject of consideration, but substantial rights to be protected by lodging certain judicial powers in the Supreme Court was the single end contemplated. There is no direct expression of an intent to limit the ordinary powers of the Legislature in respect to moulding the forms of procedure in the Courts. To raise such an intent by implication would be open to the objection of depriving the Legislature of customary and convenient powers, when no such implication is essential to effectuate either the particular or general intent of the Constitution. Such a construction would be especially objectionable in view of the provisions of Sec. 3, Art. V, making it the duty of the Legislature to enter upon a thorough reorganization of the remedial system of the State.

The argument that can be urged with greatest force against this position is, in substance, that conferring power to issue certain writs "always" implies that the writs must always exist, otherwise they would not be issued. This would be a fair argument, if the actual issuing of mandates of a particular form, and attested in a particular manner, was intended: but as the expressions are used as terms of art, covering larger and

more substantial ideas, they are not subject to such nice verbal criticism.

Although the Legislature could change the form of the remedy, the jurisdiction of this Court remains based upon the terms of the Constitution. This Court having, therefore, jurisdiction of an action based upon the rights set forth in the submission, the present case is properly before us, and we will proceed to dispose of the points made.

The plaintiff, Alexander, claims the office of Mayor of Columbia, and the other plaintiffs the offices of Aldermen of said city, under an election held on the second Tuesday of April, 1870, in pursuance of an Act of the Legislature, passed February 26, 1870, entitled "An Act to alter and amend the charter and extend the limits of the city of Columbia."

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*The defendants aver possession of the same offices, claiming in virtue of due election under the Act entitled "An Act to provide for the election of the officers of incorporated cities and towns in the State of South Carolina," passed September 25, 1868, and that the terms for which they were elected have not yet expired.

The case propounds the following questions for the judgment of the Court: 1st. "Was the election held under the Act of February 26, 1870, a valid election?" 2d. "Are the plaintiffs entitled, under such election, to immediate possession of said offices?"

The answer to these questions depends upon the power of the Legislature to oust the defendants from their offices before the expiration of the terms to which they were originally elected, and the expression of such an intent in the Act. These subjects will be considered in the order just stated.

I. If the defendants have a legal right to the offices held by them for the remainder of the term to which they were originally elected, as against the legislative power, it must arise from one of the considerations, either that they are to be regarded as having a property in such offices, or a vested interest under contract with the State Government, the obligation of which it is not in the power of the Legislature to impair, under the Constitution of the United States.

It was very properly conceded on the argument that no such contract existed as is contemplated by the Constitution of the United States in the clause prohibiting the States from passing laws impairing the obligation of contracts. The case is, therefore, narrowed down to the single question whether the defendants have such a property in their offices as to be beyond the power of the Legislature to destroy it.

An office implies three things: first, power to act in the exercise of the rights of another; second, an obligation to exercise this power within and for the purposes intended in its creation; and, third, a right to com-

pensation. Offices differ in the nature of the power, the uses to which it is to be employed, and the incidents attached to it by the Act creating it, or by the law of the land.

The most important division of powers, according to their nature, is into political and personal. Communities exercising sovereign authority, or the right to control the action of individuals for the promotion of the common good, are said to be possessed of political powers. Each individual, on the other hand, is born to the possession of a certain natural capacity or liberty, in the exercise of

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*which powers arise that are recognized by the law. In the absence of a better expression, these have been termed personal. Another and familiar division of powers illustrates the nature of the distinction based upon the uses to which the powers are devoted—it is that between public and private powers. Communities, for governmental purposes, having the capacity of holding property, exercise proprietary rights, in the course of which agents are appointed and empowered to control the application of such property to public uses. Authority of this character can hardly be called political, although it is clearly public.

The power of a magistrate, in the enforcement of the laws, clearly differs in nature from that of an engineer in charge of a State work. While no such difference, in the nature of the power exercised, exists between the engineer on a State work and one conducting a similar private enterprise, still the fact, that one is intended to enure to the public use, and the other to private uses, fully sustains the distinction between public and private powers apart from the idea of a political character.

It will be unnecessary to do more than merely allude to a class of powers that partake more or less of all the attributes that have been named in this connection, among which the most conspicuous are franchises, both public and private. As it regards the difference between offices, as to the incidents attached to them by their creation or the law of the land, something will be said hereafter in connection with some of the incidents of political offices as existing in England.

The present case involves exclusively public offices erected for the exercise of political powers, for the powers of the Mayor and Aldermen of a city appertain to this class. It follows, from the foregoing, that if the defendants have any proprietary rights attaching to the offices claimed by them, such rights must arise either from the nature or uses of the power involved, from the character of the obligation for its due exercise resulting from the possession of such power, or from the claim to compensation incident thereto.

It is of the nature of powers to be revocable at the will of the creator. To this, political powers are not an exception. It is not,

however, an invariable rule. The true distinction is, that when the beneficial use of the power is in the grantor, the power is revocable at his pleasure; when the beneficial use is in the one holding the power, or in a third person, the power is not usually revocable. Trustees, guardians, executors and ad-

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ministrators possess powers in *the strictest sense, but subject to incidents of so peculiar a nature that they are not ordinarily classed among powers, technically considered.

Political powers always enure to the beneficial use of the political community, as such, exclusively, and never to the exclusive use of private persons. This results from the fact that government exists for the common benefit, and its powers cannot be appropriated to the exclusive benefit of individuals, except by violence, destructive of its principles. It therefore follows that political powers are revocable at the will of the government communicating them. In *Butler v. Pennsylvania*, 10 How., 402 [13 L. Ed. 472], the question was as to the validity of a statute reducing the salary of the Canal Commissioner, during the term for which he was appointed, below the amount fixed by law at the time of his appointment. The Court based its judgment upon the broad ground of the power of the government to the absolute control of its agents, either by removing them or changing their duties or compensations at its own pleasure. Judge Daniels says, (p. 416), "the selection of officers, who are nothing more than agents, is for the effectuating of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them after the measures that brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated, as even detrimental to the well being of the public." Again he says, "it follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws, and to create and change or discontinue agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community." He holds that the organic law is the only check upon this power; that the tenure of an office created for the public use does not fall within the class of vested private rights, vested under the Constitution of the United States, but, on the contrary, he adds, "they are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the common good: functions, therefore, which governments cannot be presumed to have surrendered, if, indeed, they can, under any cir-

cumstances, be justified in surrendering them." The Court sustained the validity of the law of Pennsylvania in question. 1 Parsons on Cont., 530.

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*The nature and incidents of political powers have been frequently considered in reference to the rights and obligations of municipal corporations. Inasmuch as the character of political power does not undergo change in the hands of the agent for its exercise, the decisions on such questions, in the case of municipal corporations, are applicable in whatever hands such powers may be placed.

In *Dartmouth College v. Woodward*, (4 Wheat., 518 [4 L. Ed. 629],) Judge Story presents the distinction between public corporations possessed of political powers, such as cities, &c., and public corporations not possessing such powers, as a bank created and controlled by the government for its own uses. He also adverts to the fact that political corporations may have proprietary rights united to their political powers.

The case of a municipal corporation having such proprietary rights—and all have more or less—is a strong one for holding that political powers may become vested: for it is evident that the possession and right to use such political powers may be of great value in connection with the proprietary interest of the corporate body. Such a case is much stronger for the application of such a doctrine than the case of a public officer whose proprietary rights are independent of, and in no way connected with, the functions of his office. Much importance should, therefore, be attached to the views of the Courts in respect to the character and attributes of political powers when lodged in the hands of public political bodies.

In *East Hartford v. Hartford Bridge Company*, (10 How., 511 [13 L. Ed. 518],) Judge Woodbury, speaking of the Legislative control over public corporations, says: "When not restrained by some constitutional provision, this power is inherent in its nature, design and attributes, and the community possesses as deep and paramount an interest in such powers remaining in and being exercised by the Legislature, when the public progress and welfare demand it, as an individual can, in any instance, possess in restraining it." In this case it was held that a city, after having established the grade of a street, could alter it, notwithstanding it would cause damage to the property that had been conformed, to the original grade. The power in question was held to be political, and, therefore, incapable of being exhausted in its exercise. In the *People v. Morris* (12 Wen., 325,) it was held that the Legislature could deprive a village corporation of the power to grant licenses conferred by its charter. Judge Wilson, in an opinion, remarkable for its research and clear reasoning, examines the question of the rights and immunities of pub-

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lic bodies *very fully, and concludes that the power to grant licenses is not one that can become vested in a public body enjoying it by the grant of the Legislature, it being in its nature "wholly political." He holds that political powers cannot become vested rights, as against the Government, in any individual or body of men, but are always "public trusts."

In *Girard v. Philadelphia*, 7 Wall., 1 [19 L. Ed. 53], it was held, that notwithstanding the city of Philadelphia was, by the will of Stephen Girard, made trustee for charitable uses, still the power of the Legislature to remodel the city government, by extending its territorial limits and admitting the inhabitants of the surrounding country, brought within the new city limits, to a participation in all the rights and privileges enjoyed by the old city, was so complete and entire that the new city was capable of succeeding to the trust. Here was an instance where powers derived from a private source, followed the political powers granted by the Legislature, and, with them, became subject to the power of amendment and repeal remaining in the Legislature—a strong assertion of the doctrine under consideration.

Hoke v. Henderson, 4 Dev., N. C. R., 1, holds the contrary doctrine, but is without the support of reason or authority. Misapprehension of the English doctrine on this subject has frequently given rise to erroneous views of the powers of political bodies. Judge Nelson, in *People v. Morris*, 12 Wen., 325, points out the true view of this subject. He comments upon the origin and character of the idea of the inviolability of municipal charters prevailing in that country, and concludes that it is only as against the prerogatives of the Crown, and not as against the power of Parliament, that such inviolability has been asserted. After referring to the limitations put upon the power of the Crown, he says: "The right or power of Parliament, in England, and of the Legislature here, to interfere with these bodies, created as auxiliaries to be employed in the government of the State, would present a different question. The doctrine that political power is inalienable, and cannot enure to the exclusive use of an individual, or body of men less than the whole political community, is not violated by holding municipal charters inviolable as against the Crown. It is merely one of the incidents impressed upon the office by the feudal doctrine of prerogative, not affecting the fundamental principle in which the delegation of political powers rests." Again, Judge Wilson says, towns, counties, cities and villages "are, severally, political institu-

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tions, created to *be employed in the internal government of the State. There is no contract between the government and the governed, for but one party is concerned—the

public; and the individuals upon whom the powers and privileges are conferred are mere trustees, who hold and exercise such powers for the public good." Finally, he says, "we know of no vested rights of political power in any body of citizens except those conferred by the Constitution."

The authorities cited above, as well as many others of the highest authority, sustain the proposition already advanced, that political powers always enure to the beneficial use of the political community, as such, exclusively, and are revocable at the will of the Government communicating them.

If the idea of property cannot attach to the power appertaining to a political office, neither can it attach to the obligation that results from the possession of such political power. Such an idea is inconsistent on its face, for if any one has a property in an obligation, it is not the one who is bound by the obligation, but he who may enforce it.

Then there remains only one more incident of an office to be considered in connection with the idea of a property in it, namely the right to compensation. Where the compensation of an office consists of fees, perquisites, tolls and the like, there would be a show of ground for ascribing to it the character of property. Even in such a case, the contrary was held in the well-considered case of *Connor v. The Mayor &c.*, (1 Selden, N. Y., 285.) When, on the other hand, that compensation is a salary, no idea of property can attach. Whether such compensation can be claimed prospectively, depends upon whether the employment is a contract within the constitutional definition. Chief Justice Ruggles, in *People v. Connor*, says: "The prospective salary and other emoluments of a public office are not the property of the officer, nor the property of the State; they are not property at all. They are like daily wages earned, and which may be earned." Again, he says: "The right to the compensation grows out of the condition of the service, and not out of any contract, between the Government and the officer, that the services shall be rendered by him." The authority of *Butler v. Pennsylvania* is to the same point.

If, therefore, it appeared that all the defendants were salaried officers, it would not help their case; though the fact appears to be that the Mayor is the only one of the defendants entitled to compensation. It may be remarked, also, that a fixed right to the

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*compensation of the office at most would only give rise to a claim to damages, to be recovered by petition to the Legislature for the loss of the office, but under no circumstances confers a right to continue in the performance of its duties against the will of the Legislature. But it is clear, upon reason and authority, that the right to compensation is dependent on the right to exercise the

office, instead of the latter being dependent on the former, and that, as the functions of the office have been removed from the defendants, there is nothing in their hands from which a right to compensation can spring, even if attached by law to the office.

It is clear, therefore, that the Legislature had full authority to withdraw from the defendants their powers as Mayor and Aldermen in any mode that might seem most advisable, and it only remains to see whether they have, in fact, done so. The Act of 1870 extends the territorial limits of the city of Columbia, and provides for the holding of an election by the community to fill the offices of Mayor and Aldermen. It is not said at what time the officers elected shall enter upon their duties; but, it is obvious that the Legislature deemed the election of a new board as appropriate, in view of the increase of the territory and inhabitants of the city. The defendants contend that the Act ought to receive such construction that the new Mayor and Aldermen should not be admitted to the offices to which they have been elected until 1872, the end of the term for which the defendants were elected. The effect of this construction of the Act would be, that while the law stands in its present form, the election of Mayor and Aldermen would always precede their entering upon the duties of their office by two years. Such a derangement of the elective principle cannot be ascribed to the intention of the Legislature without much clearer expressions than exist in the present case. As the Act leaves to inference when the newly elected officers shall enter upon their duties, that period must be ascertained in accordance with the charter and customary practice of the city.

It was contended, on the argument, that the right of the plaintiffs depended upon the power of amotion. As the Act removing the defendants was not a corporate Act, but the Act of the Legislature, the doctrine of amotion is wholly inapplicable to the present case. Much of the argument was based upon the idea that the removal of the defendants could only be accomplished through the exercise of judicial power, and reference was made to the principles embodied in the

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Constitution and in the common law, *checking the undue exercise of judicial power; but it is an entire misapprehension to refer the authority in question to this class of judicial powers. As the removal of the defendants involved no loss of property or of vested rights, it called for the exercise of political powers alone.

The plaintiffs have established their immediate right to the offices claimed by them respectively.

MOSES, C. J., concurred.

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THOMAS F. McDOW, Administrator, v.
DANIEL W. BROWN, Executor.

(Columbia. April Term, 1870.)

[*Guardian and Ward* ⇐160.]

Bill by the administrator of a deceased ward against the executor of the guardian, to open an account stated and settled between plaintiff and defendant, on the ground of mutual mistake in this, that in the settlement no account was taken of an estate in which the ward was entitled to a distributive share, and of which the deceased guardian was the administrator. The settlement was based upon the guardian's returns, and the defendant, in making it, had acted in entire good faith. Relief refused mainly on the grounds of want of proof that the guardian's returns were false, and because it appeared that the plaintiff possessed, at the time of the statement, substantial information of the facts alleged in his bill as the ground of relief.

[Ed. Note.—Cited in *Lost Bonds Case*, 15 S. C. 231; *Dunsford v. Brown*, 19 S. C. 570; *Kennerty v. Etiwan Phosphate Co.*, 21 S. C. 236. 53 Am. Rep. 669; *Waldrop v. Leaman*, 30 S. C. 447, 9 S. E. 466.

For other cases, see *Guardian and Ward*, Cent. Dig. § 530; Dec. Dig. ⇐160.]

[*Account Stated* ⇐12.]

The authorities reviewed and the principles stated upon which Courts of Equity give or refuse relief in suits to open or to surcharge and falsify stated accounts and accounts settled, where they are impeached on the ground of fraud or mistake.

[Ed. Note.—Cited in *Annelly v. De Saussure*, 12 S. C. 521, 522; *Howlett v. Garner*, 50 S. C. 11, 27 S. E. 533.

For other cases, see *Account Stated*, Cent. Dig. §§ 73-76; Dec. Dig. ⇐12.]

[This case is also cited in *Harris v. Stilwell*, 4 S. C. 20, as to the jurisdiction of courts of equity to open settled accounts.]

Before Johnson, Ch., at Lancaster, June, 1868.

The facts relating to the only point considered by the Supreme Court in this case are stated in the judgment of that Court.

The Circuit decree from which the appeal was taken is as follows:

Johnson, Ch. In the year 1851, John S. Cunningham died intestate, leaving as his heirs-at-law his widow Mary, one son, Robert Alfred Rinaldo, the child of the said Mary, and two daughters, to wit: Isabella, who, since his death, has intermarried with Thomas F. McDow, and Nancy, the children of a former marriage. At June Term of this Court, 1854, Mary Cunningham was appointed the guardian of the estate of her infant

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son; and in the early part *of May, 1855, she intermarried with Dixon Barnes. And at June Term of this Court, 1855, Dixon Barnes was appointed the guardian of the said R. A. R. Cunningham. On the 12th day of September, 1855, Mary Barnes died intestate, leaving her husband and son her sole heirs-at-law. Soon after her death, Dixon Barnes took out letters of administration

upon her estate, and received large amounts from the administrators of the estate of the late John S. Cunningham, and, perhaps, from other sources, both on account of the estate of Mary Barnes and that of her infant son.

In September, 1862, Dixon Barnes died from wounds received in the battle of Sharpsburg, leaving, at the time of his death, a last will and testament, in which Daniel W. Brown and James H. Witherspoon were appointed the executors of the same, who, soon afterwards, proved the same, and assumed upon themselves the burthen of its execution. In 1865, James H. Witherspoon died intestate.

In the year 1865, Robert A. R. Cunningham, being still a minor, died intestate, and on the 25th of October, of the same year, letters of administration on his estate were granted to Thomas F. McDow, whose wife is the sole heir of his estate. In February, 1865, the army of General Sherman passed through Lancaster District, and all the papers belonging to the Ordinary's office were destroyed, and all the papers connected with Dixon Barnes' administration of the estate of Mary Barnes, except a single memorandum, were sent off for safe keeping, and were either destroyed or misplaced, so that they have never been recovered.

James H. Witherspoon, one of the executors of the will of Dixon Barnes, who had been for many years Ordinary and Commissioner in Equity, and who was regarded as one of the very best Commissioners in the State, made out a settlement between the estate of his testator and his ward; and, after his death, two very competent solicitors were employed to make out the statement; and they did it, after much labor, upon the basis of that of J. H. Witherspoon; and, after it was completed, the following receipt was signed by the representatives of both estates, to wit: "We, the undersigned, (D. W. Brown, surviving executor of D. Barnes, deceased, who was the guardian of R. A. R. Cunningham, deceased, and Thomas F. McDow, administrator of said R. A. R. Cunningham, deceased,) have settled the matters of account between us according to the statement of accounts exhibited on this and the four preceding sheets of paper, marked settlement sheets 1, 2, 3 and 4, which said set-

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tlement sheets, *with this sheet, comprise the entire statement of accounts and settlement between us. Thomas F. McDow, administrator as aforesaid, hereby acknowledges the receipt of thirty-nine thousand two hundred and twenty-seven dollars and thirty-four cents (\$39,227.34), and he hereby relieves the said Brown, surviving executor as aforesaid, from further accounting and responsibility, and especially from liability to pay any claims against the estate of said R. A. R. Cunningham; said McDow relieves said Brown from all liability to the estate

of J. H. Witherspoon, deceased, executor of said D. Barnes, on account of payments (if any) legally made by J. H. Witherspoon in his lifetime for the said R. A. R. Cunningham or his estate, which have not been allowed in this settlement, and holds himself responsible to the estate of said Witherspoon for the same on equality of partition of estate of Nannie B. Cureton, deceased. T. F. McDow and wife, Isabella L., were decreed to pay said R. A. R. Cunningham twenty-two hundred and fifty dollars, with interest from 11th January, 1858, which they have not done; this amount was never received by D. Barnes in his lifetime, nor by his executors since his death, and said McDow hereby relieves said estate of D. Barnes from all liability therefor. The undersigned hereby aver that this is intended as a full, final and complete settlement."

(Signed)

"Daniel W. Brown,
"Thomas F. McDow.

"Executed in duplicate in presence of:

(Signed)

"R. E. Allison,
"John D. Wylie.

"Lancaster C. H., S. C., January 1, 1866."

In about six weeks after this receipt was executed, T. F. McDow found, amongst the papers of estate Wm. C. Cunningham, who was one of the administrators of the estate of John S. Cunningham, a number of receipts of Dixon Barnes for large amounts which he had received as the administrator of the estate of Mary Barnes, which had, in no way, entered into the statement made of the settlement between the estate of D. Barnes and that of R. A. R. Cunningham, although the estate of the latter was entitled to two-thirds of the same. And on the 7th of May, 1866, the bill, in this case, was filed for the purpose of opening the settlement on the ground of this mistake. The defendant pleads, in bar, the settlement of accounts between the parties after full investigation; and, also, that

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*the estate of Mary Barnes was much embarrassed with debt at the time of her marriage with Dixon Barnes; and that his payments, as administrator, amounted to as much or more than his receipts; and that for that reason, no part of such receipts had ever been carried into the guardianship accounts of D. Barnes; and that, for the same reason, J. H. Witherspoon had ignored the receipts in the statements made by him.

The plea in bar cannot, under our decisions, be sustained, for, so far as the evidence reveals the facts, there was mistake; and it is ordered and adjudged that the same be overruled.

For the purpose of expediting the settlement of the case, the parties submitted the accounting to the Commissioner, and he charged the estate of Barnes with the amount stated in the bill to have been received by him on account of the estate of Mary Barnes

gave the estate of Mary Barnes credit for a larger amount than he had received. To this report various exceptions were filed by the complainant, mostly on the ground that the evidence supporting the credits was of such an uncertain character that it could not be relied upon, and, ordinarily, the evidence would be incompetent from the fact that evidence of a higher character could be procured; but, in this case, after the destruction of all the records in the Ordinary's office, and the loss of all the papers of D. Barnes relating to the estate of his intestate, and after the death of so many parties, who knew most about the transactions of D. Barnes connected with the estate, I am disposed to lend a willing ear to the evidence, such as it is, feeling that there is no danger of thereby doing more than justice to the estate of D. Barnes. For the reasons assigned by the Commissioner in his original report and in the report on exceptions, I overrule all the exceptions except the twelfth, and the thirteenth so far as the same may be modified by sustaining the 12th exception.

It is ordered and decreed that the complainant's 12th exception be sustained, and that the 13th exception be partially sustained as above indicated, and that the reports of the Commissioner, in all other respects, be confirmed and made the judgment of the Court.

It is, also, ordered and decreed that the estates, represented by the respective parties, do pay their own costs.

The defendant appealed, and now moved this Court to reverse the decree on the ground, *inter alia*, that the plea in bar should have been sustained, and that His Honor the Chancellor erred in overruling it.

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*The complainant also appealed, but his grounds of appeal were not considered by the Court.

Allison, for defendant.

Wylie, contra.

Sept. 22, 1870. The opinion of the Court was delivered by

WILLARD, A. J. Complainant, as administrator of R. A. R. Cunningham, deceased, seeks to open a guardian's account, stated and settled between himself and the defendant, Brown, sole surviving executor of D. Barnes, the guardian of complainant's intestate. The accounting took place January 1, 1866, and covered a period of ten years then last past. A balance was ascertained in favor of the ward's estate. The results were reduced to writing, and the balance was stated and payment made by the defendant to the complainant, and receipts and discharges exchanged between them, expressing the intention of the parties that the accounting should be final and conclusive. This bill was filed shortly afterwards, alleging that the defendant did not therein account for

the interest of the ward in the estate of his deceased mother, Mary Barnes, that came into the hands of the testator of the defendant as administrator of that estate, and in which the ward had a two-thirds interest as distributee. The bill charges that the settlement was based on, and prepared from, information afforded by the returns of Barnes, as guardian, which were produced by the defendant, who claimed and insisted, throughout the accounting and settlement, that the said guardian had therein charged himself with everything with which he was properly chargeable as guardian; that the complainant made the settlement believing this statement to be true. The prayer is, that the settled account may be opened, and that the defendant account for the distributive share of the ward in the estate of his mother.

The defendant, Brown, answered, admitting the general facts set forth in the bill, and stating that he does not know what Barnes received as the estate of Mrs. Barnes; that, so far as he knows, the account contained all sums of money with which Barnes was properly chargeable; that the account was prepared with great care by the aid of experienced solicitors, one of whom represented the complainant, and the other the defendant. He admits that, during the preparation of the accounts, he declared that the returns contained, as far as he knew, or believed, a correct statement of all sums of

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*money properly chargeable to the guardian. He reiterates this belief as based upon the character and business habits of Barnes, and denies that Barnes designedly or fraudulently misstated the accounts, and affirms that he does not believe that he did so through negligence or carelessness. That nothing was said in the settlement, by the complainant or any one else, of the fact that Barnes had received large sums of money, to two-thirds of which R. A. R. Cunningham was entitled, and which were not charged in his annual returns as guardian. He further adds that he, defendant, knew nothing of the matter. He denies that he pretended to any knowledge, except that derived from the returns as guardian, and alleges that at that time the complainant had knowledge of such facts. The defendant does not admit that the amount acknowledged in the returns of the guardian did not embrace items received on account of Mrs. Barnes' estate. He further states that Mrs. Barnes was the widow of John S. Cunningham when she intermarried with Barnes, and lived but a few months after her second marriage, and submits it as very probable that previously to her said marriage she owed debts and that, from the short time she lived, they were not discharged and paid until after her death. He further submits, that whatever debts she owed before her marriage with Barnes, and whatever liabilities then existed against her,

which were not satisfied and paid by Barnes during her marriage, survived against her estate, and are properly chargeable thereon.

The answer accounts for the absence from the Ordinary's office of any evidence whatever in relation to the administration of the estate of Mrs. Barnes, by setting forth the destruction of public records during the late war. He also alleges the destruction, from the same cause, of the private papers of Barnes in relation to the estate of his deceased wife. He states that "he has not in his possession any papers or documents connected with said administration, and knows not where to look for evidence of the receipts and disbursements of said administration." He alleges that J. H. Witherspoon, deceased, co-executor of Barnes' estate, who had, during his life-time, attended principally to the accounts and business of the estate, and who was familiar with the business of Barnes, shortly before his death, with a view to a final settlement, prepared a statement of the accounts, and therein no mention is made of the sums now claimed by the complainant. The answer further states as follows: "Respondent submits it as probable and reasonable to believe that Barnes accounted properly for the said administration; that what-

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*ever sums of money may have been received by him as administrator of his wife, (if, indeed, any have been received,) were applied to the satisfaction and payment of her debts and liabilities." The defendant objects to the bill of complaint, that it seeks to surcharge and falsify the account stated and settled, but does not point out and specify in what particulars there is error, but that it should set forth each specific sum so received by the administrator, and when it was so received. He also pleads, in bar, the account stated, and a release and discharge under seal.

A reference was ordered to take testimony and state the accounts of Barnes as administrator of the personal estate of Mrs. Barnes. Extended evidence was taken by the Commissioner, who reported a statement of the administration account, showing a balance of disbursements over receipts amounting to \$1,106.10. Complainant excepted to various items of the account as stated by the Commissioner, and a report was made on these exceptions. At June Term, 1868, Ch. Johnson heard the case upon the pleadings and proofs, and upon the exceptions to the Commissioner's report. The Circuit decree adjudged that the plea in bar should be overruled upon the ground of mistake, and overruled all the complainant's exceptions, except the twelfth, which was sustained, and modified the report as to the matters embraced in the thirteenth exception. Both parties have excepted to the decree.

The first matter to be considered is that portion of the decree that adjudges the insufficiency of the plea in bar on the ground

of mistake. The defendant's exceptions raise two propositions on this subject; first, that the plea in bar should have been sustained for the want in the bill of a proper specification of the errors in the settlement as to time, place and amount; and, second, that the finding of the fact of a mistake is unsupported by the pleadings and evidence. It appears that the basis adopted by the parties for the purposes of the accounting was the returns of the guardian. The complainant alleges that the defendant represented that these returns were correct. The defendant substantially admits this allegation, adding that he represented their truth only according to his belief, and that he believed, and now believes them to be true and just. The question, then, arises, were the returns true? If untrue, what effect would that have upon the settled account?

No fraud is alleged, proven, or to be inferred, from the character of the transactions or the testimony adduced in regard to them, either as affecting the mutual dealings of the

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complainant and defendant, or as affecting the conduct of the guardian in relation to his ward's interests. If the guardian's returns are defective in not giving credits on account of the ward's interest in his mother's estate, still the facts and circumstances attending such omission are not sufficiently presented to warrant the inference of a fraudulent motive on the part of the guardian. The defendant states, in his answer, that he knew nothing at the time of the settlement in relation to the transactions to which it is now sought to extend the accounting, and, further, that nothing was said during the accounting, which occupied a period of many weeks, on the subject of the guardian's liability for moneys received on account of his ward's interest in his mother's estate. So far as the fairness of the conduct of the defendant is involved, no ground is presented for disturbing the account. If such ground exists at all, it must be found in the fact that the complainant was misled and deceived in assuming the correctness of the guardian's returns. Both complainant and defendant stood upon an equal footing in their mutual dealings. Both were representatives of others, without, so far as appears, direct personal knowledge as to the transactions of the guardian. The complainant, as appears from the pleadings and proofs, actually possessed the best information in regard to the credits alleged to have been improperly excluded from the account. The defendant's statement of entire want of information on this subject, set forth in his answer, stands uncontradicted. Complainant was a party to a suit in which an account was taken in 1858, that disclosed, in substance, the state of facts set forth in the bill as the ground of its equity. The bill alleges that the guardian did not charge himself, in his returns, with moneys received

from W. C. Cunningham, the administrator of the estate of J. S. Cunningham, on account of Mrs. Barnes, the ward being entitled to two-thirds of her distributable estate. It puts the amount received, at \$11,477.37. The accounting, in 1858, was between W. C. Cunningham, as administrator, and the distributees of J. S. Cunningham's estate, among whom were the complainant and wife. It was then ascertained that Barnes, as administrator of Mrs. Barnes, had received \$9,779.92, being \$168.69 less than the amount payable to him. It appeared, also, that complainant and wife had received more than their distributive share, and the result of the accounting was that, among other things, complainant and wife were brought in debt to the estate in an amount covering their rateable proportion of the sum of \$168.69, remaining unpaid to Barnes, as administrator

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of Mrs. Barnes. Although *complainant did not then stand in the character of administrator, in which he presents this bill, yet his direct interest in the accounting of 1858 is all that need be looked to in order to ascertain how far he is chargeable, at the accounting with the defendant, in 1866, with knowledge of the facts set forth by him as constituting the equity of his present demand. It is necessarily to be inferred, from the foregoing facts, that eight years before the filing of the present bill the complainant was in a position to make the averments set forth in his bill. It becomes important, then, to inquire whether, at the time of stating the account, he had these facts in mind. He has neither alleged nor proven, though his own testimony could be employed for that purpose, that he had forgotten, or lost sight of, these facts. In fact, the inference from the bill is rather that he never knew of their existence, though no such statement is made in express terms. If ignorance, or forgetfulness of any fact, is material as a ground of equity, it must be alleged and proven, like any other fact, nor is making such proof attended with either theoretical or practical difficulty, when the oath of the party may be resorted to as proof. In the absence of any allegation of either ignorance or forgetfulness, it must be assumed that the complainant knew, at the settlement, that large sums of money had, theretofore, been received by Barnes, as administrator of Mrs. Barnes, as to which he was liable to account to his ward. It must also be assumed, as established, that the defendant was ignorant of such facts.

It is proper to remark, in this connection, that it is in proof that certain receipts given by Barnes, as administrator of Mrs. Barnes, to W. C. Cunningham, in acknowledgment of the amounts paid to the former by the latter, as administrator of J. S. Cunningham, in full of Mrs. Barnes' interest in the estate of J. S. C., came into the hands of the complainant shortly after the accounting of 1866; but, as

these receipts exhibited nothing of importance beyond what was spread out on the record of the accounting of 1858, this evidence has no tendency to establish previous want of knowledge, on the part of the complainant, of the facts relied on in this bill.

In view, then, of the state of knowledge possessed by the complainant, it is important to inquire whether he was improperly influenced by the guardian's returns, in assenting to the settlement of the guardian's account, and discharging his personal representatives from further liability to account. This involves the consideration of the question of fact, whether the guardian's returns

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were *false or incorrect in fact. They allow no credit to the ward, on account of his distributable share of his mother's estate. There is no evidence that the administration of Mrs. Barnes' estate was closed during the life of her administrator. Mrs. Barnes died in Sept., 1855, and letters of administration were immediately taken out by Barnes. The funds received by the administrator from the estate of J. S. Cunningham appear to have been paid into his hands in 1856, with the exception of a small balance paid after the accounting of 1858. The extent to which Mrs. Barnes' estate was indebted can only be ascertained conjecturally. This is due to the death of parties having personal knowledge of the facts, the loss and destruction of books and papers during the war, and the great lapse of time since the death of Mrs. Barnes. The parties were enabled to give proof of comparatively a small amount of the probable indebtedness, and also to introduce a memorandum, in the handwriting of Barnes, stating certain amounts paid by him on account of Mrs. Barnes' estate. This memorandum is not a regularly stated account, and is without date, nor is the time to which it relates ascertained. Evidence was offered tending to show the probability of a large indebtedness on the part of Mrs. Barnes of which no specific proof appears to have been attainable. The Commissioner was so much impressed with the probability of such indebtedness that he stated in his account a conjectural disbursement of \$3,000, evidently arrived at by arbitrating the difficulty arising from want of evidence upon opinion and conjecture. The decree disallowed this item, but states no reason for so doing. It is not necessarily to be inferred that the Chancellor entertained a different opinion from the Commissioner as to the probability of a large unproved indebtedness, but he probably refused to allow his decree to stand on purely conjectural grounds.

It is clear, upon the whole case, that it is impracticable to make a statement of the accounts of the administration of the estate of Mrs. Barnes with reasonable approximation to the truth.

The force of the testimony must, therefore,

greatly depend on the *onus probandi*, which will be hereafter considered. Assuming, at the present time, that the burden of proof rests on the complainant of showing that the guardian's returns are untrue, and it is evident that there is a failure of clear and palpable proof to show that, after the payment of the debts of Mrs. Barnes, there remained a distributable estate, which, to the extent of two-thirds, ought to have been credited on the guardian's returns. On the opposite as-

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sump^tion that the defendant, as the representative of Barnes, is bound to account for his administration of Mrs. Barnes' estate, it is equally evident that full justice cannot be done to the parties to such accounting, for want of distinct evidence as to the transactions embraced in such accounting.

It becomes necessary at this stage to enquire into the legal and equitable rights and standing of the parties under the account stated and settled.

The present question concerns the opening of a settled account. An account is deemed settled when payment has been made upon it. When there has been an adjustment and balance struck, but no payment made, it is treated as stated merely.—Story Eq. Jur., § 798. Four things are essential to a settled account: there must be a balance ascertained; it must be reduced to writing; it must be final and conclusive, and payment must be made.—Ib., § 798. The taking of security for the balance is equivalent to payment.—Ib., § 800; *Pratt v. Weyman*, 1 McC. Eq. 156. It is manifest that, in disturbing a settled account, the Court acts with a greater circumspection than when dealing with a mere stated account, for the former is a bar, at law, to a demand for a general accounting that may be made available by a plea of accord and satisfaction, while an account merely stated is, at most, evidence of the true state of the accounts. The effect of this distinction upon the relief in cases of this character is not as clearly drawn in the cases as might have been anticipated. In an account settled in the strict sense, that is, by actual payment of the balance ascertained, the original cause of action is merged and lost, and the parties stand upon the ground of an act having a conclusive legal effect upon their antecedent relations. It is, therefore, clear that the authority of equity to disturb such a settlement depends upon the general doctrine governing those Courts in granting relief by setting aside the legal force and effect of the act or contract of the party. The relief granted in the case of a settled account extends either to opening the account and remitting the parties to the position they occupied before the settlement, or to allowing the party contesting to surcharge and falsify it. When fraud exists the Court will open the whole account.—1 Dan. Ch. Pr., 691; Story's Eq. Jur., § 529; Fonbl. Eq., 15.

Story (Eq. J., § 521) lays down the rule in broader terms, as follows: "For gross fraud, a gross mistake, or undue advantage, or imposition, made palpable to the Court, it will direct the whole account to be opened and

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taken *de novo*." If errors and mistakes alone exist, the party will be permitted to surcharge and falsify.—1 Dan. Ch. Pr., 691; Fonbl. Eq., 15. In this case the opposite party will have leave also to surcharge and falsify (1 Dan. Ch. Pr., 693), and the *onus probandi* rests on the party surcharging and falsifying.—Ib., 692; Story Eq. Jur., § 525.

The general rule applicable to the relief afforded by equity, as against settled accounts, has not been stated in uniform terms by the various authorities. It would be difficult to reconcile the expressions that have been employed to define the limits of this jurisdiction, unless the distinction between stated and settled accounts is carefully observed. Story states that if there has been "any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is, in truth, vitiated, and the balance is incorrectly fixed, a Court of Equity will not suffer it to be conclusive upon the parties, but will allow it to be re-opened and re-examined."—Story Eq. Jur., § 521. Again, speaking of a settled account, he says, that it is deemed conclusive, unless some fraud, mistake, omission or inaccuracy is shown.—Ib., § 527.

Fonblanque states as follows: "But the interference of Courts of Equity is peculiarly effective in correcting errors, or detecting fraud in accounts relied upon as stated and settled, by allowing the plaintiff, in the case of specific errors alleged and proved, to surcharge and falsify, and, in the case of fraud, to open the whole account." Whether the rule thus broadly laid down by such eminent authorities is applicable, without qualification, to the case of an account merely stated, is not a question for decision at the present time; but a review of the cases will make it clear that, in its application to settled accounts, it must be considered as subject, at least, to the qualifications that arise out of the distinction between cases between parties standing in terms of equality, and those between parties whose mutual relations imply personal trust and confidence as to the matter of the accounting.

A reference to the authorities cited by Fonblanque, in support of the rule stated by him, will throw light on this subject. *Vernon v. Vawdry* (2 Atk., 119,) was a case of a stated account merely, and what is there said of "mistakes and omissions" is in terms applied to a "stated account." *Chambers v. Golden* (5 Ves., 834,) was a case between principal and agent, and the duty of accounting was affected by confidential relations existing between the parties.

It will be observed, from a review of the

decided cases, that a much broader application of this kind of relief is allowed where

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the *party against whom the relief is sought was under the obligation of personal trust and confidence to render a full and fair account. In *Matthews v. Wallwyn*, 4 Ves., 125, a settled account rendered by an attorney was opened, on the ground that it was the business of the attorney to keep his clients' accounts, and that the omission of credits was not a due discharge of that duty. In *Beaumont v. Boulton*, 5 Ves., 485, the effect of a confidential relation is considered with reference to laches on the part of the employer in seeking to open a settled account. The Lord Chancellor says that he did not know a case in which a confidential agent and steward could impute neglect to his employer in this respect. *Wharton v. May*, 5 Ves., 27, was a case of confidential relations, but was determined on the ground of fraud. *Brownell v. Brownell*, 2 Bro. C. C., 62, was a case of a trustee who had abused the confidence of his cestui que trust. Although the lapse of ten years inclined the Court to refuse to open the whole account, yet the defendant was admitted to surcharge and falsify. The account in that case had been settled solely on the representations of the trustee that it was correct. *Chambers v. Golden*, 5 Ves., 834, was the case of a disbursing and accounting agent, and the account was opened to correct an overcharge of commissions. *Vernon v. Vawdry*, 2 Atk., 119, was a case of fraud, and what is said about opening "settled accounts" for "mistakes and omissions" is employed to distinguish those cases in which the party is confined to merely surcharging and falsifying from those involving "fraud and imposition," where the whole account is opened. It evidently was not the intention of the Court to state the limitations upon which stated accounts are opened upon proof of "mistakes and omissions." In *Pratt v. Weyman*, 1 McC. Ch., 156, a bill to correct mistakes in a settled account rendered by executors was dismissed, on the ground that the defendant had to rely on a statement of facts supplied by the complainant. In that case, the complainant, who was a debtor of the defendant's testator, was under no general obligation to the defendant, involving trust and confidence in respect to the information communicated for the purpose of the settlement, yet having assumed to perform that duty, he was under an obligation to perform it fully and fairly. This case was within the reason of the rule affecting confidential relations. *Chappedelaine v. Dechenaux*, 4 Cranch., 306 [2 L. Ed. 629], was a case of confidential agency. In *Barrow v. Rhineland*, 1 Johns. Ch., 550, Ch. Kent opened an account rendered by a confidential agent, on the ground of abused confidence.

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*It will be observed that the cases in which the terms of the rule of equity governing the relief afforded against stated or settled accounts are stated, are generally those where a stated account has been rendered by one bound to render a full and fair account under an obligation imposed by personal trust and confidence, either resulting from the general relations of the parties or from an assumed undertaking of the party rendering the account to make it full and fair. The grounds on which relief has been afforded in such cases are reducible to fraud, imposition or mistake. Ch. Dargan, in *Murrel v. Murrel*, 2 Strobl. Eq., 148 [49 Am. Dec. 664], states them as "fraud, misrepresentation, concealment or mistake of facts;" but misrepresentation and concealment on the part of one bound by trust and confidence may well be referred to the single expression, imposition.

It is a general rule of equity that an act done, or contract made, either under a mistake or ignorance of a material fact, is voidable and relievable in equity.—Story Eq. Ju., § 146. Story defines a mistake as follows: "It is some unintentional act, or omission, or error arising from ignorance, surprise, imposition or misplaced confidence."—Story Eq. Ju., § 110. Two classes of cases arise under this rule, thus defined: First, when a mistake has arisen without the fault of either of the parties, in which case relief is granted only where the mistake is mutual.—Story Eq. Ju., §§ 142, 147, Redfield's Ed. Second, where the mistake has arisen through the wrongful act or omission of the party against whom the relief is sought: in which case relief is granted when it appears that an innocent party, induced by mistake as to some material matter of fact, caused by fraud, imposition or breach of trust or confidence on the part of the party against whom the relief is sought, has done an act, or made a contract to the injury of his rights, and seeks in due time to be relieved therefrom. If it appears that the party alleging mistake might, by reasonable diligence, have obtained information as to the matter of the mistake, relief will well be denied—Story Eq. Ju., § 146. This rule is laid down very clearly by Ch. Dargan, in *Murrel v. Murrel*, 2 Strobl. Eq., 148 [49 Am. Dec. 664], as follows: "A party fully competent to protect himself, under no disability, advised as to all circumstances by which he may be saved his rights, or in a situation where he might, by due diligence, be so advised, not over-reached by fraud, concealment or misrepresentation, nor the victim of a mistake against which prudence might have guarded, has no right to call the Courts of justice to protect him."

The relief granted by way of opening set-

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tled accounts flows from *the terms of the

rule heretofore stated as laid down by Story and the other authorities. An important question has arisen as to when a fact is to be regarded as material to the accounting within the terms of the rule above stated. In reference to the rule, in its general application, Story lays down the following tests of materiality: that it must be material to the "act or contract," it must be "essential" in its character, and "an efficient cause of its concoction."—Story, Eq. Jur., § 141. In other words, the truth of the fact, in respect of which mistake is alleged, must be a material part of the consideration on which the act or obligation is based which is sought to be set aside. If, therefore, the parties intended the settlement as a composition or compromise of a doubtful or disputed right, the Court will not, on the sole ground of mistake, set it aside.—*Durham v. Wadlington*, 2 Strob. Eq., 258; *Keitt v. Andrews*, 4 Rich. Eq., 349. For it is obvious that in that case, inasmuch as the parties did not seek to conform their settlement to the exact facts of the case, the truth of no one fact could be regarded as vital to the consideration by which they were moved. For the same reason, if, for want of information, the parties mutually assumed the existence of certain facts and understandingly dispensed with further inquiry as to their actual truth, the Court will not interfere, if this assumption turns out to be erroneous. (See *Pratt v. Weyman*, 1 McC. Eq. 156.) In the case last supposed, as well as in the one immediately preceding it, something other than the actual truth of the fact, supposed to be known, influenced the minds of the parties in reference to the consideration of their act or contract.

On the other hand, when the parties look to the actual state of facts, and acting from the supposition mutually entertained, that they are possessed of the truth of such state of facts, make a settlement of their accounts, relief will be granted, if it be made to appear that they were mistaken in that respect as to a material fact. When one intrusted with the control or management of a fund in a confidential or fiduciary capacity, and having, or supposed to have, either exclusive or better information of the matters of account relating thereto than the person beneficially entitled to such fund, renders an account thereof to such person, and the account is accepted and settlement made upon it, it will be presumed that the settlement was made on the faith that the account is full, fair and accurate. That such assumption must be regarded as entering into the consideration is in accordance with what was said by Ch. Harper in reference to the validity of a release given

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on the settle*ment of accounts.—*Gist v. Gist*, Bail. Eq., 343. He says of the adjustment, that the fairness of the accounts is of the essence of the consideration. If they are not

fair, the consideration is not fair, and the instrument based on such consideration is void. The expression "fairness," as here used, may have relation to the good faith of the transactions, rather than the accuracy of the accounts and their strict conformity to the truth of the transactions represented by them; but the idea is still enforced that what the party accepting the account rendered has a right to expect must be regarded as entering into the consideration, and, in the case of a confidential or fiduciary agent, accuracy, as well as good faith, may be reasonably expected, for both are embraced within the duty of accounting under such circumstances.

If the accounts rendered by a confidential or fiduciary agent are incorrect, it must result either from imposition or mutual mistake; for, if the agent is aware of the inaccuracy and does not disclose the fact, he must be regarded as imposing on the confidence of the party; if not aware of such incorrectness, it is a clear case of mutual mistake of a material character.

It is thus made clear that, whatever difference exists in the conclusiveness of an accounting, whether by parties between whom a confidential or fiduciary relation exists, or between parties acting exclusively in their own interests, does not result from the application of a different rule of equitable relief, but from the nature of the presumptions that arise from the relations of the parties in the respective cases. Having gained a correct view of the ground on which this branch of equity relief rests, the decided cases will be easily harmonized together. In *McCrae v. Hollis*, 4 DeS. Eq., 122, the maker and payee of a note, in the course of a settlement, mutually mistook the amount of the note and also the amount of the payments upon it, and Chancellor DeSaussure opened the settlement. In *Porter v. Cain*, McM. Eq., 84, the parties, in settling an administrator's account, did not take into consideration interest on annual balance. If there was any mistake in the case, it must have been as to the right of the complainant to such allowance of interest; for the facts were all spread out on the face of the account. It might well be that this charge of interest was regarded by the parties as inequitable, as it would have been if the administrator had neither derived benefit from the use of the funds, nor neglected his duty with regard to investment. The case went off on the ground that neither fraud nor

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mistake were sufficiently *alleged or proven. In *Murrel v. Murrel*, 2 Strob. Eq., 148 [49 Am. Dec. 664], the bill, though in form an application to open an administrator's stated account, had for its real object the opening of a composition made among distributees, the administrator having based his account on such composition. The claim was for the distribution of a certain sum set apart by the agreement of the parties for a specific use,

namely, the support of an aged mother, and also for a re-statement of the account in reference to advances alleged to have been made. The Court refused to open the settlement, as there was neither fraud, misrepresentation, concealment, nor mistake of facts established.

In *Pratt v. Weyman*, 1 McC. Eq. 156, the Court refused to open an account for errors in favor of the party from whom the information on which the account was settled was derived. Whether the complainant was regarded as at fault within the principles heretofore stated from *Murrel v. Murrel* does not distinctly appear, though it may be fairly presumed. It is said, in this case, that when error is apparent on the face of the account, the Court will not hesitate to relieve. This remark should be understood as referring to errors of the class that the parties are presumed not to have intended such as errors, or statements, or computation, as in *McCrae v. Hollis*, and *Chappedelaine v. Dechenaux*, 4 Cranch, 306 [2 L. Ed. 629].

Frazer v. Hext was a case where a distributee settled on the faith of the representations of the administrator that his account rendered was correct, and would have been a case for relief, had it been sought in due time.

In *Durham v. Wadlington* (2 Strob. Eq., 258,) an attempt was made to set aside an agreement by way of compromise, and the Court refused to interfere with the compromise made by the parties.

Gist v. Gist (Bail. Eq., 343,) was a clear case of mutual mistake of fact. The devisees settled among themselves, on the erroneous supposition of a certain debt being due by the estate. The account was opened. Ch. Harper, whose opinion was affirmed on appeal, says: "This was not a case of speculation or compromise. The parties did not agree to take the estate in South Carolina, whatever it might be, and pay the debts, whatever they might amount to."

In *Garner v. Garner* (1 DeS. Eq., 437,) relief was granted against a mutual mistake of the parties, as to their legal rights, induced by erroneous professional advice. (See *Lawrence v. Beaubien*, 2 Bail., 623 [23 Am. Dec. 155].)

Alexander v. Muirhead (2 DeS. Eq., 162,)

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was a bill to set aside *an agreement, on the ground of mistake; but the question does not appear to have been adjudicated on the merits.

Zylstra v. Keith (2 DeS. Eq., 142,) and *Lowndes v. Chisolm* (2 McC. Eq., 455 [16 Am. Dec. 667,]) did not necessarily depend on the power of equity to grant affirmative relief on a bill alleging mistake, but upon the principle that when parties are before a Court of Equity seeking equity, the Court will look into transactions collateral to, and dependent upon, the main subject of inquiry, in order that full justice may be done.

In *Matthews v. Walwyn*, (4 Ves., 155,) re-

lief was granted in a case of mistake, based upon the duty of an attorney to render full and fair accounts.

In *Beaumont v. Boulton*, (5 Ves., 455,) a settled account was opened upon the distinction between cases involving confidential relations and ordinary cases, such as between landlord and tenant.

In *Chambers v. Golden*, (5 Ves., 834,) the party was permitted to surcharge and falsify a settled account rendered by a confidential agent, on the ground that certain commissions were improperly charged.

Chappedelaine v. Dechenaux, (4 Cranch, 306 [2 L. Ed. 629,]) though between the representatives of the original parties, yet it sought to open a settled account stated between the original parties, on the ground of fraud and error. Relief was granted upon a principle distinctly stated by Chief Justice Marshall. He says: "But, if palpable error be shown which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such intent cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist." This was said of transactions between a confidential agent and his principal, and fully supports the proposition heretofore advanced in regard to the presumptions arising from errors found in an account rendered by such agent.

In *Hunt v. Rousmanier*, 8 Wheat., 174 [5 L. Ed. 589], relief was allowed on the ground of a mutual mistake as to the effect of an arrangement intended to furnish security for a debt, induced by the erroneous advice of counsel. In *Barrow v. Rhinelander*, 1 John's Ch., 556, an account rendered by a confidential agent was opened on the ground of abuse of confidence amounting to imposition.

In *Wild v. Jenkins*, 4 Paige, 481, as the par-

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ties did not stand in *confidential relations as it regards the accounting, *Walworth, Ch.*, did not allow them the benefit of the presumption that errors were not assented to, but held that the error or mistake alleged should be supported by clear and conclusive evidence.

As a question of pleading is made, it will be proper to look at the settled rule of pleadings in these cases. The bill must set forth the fraud or mistake so that the defendant may answer it.—*Porter v. Cain*, McM. Eq., 84. General charges of fraud or mistake are insufficient—*Fraser v. Hext*, 2 Strob. Eq., 250; *Bulloch v. Boyd*, 2 Edwards' Ch. R., N. Y., 293; but the ground of the relief sought must be specifically stated.—*Murrel v. Murrel*, 2 Strob. Eq., 148 [49 Am. Dec. 664]; *Story Eq. Jur.*, § 800; and if errors in the account are alleged they must be distinctly proved as alleged—*Pratt v. Weyman*, 1 McC.

Ch., 156; *Wilde v. Jenkins*, 4 Paige, 481. If specific errors or fraud are charged in the bill they must be denied by the averments in the pleas as well as by answer in support of the plea—1 Dan. Ch. Pr., 691; *Story Eq. Jur.*, § 796; and must allege that the account is just and true, to the best of his knowledge and belief—1 Dan. Ch. Pr. 691; *Story Eq. Jur.*, § 802. If a release under seal is pleaded the consideration must be set forth, (*Story Eq. Jur.*, § 797); but if not under seal it must be pleaded as an account stated. If a release is pleaded to a bill charging fraud, surprise, or inadequacy of consideration, this averment must be met in the body of the plea, and it must be supported by an answer.—*Story Eq. Jur.*, § 796. When the existence of errors is admitted in the answer relief will be granted, though not necessarily upon a mere parol admission.—1 Dan. Ch. Pr., 693. If the charges of the bill are fully and substantially denied by the answer, the account will not be opened on the averments of the bill alone.—*Pratt v. Weyman*, 1 McC. Eq., 156. When a bill is brought for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill and set forth the specific ground of opening the settlement for surcharging and falsifying it.—*Dawson v. Dawson*, 1 Atk., 1. The onus probandi rests on the party contesting the account. The proof of fraud or error must be strong and conclusive.—*Wilde v. Jenkins*, 4 Paige, 481. Doubtful and probable testimony will not be considered sufficient.—*Chappedelaine v. Dechenaux*, 4 Cranch, 306 [2 L. Ed. 629]; *Wilde v. Jenkins*, 4 Paige, 495.

The first exception relied upon by the defendants is, that the bill does not contain a specification of errors in the account stated sufficient to open a settled account. If the

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defendant had undertaken, *in behalf of the guardian, to account for the administration of Mrs. Barnes' estate, and it was sought to open such account on the ground of errors in the statement, it would be necessary to open the settlement quoad the administration, and in that case it would be the duty of the defendant, as the representative of Barnes, who was both guardian and administrator, to render, as best he could, the administration account. The form of the bill is, therefore, consistent with the theory of the complainant's demand, and the only question is, whether the complainant has established a case for either opening or surcharging and falsifying the account.

Barnes was bound to account for the interest of his ward in his mother's estate. As the representative of the ward he could not bind the latter by any settlement made as guardian in favor of himself as administrator; but in his character as guardian he could be called upon by the ward to render

an account of the administration. The complainant, as the personal representative of the deceased ward, succeeded to this right; but as Barnes was also deceased, it could only be put in exercise as against the defendant, his personal representative. The relation between the ward and his guardian was fiduciary, the guardian being bound to render full, fair and accurate accounts. This duty devolved upon the defendant, who was bound to discharge it to the best of his ability. He was so far affected by the fiduciary relations existing between the original parties that imposition on his part, or mistake mutually affecting the parties, would be ground for disturbing the settlement. As the guardian's returns, the basis of the settlement, were acted upon as correct, if incorrect, the consideration on which the complainant settled must be regarded as affected by such incorrectness, and as we have already seen, between parties similarly related, the inaccuracy being shown, mutual mistake must be presumed.

In order to sustain the conclusions of the Chancellor, that a mistake existed sufficient to disturb the account, we must be enabled to find in the case clear and conclusive proof that the guardian's returns are false or incorrect. But this the case does not afford. Both the report of the Commissioner and the decree show that it became necessary to resort to conjectural testimony, and at best merely probable testimony, to ascertain the state of facts upon which the question of the truthfulness and correctness of the guardian's returns must depend. This, as we have seen, is not admissible.

There is a strong equity with the defendant to uphold the settlement, arising from the fact that on the one hand the settlement

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*made by him was in entire good faith, so far as appears from the case, and upon the best information that he possessed, while, on the other hand, should the account settled be opened, it will be impossible, after the great lapse of time that has occurred, the death of witnesses, and the destruction of records and documentary evidence, to take the administrator's account with reasonable approximation to justice or accuracy, if the ordinary rules as to the sufficiency of testimony are to be applied to this case.

It is by no means certain that the results of such accounting would approach nearer to the truth than the present settlement.

On the other hand, there is defect of equity on the part of the complainant, in that he is chargeable with being possessed of substantial information of the facts alleged in his bill as the ground of opening the account at the time of accounting with defendant, and neglected then to call the defendant's attention to the matters now complained of. Fair and equitable dealing re-

quires that all matters in the knowledge of either party bearing on the settlement should be brought forward. If this obligation is complied with by one of the parties and not by the other, the party making a candid disclosure, and not meeting with the same on the other side, may be misled to the serious prejudice of his rights. As has been already said, the complainant must be regarded as having knowledge of these facts at the time of settlement—he not having alleged or proven forgetfulness at that time. The effect of such an allegation need not be considered at the present time. As this conclusion will lead to a dismissal of the bill, it will be unnecessary to consider the other questions raised by the respective grounds of appeal.

The decree must be reversed and the bill dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*WM. J. WHITE, Trustee, v. ANDREW J. KIBLER, Adm'r.

(Columbia. April Term, 1870.)

[Trusts \hookrightarrow 326.]

The Commissioner, in stating the account of the defendant, having departed from the established rule as to the mode of stating such accounts, and it appearing that the defendant was possibly prejudiced by the mode adopted by the Commissioner, the decree below was set aside, and the case remanded to the Circuit Court, with instructions to have the account taken in the established mode.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 486; Dec. Dig. \hookrightarrow 326.]

Before Johnson, Ch., at Lancaster, June, 1867.

In October, 1866, the plaintiff, White, was appointed trustee of Anna Mittag, in the place of Joseph A. Cunningham, deceased, the former trustee, and this was a bill by White against Kibler, administrator of Cunningham, for an account. The case was referred to the Commissioner to state the accounts of the intestate, and he submitted a report, which it seems necessary to give in full in order that the decision of the Court may be understood. It is as follows:

The Commissioner reports that the corpus of Mrs. Mittag's estate consisted of the bonds, notes and money turned over to the late Joseph A. Cunningham, by George W. Williams, Esq., in 1861.

On the ——— day of February, 1867, the defendant, as administrator, turned over to complainant notes originally received from Mr. Williams, amounting, at that day, with interest, to \$22,302.53, and notes which he had reinvested amounting to \$2,738.76, with the interest included; the whole making the

sum of \$25,041.27, as stated in the receipt filed with the answer.

It only remains for the defendant to account for his receipts and disbursements of money during the administration of the deceased trustee, and the transactions of the defendant as administrator since his decease.

In the year 1861, deceased received, as trustee, in good money, which he did not invest for the estate, less commissions on the whole amount of cash receipts, the sum of \$1,696.52, for which defendant is chargeable with interest from January 1, 1862.

Up to May 5, 1862, the trustee had received, in State money, then good, \$1,631.09, and paid out in that year, probably in the same money, \$651.70, and commissions \$57.06, leaving a balance against him, in State money, of \$922.33. In the same year trustee received, in Confederate bills, \$2,980.18, and paid, in the same funds, \$972.06, and was entitled to commissions, \$98.80, leaving a balance against him, in Confederate money, of \$1,909.32.

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*In order to state the account most favorably, it may be proper to reduce the State money received in this year to the standard of Confederate money, and blend them together:

Balance of State money.....	\$	922	33
Premium 10 per cent.....		92	23
Balance Confederate money.....		1,909	32
		\$2,923	88
Add receipt, in 1863.....		546	22
		\$3,470	10

Deduct am't paid in 1863, and invested	\$3,159	84	
Commissions on \$1,505.26, paid....	37	88	
Commissions on \$546.22, rec'd.....	13	65	3,211 37
			<hr/>
			\$ 258 73

Balance due, with interest from January 1st, 1863	\$	258	73
This was, at that day, worth one-third in gold according to the testimony of Mr. Hasseltine, say		86	24

In 1864, trustee received.....	\$1,107	61
And paid out \$2,142.03, and commissions, \$81.24	2,223	27

Balance due him January 1st, 1865.....	\$1,115	66
Worth in gold, 1-60, (see Hasseltine's evidence)	18	59

In 1865, was paid.....	\$	4	87
In 1866		55	37

Bringing forward this balance to January 1st, 1867, we find trustee chargeable, as follows:			
To balance due January 1st, 1862.....	\$1,696	52	
Interest to 1st January, 1867.....	593	78	
Balance January 1st, 1863, in gold... \$86 24			
Interest four years.....	24	13	110
Premium on \$110.37, in gold, at 35 per cent.			38
	\$2,439	28	

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*The credits brought forward, as stated, are as follows:

By balance due trustee, January 1st, 1865	\$ 18 59		
Interest to January 1st, 1867, 2 years	2 60	21 19	
Add gold premium on do., 35 per cent.		7 41	
Am't paid in 1865	4 87		
Commissions on do.	12	4 99	
Interest on this, 1 year		35	
Am't paid year 1866	55 37		
Commissions on do.	1 46	56 83	
Commissions on interest, as follows:			
By com's on int. on balance due Jan'y, 1862	593 78	14 82	
By com's on int. on balance due Jan'y, 1863	24 13		
And on premium on do., 55 per cent.	8 43	32 56	80
And on interest on bal. due trustee January, 1865	4 35		
And on premium on do.	1 52	5 87	14
By com's on \$22,302.53, original notes turned over		557 56	
Total credits	\$ 664 09		
Total debits	2,439 38		
Balance due trustee January 1st, 1867...	\$1,775 19		

Which the Commissioner finds to be the balance due the trust estate, by the estate of Joseph A. Cunningham, deceased. But it is submitted, on the part of the defendant, that he should be allowed his commissions on the bonds and notes received by him from G. W. Williams, Esq., in 1861. The amount so received by him was \$21,177.12, but he collected of that amount, in 1861, notes of S. J. Dunlap, \$753.21, upon which he is allowed commissions in that year. His commissions on the balance of said notes would have been as follows: On \$21,177.12, \$753.21; \$20,423.91, at $2\frac{1}{2}$ per cent, \$510.57. The interest on that sum, to January 1st, 1867, 5 years, would be \$178.65; which he would be entitled to a credit for, on the above balance, if the commissions should have been taken out on the bonds and notes received in 1861, rather than at the date of the settlement. If the Court should decide that the defendant is

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so *entitled, the balance will be in favor of complainant, January 1st, 1867, \$1,595.54, instead of the balance as stated above.

The defendant excepted to the report; and the decree of His Honor upon the report and exceptions is as follows:

Johnson, Ch. On the 29th of January, 1861, George W. Williams executed to Joseph A. Cunningham a trust deed by which a considerable estate was secured to Mrs. Anna Mittag, wife of John F. G. Mittag; the trust estate, consisting principally of personal securities for the payment of money and cash, was turned over to J. A. Cunningham, as trustee, in accordance with the terms of the deed. In 1861 and 1862, there were considerable balances left in the hands of the trustee, in money, after the payments to the cestui que trust, and new investments were de-

ducted. In 1863 and 1864, the payments made and the reinvestments by the trustee amounted to more than his receipts in money to an amount slightly larger than the balances against the trustee in the two former years. On the 11th day of November, 1865, Joseph A. Cunningham died intestate, and the defendant Andrew J. Kibler took out letters of administration upon his estate, and in October, 1866, the complainant W. J. White was appointed by this Court trustee in place of J. A. Cunningham, deceased.

On the of February, 1867, the defendant turned over to the complainant notes originally received from G. W. Williams, amounting on that day, with the interest, to \$22,302.53, and notes which Cunningham had taken amounting, on that day, to \$2,738.76, making, in the whole, \$25,041.27; \$478.01 more than the amount due, making up the statements in the ordinary way.

The bill is filed for an account of the moneys received and paid out by J. A. Cunningham after his appointment on account of the trust estate.

And if the Commissioner had made his report regarding all the receipts and payments made by Cunningham as having been in good money, I do not know that I would have ordered him to remodel the account, for it required great firmness on the part of the trustee to refuse payment of old notes in the latter part of the war by over anxious debtors, and the trustee in this case is entitled to credit for having received so little of it.

The Commissioner, however, regarded the money received in 1861 as good, and scaled the balances in the following years, and drew distinctions between State money and

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Confederate money. To this *report of the Commissioner at least twenty-one exceptions have been filed by the defendant, but I have neither time nor the inclination to take them up one by one and dispose of them.

The proof was that Cunningham was not engaged in any speculations, and there was no proof that he used the State bills to any better advantage than he did the Confederate money received by him about the same time. The opinion of the Court is that this distinction should not have been made by the Commissioner.

The amount of the balance of receipts over expenditures, on the first day of January, 1862, is not scaled, but inasmuch as the balances for other years are scaled I think it is but just that that should be also, on the same principles on which the others are.

If the receipts of any portion of the trust property in Confederate money can be sustained, and they are not questioned, my opinion is that the trustee was entitled to commissions for the full amount to be credited on the first of January next after they were received.

It is ordered and decreed that the above opinion be taken as the judgment of the Court, and that such portions of the Commissioner's report as conflicts with this opinion be overruled, and that all other portions of the same be confirmed, and made the judgment of this Court. It is also ordered and decreed that the report of the Commissioner be referred back to him, that he may make it conform to the above opinion, and that the costs of each party be paid by the estates which they respectively represent.

The defendant appealed, and now moved this Court to reverse or modify the decree on the grounds:

1. Because, it is respectfully submitted, the Chancellor, in his said decree, erred in sustaining the Commissioner's report on the accounts of the trustee in his departure, in said report, from the established mode of stating such accounts.

2. Because he therein sustained the Commissioner in considering and stating certain cash receipts of the trustee, and making up and charging balances thereof against said trustee, independent of, and apart from, his general account of the funds which went into his hands as such trustee.

3. Because he has therein sustained the Commissioner in a mode of stating the accounts whereby, in breaking up said cash account into several and distinct fragments, and fixing upon him charges for balances of currency against him at certain periods and

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credits *for balances in his favor at later periods during the war, and scaling said balances down to the gold standard, the said Commissioner has caused the losses occasioned by the depreciation of said currency to fall upon the trustee; whereas it is submitted that, inasmuch as the trustee acted in good faith, and with even more than ordinary prudence and caution in the management of said trust estate, and in receiving and paying out said currency, such losses should fall upon said trust estate.

4. Because the Chancellor has therein sustained the Commissioner in postponing the allowance of credit for commissions on the trust funds turned over to him to the 1st January, 1867, instead of allowing the same as a credit on the 1st day of January (1862) next succeeding the year in which the same was so turned over.

5. Because the decree of the Chancellor is, in many other respects, erroneous.

Moore, for appellant.

Kershaw, contra.

Sept. 30, 1870. The opinion of the Court was delivered by

MOSES, C. J. It may be that the departure in the statement of the accounts from the mode heretofore established by the Courts has resulted in prejudice to the deceased trustee.

Assuming even that justice may be reached by separating from the general account certain receipts and expenditures, and making them the basis of the calculation, by which a balance, the one way or the other, may be ascertained, still the trustee called to answer for the funds which were in his hands, may, of right, demand an examination of his whole account, that the annual balance may be struck in conformity with the prescribed rule.

This right should the more readily be conceded in this case, for the Chancellor states in his decree that the amount turned over by the administrator of the original trustee on the — day of February, 1867, exceeded "by \$478.01, the amount due, making up the statements in the ordinary way," while the report of the Commissioner, by disjoining the account and taking up only such items of it as were outside "of the payments to the cestui que trust and new investments," makes a balance due by the trustee of \$1,775.19. This discrepancy is in itself sufficient to shew that the objection of the administrator may be well founded.

The principles which regulate and govern

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the adjustment of the *accounts of those who stand in a fiduciary relation, have been laid down with precision in the reported decisions. If there are particular circumstances which may justify a departure from them, they must be applied in strict analogy to the reasons on which the general rule is founded.

We are the more disposed to remit this case for a full report on the receipts and disbursements of the trustee, as the Chancellor has ordered it back, to be reformed, in some respects, according to the intimations of his decree; and an examination of the whole account, to be followed by a report exhibiting the result of it in the usual way, will not add to the delay.

Without, therefore, expressing an opinion on any other ground submitted in the notice of appeal, it is ordered and adjudged that the decree of the Chancellor be set aside, and the case remanded to the Circuit Court with instructions that the accounts of the trustee be submitted to a Referee to be appointed by the said Court, to be taken according to the mode established by the rule of practice of the Court.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 122

EDGAR W. CHARLES v. CALEB COKER & BRO., JOHN M. DAVIS and Wife, and Others.

(Columbia. April Term, 1870.)

[*Husband and Wife* ⇨119.]

A trust to pay the income of the settled property to a married woman "for and during the joint lives of her and her husband, taking her receipt therefor," gives her a sole and separate estate in the income.

[Ed. Note.—Cited in Bouknight v. Epting, 11 S. C. 77.]

For other cases, see Husband and Wife, Cent. Dig. §§ 424-429, 447; Dec. Dig. ⇨119.]

[*Husband and Wife* ⇨119.]

To create such an estate, technical words are not necessary. If a plain intention to exclude the husband appears, that is enough, and a declaration making the receipt of the wife a sufficient discharge, shows such intent.

[Ed. Note.—Cited in Trustees v. Bryson, 34 S. C. 413, 13 S. E. 619.]

For other cases, see Husband and Wife, Cent. Dig. § 425; Dec. Dig. ⇨119.]

[*Husband and Wife* ⇨49¾.]

Where income is to be paid to a married woman to her sole and separate use, and no restriction is imposed upon her use or disposition thereof, she is regarded, as to the use and disposition of such income, as a feme sole, and after it is paid to her, she may give it to her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 256; Dec. Dig. ⇨49¾.]

[*Husband and Wife* ⇨137.]

Where a married woman was entitled to the hire and labor of slaves to be paid to her, on her receipt, for her sole and separate use, and the slaves were in the possession of her husband, though he was not the trustee, and he, for a number of years, with her knowledge, and without complaint or objection on her part, paid the annual proceeds of the hire and labor of the slaves to C. in consideration of supplies annually advanced by C for the use of the family and the preservation of the trust estate: *held*, that C could not be compelled to account, for the benefit of the married woman, for the proceeds so received by him.

[Ed. Note.—Cited in Reeder & Davis v. Flinn, 6 S. C. 240; Dunlap v. Garlington, 17 S. C. 572; McLure v. Lancaster, 24 S. C. 282, 58 Am. Rep. 259; Martin v. Jennings, 52 S. C. 381, 29 S. E. 807.]

For other cases, see Husband and Wife, Cent. Dig. § 523; Dec. Dig. ⇨137.]

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[*Equity* ⇨182.]

*An indorsement by defendants on the sub. ad res., that they accepted service thereof, admitted the truth of the statements of the bill, and consented to the prayer thereof, will not be regarded as an answer, nor have the effect of one.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 413, 418-421; Dec. Dig. ⇨182.]

[*Mortgages* ⇨29.]

J bargained for a tract of land, and received a bond for titles, which he afterwards transferred to C, as security for advances made and to be made. C having paid for the land, and taken a conveyance to himself, *held* that he could hold it only as security for any balance

due him on the account for advances and money paid.

[Ed. Note.—Cited in Mars v. Conner, 9 S. C. 76.]

For other cases, see Mortgages, Cent. Dig. § 54, Dec. Dig. ⇨29.]

[*Accord and Satisfaction* ⇨14.]

Where a judgment by confession is intended as additional or cumulative security, it will not discharge other securities for the same debt held by the plaintiff.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 111; Dec. Dig. ⇨14.]

[*Husband and Wife* ⇨137.]

In February, 1861, C purchased from J, the husband, but not the trustee of the cestui que trust, certain slaves of the trust estate: *Held*, that C could not, after the general emancipation in 1865, treat the transaction as void and inoperative, because J had not title to the slaves, or right to sell them, but that he was liable to account for the benefit of the cestui que trust for the sum he had agreed to pay, with interest thereon.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 512-523, 939, 940; Dec. Dig. ⇨137.]

Before Johnson, Ch., at Darlington, February, 1868.

The facts upon which the appeal in this case was heard are stated in the Circuit decree, which is as follows:

Johnson, Ch. On the 10th day of December, 1842, John N. Williams executed a deed, of which the following is a copy, that is to say:

"Know all men by these presents, that I, John N. Williams, in consideration of the love, good will and affection which I bear to my cousin John M. Davis, and in further consideration of one dollar to me in hand, paid by Alexander M. McIver, of Chesterfield District, and State aforesaid, have granted, bargained and sold, and by these presents do grant, bargain, sell and release unto the said Alexander M. McIver the following negroes, viz: Sampson, Tone, Tobe, Ned, John, Jack, Carson, Peter, Stephen, Edward, Phillis, Ruth, Bird, Rose, Dow, Nancy, Cloe, Effy, Lucy, Dinah, Charlotte, Jim, Anson, Sam, David, and their increase; also, seven mules, two horses, and two wagons and gear; also, the life estate of said John M. Davis, which I have heretofore purchased of him, in the following negro slaves, viz: John, Charlotte, Bonaparte, Lavinia, Serena, James, Bignoh, Betsey, Mingo, Minerva, and their increase; together with all the rights, members and appurtenances to the same, belonging or in anywise incident or appertaining: to have and to hold all and singular the premises before mentioned, unto the said Alexander M. McIver, his heirs and assigns, forever; and I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the premises unto the

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said *Alexander, against myself, my heirs, and all persons lawfully claiming or to claim

the same or any part thereof, by or from this or under me: provided, nevertheless, and all the above conveyances are made on the following conditions and limitations, viz:

"1st. That the said Alexander M. McIver shall well and truly pay and discharge all the judgments of Court now outstanding and unpaid against the said John M. Davis, in Darlington District.

"2d. After the payment of the judgments aforesaid, then to pay over the proceeds of the hire or labor of said negro slaves to Jane F. Davis, (taking her receipt therefor,) the wife of the said John M. Davis, for and during the joint lives of her and her husband, John M. Davis.

"3d. Should the said Jane F. Davis die before her husband, then the said Alexander shall well and truly devote and expend all the income of the said negro slaves in the maintenance and support and education of all the children of said John M. Davis, making no distinction between those of the present and those of the first marriage.

"4th. At and after the decease of the said John M. Davis, then, in this case, the said Alexander M. McIver shall convey and deliver the negro slaves herein mentioned to such children of the said John M. Davis as the said John M. Davis may indicate and direct by his last will and testament, now made or hereafter to be made: provided, however, that the said Alexander M. McIver may confer the execution of the trust herein created upon any agent or agents he may deem fit or proper, such agent or agents being held liable for any mismanagement of the said property, or any payment of moneys by him or them. And the said McIver shall alone be liable for his own fraudulent or willful conduct in the premises."

In a few days after the execution of the deed, it was admitted to probate, before Caleb Coker, as Magistrate, and on the 29th of the same month it was recorded in the office of the Secretary of State, at Columbia: and on the 22d day of March, 1851, it was recorded in the office of Register of Mesne Conveyance for Darlington District.

On the deed there is the following endorsement, signed by the trustee, A. M. McIver, and dated December 26, 1842:

"I hereby appoint John M. Davis my agent, under this deed."

At the time the deed was executed, John M. Davis was living on a plantation of Col. John N. Williams, near Society Hill. In 1843 he removed the greater part of the

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trust negroes to the State of Georgia, and worked them on a plantation there, but his family and the other trust negroes remained on the plantation near Society Hill, free of charge, until the year 1856, when they removed to a plantation about twenty miles from Society Hill, which John M. Davis had purchased of Simon Parrott, on the 11th day

of September, 1850, and to which he afterwards removed the negroes which he had taken to Georgia, except nine, which he had to sell, for the purpose of removing the others. When the land was purchased, it was not paid for, but was to be paid for in three equal installments, and a bond, in the penalty of three thousand dollars, was given by Parrott, for titles, as soon as the purchase money was paid. C. Coker & Brother were merchants at Society Hill, and from the time the title deed was executed, they furnished such supplies as were needed by John M. Davis and his family, and the trust estate, especially after the trust negroes had been brought back from Georgia, in 1850, and in return received from Davis the greater part of the crop produced, and most of the notes that were given to him from year to year for the hire of a portion of the trust negroes.

On the 3d of January, 1855, after one of the installments for the land had been paid by Davis, by funds furnished by Coker & Brother, he, in consideration of debts due by him to them, or to become due during the year 1855, assigned to them the bond which he had received from Parrott, for titles to the land, and authorized them, upon the payment of the balance of the purchase money to Parrott, to claim and to receive titles for the same, in their own names, and to hold it as "collateral security" for all the debts he then owed them, or which he should owe them, when they should pay for the land, and take titles.

On the 23d day of January, 1856, J. M. Davis executed an instrument, under seal, of which the following is a copy, to wit:

"Whereas C. Coker and Lewis M. Coker have paid Simon Parrott for the tract of land now occupied by me, containing eight hundred and nine and seven-tenths acres, and taken title in their name from the said Parrott for the same:

"Now, I do hereby agree and bind myself to consent to the sale of said land whenever the said C. Coker and Lewis M. Coker may desire to sell, and to give full and peaceable possession to all and singular the said land and its appurtenances to them, or such person or persons as they may sell to; they allowing me the proceeds of such sale on such debts as I may owe them at the time of said sale."

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*On the same day, C. Coker & Brother executed an obligation, under their hands and seals, to J. M. Davis, to make and execute such titles to the said tract of land as may be required upon his paying them, when required, the whole amount that he might owe them at the time.

In the early part of the year 1857, J. M. Davis confessed a judgment to C. Coker & Brother for nine thousand dollars, which was the whole amount that he owed them.

not only for advances made for the trust estate, but also for the purchase money of the land.

The following is a copy of a conveyance of five of the trust negroes, made by J. M. Davis, on the 8th of February, 1861:

"\$2,600.—Received, 8th February, 1861, of C. Coker & Brother, twenty-six hundred dollars, in full payment for negro woman, Charlotte, about twenty-nine years old, and her four children, viz: Sallie, about twelve years old; Stephen, about seven years old; Leaban, six years old; and infant girl, about two months old. And I do hereby warrant said negroes to be sound and healthy, and also warrant the title of the same to the said C. Coker & Brother, their heirs and assigns forever."

J. M. Davis, Jr., W. G. Davis, Ellen E. Stuckey and John J. Stuckey also executed a paper, dated February, 1861, as follows:

"We, the undersigned, children of John M. Davis, do hereby sanction and confirm the sale of negro woman, Charlotte, and her four children, and do renounce and assign all claim we have, or ever may have, to the said negroes, unto the said C. Coker & Brother, their heirs and assigns, forever."

On the same day C. Coker & Brother executed to J. M. Davis their written obligation, of which the following is a copy, to wit:

"We have this day purchased from John M. Davis a family of negroes, Charlotte, and her four children, Sallie, Stephen, Leaban, and an infant girl, for the sum of twenty-six hundred dollars, which said negroes we have hired for the balance of the year to Josiah Coker, for thirty dollars and their support; and we do hereby agree to allow the said John M. Davis until the first of January next, to receive offers for the purchase of the said family of negroes, and, if he can or does effect a sale of the same for more than the said sum of twenty-six hundred dollars, and the interest from this day, as well as any expense of doctor's bills we may have to pay for the same, we will surrender the possession of said negroes, transfer his bill of sale to such purchaser, and place to the cred-

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it of *said Davis the overplus on any debt he may then owe us; this agreement to expire and to be null and void after the 1st day of January next.

"It is understood that the above described family of negroes may be sold for one-half cash, and the balance on a credit of twelve months, and that J. M. Davis may sell the land on which he resides for a price satisfactory to us, one-fifth to be paid on the delivery of the same, on the first of January next, in cash, and the balance in one, two, three and four years, with interest from that date, to be secured to our satisfaction."

J. M. Davis failing to make a better sale of the negro slaves within the time limited, they remained the property of C. Coker &

Brother, so far as they could be made such by the grantors, until they were emancipated by the action of the Government, to wit: on the first day of May, 1865. The plantation has remained up to this time in the possession of J. M. Davis, without the payment of any rent, and without any new agreement upon the subject.

The judgment debts of John M. Davis, at the time the trust deed was executed, have all been paid, the last of which amounted to \$247.57, and was paid by C. Coker & Brother to Col. Williams, the owner of the same, on the 30th April, 1856. On the 10th day of July, 1850, Alexander M. McIver died intestate, and, after his death, J. M. Davis continued to manage the trust estate, by hiring out a part of the trust negroes, and employing the others in planting and collecting, and applying the proceeds to the use of his family, and the purposes of the trust estate, as he had before done, without taking any receipt from Jane F. Davis, as required by the trust deed. J. M. Davis was insolvent at the time the trust deed was executed, and has continued to be insolvent. From the evidence, I infer that by far the greater part of the notes taken by him for the hire of negroes belonging to the trust estate, and the cotton crops produced by them, went into the hands of C. Coker & Brother, but that these were not sufficient for the support of the family and of the trust negroes; not because the expenses were so heavy, but from the fact that the planting operations were not successfully carried on. The balance against Davis, as agent of the trust estate in favor of C. Coker & Brother, became larger from year to year, and, in 1867, after the reception of large payments in Confederate money, and, after a credit for two thousand six hundred dollars was given for Charlotte, and her four children, it amounted to \$——.

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*Since the close of the late war the complainant, Edgar W. Charles, was substituted as trustee in the place of Alexander M. McIver. John M. Davis and wife, Jane F., are still living, and have the following named children living, to wit: Ellen E., the wife of John J. Stuckey; William G. Davis, and Charles A. Davis, who is still a minor.

On or about the first of January, 1867, J. M. Davis was served with a notice by C. Coker & Brother, after some negotiations between the parties, that if he did not, within a short time, surrender to them the possession of the said plantation, that they would institute proceedings for the purpose of ousting him, which led to the filing of this bill.

The complainant insists that, although the plantation was first purchased by J. M. Davis, in his own name, yet it was necessarily done by him for the trust estate, from the fact that he was insolvent at the time and could not expect to pay for it in any other

way than by the use of the proceeds of the trust estate, and from the further fact that Cokers have, at different times, received enough of the proceeds of the trust estate to pay for the land. He insists that he is now entitled to a conveyance of the plantation for the trusts of the trust estate. He also insists, that inasmuch as C. Coker & Brother, in 1857, took a confession of judgment from J. M. Davis, that they cannot resort to the proceeds of the trust estate to reimburse themselves for any balance that was due by it to them at that time, and which was included in the judgment. He also insists that he is entitled to an account from them for all the cotton, notes for negro hire, drafts on factors, etc., which they, at any time, received from J. M. Davis, and which were the proceeds of the trust estate; and he, also, insists that they are bound to account to him for at least two thousand six hundred dollars, as of the 8th of February, 1861, as a part of the corpus of the trust estate, that being the amount which they agreed to pay for Charlotte and her four children, and that, really, they ought to account for a larger amount under the allegation that they took the negroes for less than their real value; and he, also, insists that, in their dealings with J. M. Davis, after the death of A. M. McIver, in 1850, they should be regarded as having dealt with a stranger, and not the regularly authorized agent of the trust estate.

C. Coker & Brother, in the first place, interpose the objection to all the claims of the complainant that, by the terms of the deed from Colonel Williams to A. M. McIver, the

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proceeds of the estate *were to be paid over to Jane F. Davis, without imposing any trusts, and, upon that being done, the marital rights of the husband attached, and that he had the right to dispose of them in such manner as he thought best. To this view of the case I cannot give my assent; for in requiring A. M. McIver to take her receipt therefor, "during the joint lives of herself and husband," clearly implied that she was to have an estate in the same limited to her sole and separate use.—Wilson v. Bailor, 3 Strob. Eq., 261 [51 Am. Dec. 678].

From the evidence before the Court, I am of the opinion that the advances made by C. Coker & Brother for the support of Jane F. Davis and her family, for the education of the children, for the payment of doctors' bills, and for supplies furnished for carrying on planting operations from the time the dealings between the parties commenced until 1861, when they end, amounted to more than all the proceeds of the trust property which went into their hands, and I cannot, therefore, order a general accounting, unless I were to do it on the ground that the provisions of the trust deed had not been strictly complied with. It is true that the agency

of J. M. Davis was revoked by the death of A. M. McIver, and that the receipts of Mrs. Davis were not taken, as required, by the deed; but Mrs. Davis was cognizant of the transactions between the parties, and by her own conduct sanctioned them, and it would be a fraud upon the rights of C. Coker & Brother to treat all their transactions with J. M. Davis, since 1850, and even before that, as void, which the Court will not do.

From a careful examination of the pleadings and evidence, I am satisfied that the whole purchase money for the land was paid by C. Coker & Brother, except it may be that a portion of the second installment was not, and the doubt on this point is created by the evidence of C. Coker himself, and the matter will have to be referred to the Commissioner. From the evidence before me, I cannot regard the purchase of the land as one made by the trust estate, though I have no doubt but J. M. Davis made the purchase, supposing that, with the surplus proceeds of the estate, he would be able to pay for it, and that the cestuis que trust would be thereby benefited, and I do not hold that the debt against the trust estate was satisfied by C. Coker & Brother taking a judgment against J. M. Davis for the same. It was only taking a collateral security from a third party for the debt. Are the defendants, C. Coker & Brother, entitled to have the possession of the plantation surrendered to them? I think

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not; for the whole transaction *shows that the understanding between the parties was that the land should be held by them as a security for their money, and that being the case, they can only hold as mortgagees.

C. Coker & Brother purchased Charlotte and her four children for two thousand six hundred dollars, which the bill alleges was less than their real value, but the evidence does not sustain the allegation; knowing, at the time the purchase was made, that they were subject to the trusts of the deed, and endeavoring, as far as they could, without applying to this Court, to obviate that difficulty, to what extent did they succeed? The presumption of fact is that J. M. Davis, having executed a deed for the negroes, will, by his last will and testament, make good his conveyance by bequeathing the trust property to such of his children as have renounced their interest in Charlotte and her children, but the rights of Mrs. Davis, under the trust deed, cannot be defeated by the conveyance of her husband and her children; and, if the negroes were still slaves, she might recover their hire, or, if it were more beneficial to her, the purchase might be confirmed, and she might recover her interest in the same from the time of the sale. The negroes having been emancipated, and Mrs. Davis and her infant son being the only parties interested in the result, the Court makes the election for them, and confirms the sale

made by J. M. Davis in 1860, and directs that C. Coker & Brother do pay for her benefit whatever the hire of the said negroes may have been worth from the 8th day of February, 1861, to the 1st day of May, 1865, when they were emancipated; and, also, that, from the 1st day of May, 1865, they do pay for her use the interest on two thousand six hundred dollars, with interest from the end of each year, and that they continue to do the same so long as both J. M. Davis and Mrs. Davis may continue to live; and if she should die before J. M. Davis, then that they do annually pay, for the benefit of Charles A. Davis, the sum to which he shall be entitled, under the terms of the deed, until the death of his father, and that their liability shall not extend beyond the limits above indicated.

It is ordered and decreed that the above opinion be taken as the judgment of the Court.

It is also ordered and decreed that it be referred to the Commissioner to ascertain and report the different amounts paid by the said C. Coker & Brother for the plantation which J. M. Davis purchased from S. Parrott, including the first payment made by J. M. Davis with funds furnished by C. Coker &

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Brother, but excluding any means furnished by J. M. Davis with which to pay the second installment of the purchase money, without he has credit for the same heretofore; and, also, the interest that may be due on the different payments.

It is also ordered and decreed that it be referred to the Commissioner to ascertain and report what the hire of Charlotte and her four children was worth from 8th February, 1861, to 1st May, 1865, with interest calculated from the end of each year, on the hire for that year; and, also, the amount of interest now due on \$2,600 from the 1st of May, 1865, with interest calculated from the end of each year on the interest of that year. It is also ordered and decreed that further orders may be taken at the foot of this decree, and that the Commissioner be at liberty to report any special matter.

It is also ordered and decreed that C. Coker & Brother do pay the costs of the complainants, Jane F. Davis and Charles A. Davis, and that the other parties do pay their own costs.

The plaintiff appealed, and now moved this Court for a modification of the decree in the particulars, and on the grounds following, to wit:

1. Because a general accounting on the principles of the decree itself should have been ordered by the Messrs. Coker for all the trust funds which they received from the death of the original trustee, Alexander M. McIver, Esq., inasmuch as the cestui que trusts were under disabilities, which, as well as the trust, were well known from the be-

ginning to the Messrs. Coker, as well as the insolvency of the party with whom they dealt, otherwise the trust deed must be deemed a nullity.

2. Because no power can change the terms of a trust while it remains unexecuted, short of the power of a Court of Equity, and then only on a case made. The trust property remains trust property as long as the trust remains, and parties with notice of the trust are trustees, who take it otherwise than by its terms, or an order of Court, whether for one year or fifty.

3. Because the statute of limitations cannot run against those disabled by coverture or infancy, and the vacancy in a trusteeship can furnish no presumption that the trust is executed. Parties under disability are not to lose their rights by presumption of benefit, or even because they do receive some aid. Their very disability commend their rights to the protection of the Court. From the day of the death of the original trustee to the day

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of the appointment of another, the Court stood open. This defendant knew. They preferred to treat with an insolvent husband and father and take the chances. They must abide the consequences, and not those who were disabled in law and equity to protect themselves.

4. Because the Simon Parrott land should have been decreed to be trust property, inasmuch as the Messrs. Coker received in payment for it any and all advances they made, in trust funds largely more than enough to pay them.

5. Because the judgment confessed to them by J. M. Davis satisfied all their claims, even against the trust estate, if they had any.

6. Because they (the Messrs. Coker) should account for all interest on moneys received for the sale of trust negroes from the day of the sale to them.

C. Coker & Brother also appealed, and now moved this Court to reform and modify the decree in respect to the objections herein suggested, and on the grounds following, to wit:

1. Because, it is respectfully submitted, the Chancellor erred in decreeing that the Messrs. Coker should pay interest on the purchase price of the slaves, Charlotte and her children, after their emancipation, to Jane F. Davis and her infant son, inasmuch as the purchase price was applied to the reduction of the debt created for the benefit of Jane F. Davis and family, and the trust estate, leaving the balance of said debt, which is on interest, greater than can be paid from the security held by the Cokers, or from any other source—the cestui que trusts, meanwhile, enjoying the possession and use of the plantation pledged to secure said debt.

2. Because that part of the decree which requires the Messrs. Coker to pay interest on the purchase price of the slaves, after their

emancipation, is in conflict with the Constitution of the State.

3. Because His Honor erred in decreeing that any accounting should be had against the Messrs. Coker, and especially in excluding them from the benefit of any amount furnished by J. M. Davis in making the second payment on the land, inasmuch as the means furnished by him, if any, were such as he had a right to use in paying the debt due them, or in securing the debt.

4. Because the Chancellor should have decreed a sale of the premises, on which he decided the Cokers held an equitable mortgage, and ordered the application of the proceeds towards the payment of the mortgage debt.

5. Because rents and profits of the planta-

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tion should have been *decreed to the Cokers, at least from the time the complainant enjoined them against the means of availing themselves of their security.

6. Because, their principal grounds of complaint being decided against the complainant, the equities being entirely in favor of the Cokers, His Honor erred in decreeing that they should pay the costs of complainant and of Mrs. Davis and son—being, in fact, all costs.

Spain, for the plaintiff.

Edwards, McIver & Moore, for C. Coker & Brother.

Sept. 30, 1870. The opinion of the Court was delivered by

MOSES, C. J. We concur with the Chancellor, that the interest of the wife, Jane F. Davis, under the terms of the deed, is to her sole and separate use.

To create such an interest, it is sufficient, if a plain intention appears, to exclude the husband from its legal ownership. Technical words are not necessary if there is enough to show, by clear expression, that the purpose was to deprive him of that title, which, in the absence of such intention, he would acquire by virtue of his marital rights. A direction inconsistent with his full ownership of the property will be as potent to protect her in the separate enjoyment, as if the most express terms were employed to that end.

Where, therefore, the instrument establishing the trust makes the receipt of the wife a sufficient discharge, the employment of those words is held to confer a sole and separate estate.—*Lee v. Prieaux*, 3 Br. C. C., 381; *Tyler v. Lake*, 2 Russ. & M., 183; *Wilson v. Bailor*, 3 Strob. Eq., 261 [51 Am. Dec. 678].

The deed did not, in any manner, restrict the wife in the appropriation of the proceeds of the hire or labor of the slaves. They were not to be held by her subject to a particular power of disposition, either by appointment or otherwise. Her use of them

was not limited to any special provision, and she is to be regarded, in respect to the control of the income secured to her separate use, as a feme sole.—*Ewing v. Smith*, 3 Des., 417 [5 Am. Dec. 557]; *Dunn, et al., v. Dunn, et al.*, 1 S. C., [350]; *Metho. Epis. Church v. Jaques*, 3 John. Ch., 113. Although the agency of the husband, John M. Davis, ceased upon the death of Alexander H. McIver, the trustee, still the legal title to the property was in his personal representative. "Trusts expressly created, when of personalty, on the death of the trustee vest in his executors or administrators."—*Willis on*

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*Trustees, 53; *Hill on Trustees*, 303. Whether Davis continued to manage the trust estate after the death of McIver, with the express authority of his personal representative, or whether, without any interference on his part, he remained in the supervision and direction of it, as he had in the lifetime of the original trustee, does not appear. While Davis and his wife were both alive, no one was entitled to the proceeds or profits of the property, but the cestui que trust, the said Mrs. Jane F. Davis. During all the transactions between her husband and the defendants, C. Coker & Brother, of which, according to the Circuit decree, she had full knowledge, she did not take a single step within her competency, as a married woman with a sole and separate estate, to arrest the course of her husband with respect to her settled interest, but, on the contrary, sanctioned it by her conduct. From the execution of the deed in 1842 to 1861, the same manner of dealing was conducted between the parties, and to make the Messrs. Coker now responsible for so much of the payment to them of the proceeds of the hire or labor of the slaves, the subject of the trust estate, which their advances, in a great part, tended to aid and sustain, would not be consistent with the principles of honesty and fair dealing which Courts of Equity encourage and enforce.

It cannot be pretended that if the proceeds of the trust property had been paid over to Mrs. Davis by her husband and her receipt therefor taken, that she was incompetent to transfer them to him to deal with at his pleasure.

If the trusteeship had ever been vacant, and the husband dealt with the estate as his own, he would be treated in equity as a trustee for the benefit of the wife.—*Hill on Trustees*, 420.

If Davis, the husband, is to be considered as a trustee de son tort, by having, of his own will, intermeddled with the management of the trust, he would be subject to the same rules and remedies which obtain as to constructive trustees.—*Hill on Trustees*, 173.

When such a trustee has complied with all the requisitions of the deed or will which devolved on the party in whom the legal title was intended to have been vested, he could

not be called to answer anew, if he had already done all which could have been demanded of a rightful trustee, for then there would be nothing of which the cestui que trust could properly complain.

The proof leaves no doubt of the fact that the Messrs. Coker had notice of the deed, and of the death of McIver, and they are therefore to be considered in the position of

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those interfering with trust *funds, with knowledge of the source from which they were derived and the purposes to which they were appropriated.

The condition, however, in the deed, which required the receipt of Mrs. Davis on the payment to her of the proceeds, was intended to protect the wife against the legal rights of the husband, by securing to her sole and separate enjoyment the usufruct of the property. Its aim and object were to subject to her use the proceeds of the labor of the slaves, with unrestrained power, on their receipt, to dispose of them, if she so desired, in favor either of her husband or a stranger. A technical adherence to the terms of the deed could do no more than ensure the payment of the proceeds to her, that she might have uncontrolled use of them. The deed in no way undertook to regulate or restrict her disposition, and, if the end which it was intended to accomplish has in fact been attained, it would not be consistent with any rule of equity or justice to convert what was intended as a security for her into a medium through which she could perpetrate a fraud upon others.

The evidence impressed the Chancellor, as it does this Court, with the fact of full cognizance, on the part of the wife, of all transactions between her husband and the Messrs. Coker in regard to the annual transfer of the crops and the cash and notes received for the hire of the slaves, in consideration of the advances and supplies furnished by them. Whether, beyond their necessity for the support of the trust property, there would be thereby acquired any claim against it, seems to be fully settled by the decisions of the former Appellate Court of this State. That question, however, is not involved in the ground on which we base our judgment here.

Mrs. Davis, in her testimony, states that, after the death of McIver, her husband managed the trust estate in the same manner as he had done in his lifetime. From 1842, when the deed was executed, up to 1861, there was the same character of dealing; and, during this whole period, if the wife was not aware of the application of the annual proceeds, it is strange that she never called for their payment to her. In fact, to use her own language, "she looked upon Mr. Davis as much her agent as Mr. McIver looked upon him as the party authorized to manage the business all the time."

We are not considering here the right of

this cestui que trust, being covert, to constitute an agent when the power is not specifically given; for if she, without such authority,

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could re-nominate *her husband, she could as well name a third person, and without a special grant of the right she could appoint neither.

We have already said that her control of the proceeds, when received by her in conformity with the stipulations of the deed, enabled her to make her husband the beneficiary of them. Even where the married woman is considered, in regard to her separate estate, as a feme sole, only to the extent of the power conferred by the instrument, if this does not restrict her disposition and alienation—if she permits the husband to receive the rents and profits of her estate—the presumption is that it is with her assent and by way of gift.—Hill on Trustees, 425, and note 2.

In *Methodist Episcopal Church v. Jaques*, 3 John. Ch., 80, Chancellor Kent says, in reference to this question, "that, as between strangers, a more strict and severe proof would be required; but the books teach us that the greatest liberality is shewn, and the most favorable presumptions indulged, where the husband is permitted by the wife to be concerned in the management of the income of her separate estate as it occasionally accrues."

The point of gift does not arise here, for the husband prefers no claim, through such title, to the annual proceeds; but this long continued dealing between him and the Messrs. Coker, in respect to them, sanctioned by knowledge and acquiescence, precludes any right on the part of the plaintiff, the substituted trustee, to call upon them for an account in her behalf.

The bill in regard to the rights of the wife, as to the annual proceeds, is not entitled to favor. It is not framed in an aspect that recommends it to any consideration beyond that which the mere principles which it seeks to enforce demand. The wife has preferred no claim through a next friend; but the substituted trustee is the plaintiff complaining, and she and her husband and children are made parties defendant. Neither she nor they, (save the minor child,) file any answer; but on the subpoena is the following endorsement, subscribed with their respective names: "We accept service of this writ, admit the worth (a) of the statements in the bill contained, waive time, and consent that the prayer in the said bill shall be granted."

It is a proper occasion to say that this practice is not to be encouraged. A defendant called in by bill must answer in proper form, or take all the consequences which a default in obeying the requisitions of the writ will entail. If he proposes to answer, it

(a.) "Sic." in brief: "Truth," it is presumed, was the word used.

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*must be according to the forms prescribed by the rules and usage of the Court.

The view which we have taken of the points made, so far as already considered, preclude the right of plaintiff to a general account of the funds alleged in the bill to have been received by the defendants, the Messrs. Coker, of the said J. M. Davis, or to a transfer or conveyance of the Parrott land.

We concur with the Chancellor in holding that the Messrs. Coker are not entitled to the land. The whole transaction places it beyond doubt, that it was to be held as a security for the debt to them. They can claim nothing more than an equitable mortgage of it, and a sale of the premises, which will be directed.

We also concur with the Circuit decree in holding that the judgment confessed by Davis was no satisfaction of the debt due them on account of their advances for the payment of the land. Even if in a Court of law it could be so ruled, when it plainly appears that in taking it there was no intention to change or affect their rights as to the money advanced, or their remedy for the debt due them on its account, equity will not regard that as satisfaction which the parties themselves, on both sides, did not intend so to operate.

In *Gardner v. Hust*, 2 Rich., 601, it was held, that "the taking of a higher security, if accepted as satisfaction, extinguishes a lower one for the same debt; and the law, it seems, will imply, in the absence of proof to the contrary, that the higher security was taken as satisfaction; but if it be made to appear that it was not taken as satisfaction, then it will be merely additional or commutative security."

If the claim of the Messrs. Coker to the land is only by and through an equitable mortgage for the security of the money advanced in the purchase, it cannot be regarded as merged in the judgment, or waived by it. In fact, if Davis was utterly insolvent when the confession was given, as the bill alleges, the mortgage is not only a better, but a higher security. Through the judgment the land could not be reached while it can be available to respond to the mortgage by the lien which it holds.

The instrument executed by the Messrs. Coker & Brother, to the said Davis, on the day of the taking of the confession, referring to the stipulation of time when payment was to be demanded, expressly declares, "that nothing in the said instrument is to waive our right to claim any and all such property or money as may now be liable for the said debt."

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*This recital brings the question within the principle declared in *Twopenny v. Boys and Young*, 3 B. & C., 208, and *Sally v. Forbes and Ellenman*, 2 B. & A., 38.

The claim of the plaintiff, as to the negro Charlotte and her four children, is affected by other considerations. They were of the corpus of the estate, and after the death of Jane F. Davis, in the lifetime of her husband, the proceeds are to be applied to the maintenance and education of the children, and on the death of the husband they were to be conveyed and delivered to such of his children as he might indicate by his last will and testament. All of the children have renounced and assigned to the said Messrs. Coker their interest in the said slaves so sold, save the minor son, Charles A. Davis.

If Melver, the original, or any lawfully substituted trustee, had sold Charlotte and her children to one having notice of the deed, the sale would have been invalid. Much more is it so when made by one in no way invested with the legal title. The *cestuis que trust* interested are the married woman and the infant. On their behalf the Circuit Court, in and by its decree, has elected, for their benefit, to confirm the sale. When the Messrs. Coker bought, they well knew that the vendor had no power to sell. They assumed all the risk of defect of title, and it would not be equitable now to permit them to renounce the purchase, because the slaves were afterwards emancipated. One knowingly dealing with trust property to the prejudice of those for whose benefit it was held, must stand to his bargain, unless they insist on defeating it. With what grace could a purchaser ask to set aside a sale on the ground of a supposed defect of title, afterwards arising, when he knew, at the time it was made, the vendor could convey no title?

When the sale was confirmed by the decree, all the incidents attaching to such a transaction must necessarily follow. One of these is the liability of the buyer for the purchase money and interest. The Chancellor, therefore, erred in discriminating between the right of the *cestui que trust* to the value of the hire of the slaves to the date of their freedom, and from that period to the interest on the sum at which they were sold. If the title is held to have been in the Cokers, the trust estate could not be entitled to the value of their labor. The interest must therefore be allowed.

If, in fact, as alleged in the answer, a part of the consideration of the said slaves was four mules at five hundred dollars, received by the trust estate, and of which it had the

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benefit, the Messrs. *Coker would be entitled to a credit for that amount. It would not be just, or even reasonable, to require them to pay the interest on the price of the slaves (for the benefit of the parties now alone interested in the trust), and allow them to enjoy the past and future profit of the property thus substituted. The Chancellor, however, in his decree, does not express his

judgment as to the fact, and we are not, therefore, prepared to apply the equitable principle expressed. An opportunity must therefore be allowed the Messrs. Coker to introduce testimony on the point, with full right to the plaintiff to controvert it.

The Circuit decree is affirmed, except as it is changed or modified by this opinion.

It is ordered and adjudged that the case be remanded to the Circuit Court for the County of Darlington, that the said Court may direct an account to be taken of the several amounts paid by the said C. Coker & Brother, for the plantation described in the pleadings as purchased from S. Parrot, including the first or any other payment made by the said J. M. Davis, with funds furnished by them, and the interest due on the respective payments. That a sale of the said premises be made, under the order and direction of the said Court, and the amount so found due to the said C. Coker & Brother be first paid to them from the proceeds, and the balance of the proceeds (if any) to be held subject to the further order of the said Court. That the said Court do also direct an account to be taken of the interest on the purchase money of said slaves so sold, to wit, the sum of \$2,600, from February 8, 1861, with interest from the end of each year on the interest of that year. That this being ascertained, the said C. Coker & Brother be decreed to pay the same to the said plaintiff, or to the said Jane F. Davis, on her receipt, and that they further pay her annually, on her receipt, the interest on the said purchase money, from the day to which the account may be brought down, during the joint lives of herself and husband, J. M. Davis.

Should the said Jane H. Davis die before her said husband, then the said Charles A. Davis, if living, is to be at liberty to apply to the Circuit Court, under this bill, for the payment by the said C. Coker & Brother of whatever proportion of interest on the price of the said slaves he may be entitled to by the terms of the said deed.

The Circuit Court will, also, by its order, enquire and ascertain whether four or any other number of mules were received in part payment of the sale of Charlotte and

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children, and at what price, *and if the trust estate got the benefit of the same. In the event of the conclusion in favor of the said C. Coker & Brother, in these particulars, it will direct that they have a credit for the sum so found, with interest from the day of the sale, on the amounts herein decreed to be paid to the said plaintiff, or the said Jane F. Davis.

Decree modified.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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BIGGERS MOBLEY v. T. K. CURETON
and Others.

(Columbia. April Term, 1870.)

[Equity ⇨87.]

To a bill in equity to enforce a purely legal demand the Statute of Limitations is inapplicable, if it would be inapplicable to an action at law upon the same demand.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. ⇨87.]

[Descent and Distribution ⇨143.]

The Statute of Limitations being inapplicable to an action at law against the heirs of an intestate, to recover a specialty debt of the intestate, it cannot be pleaded to a bill in equity against the heirs to subject real estate descended to the payment of a debt due by sealed note. If, however, the plaintiff in such a bill has been guilty of laches, the Court may refuse him its aid and bar the equitable remedy at a period short of that which would raise the presumption of payment.

[Ed. Note.—Cited in *Cleveland v. Mills*, 9 S. C. 437; *Lanier v. Griffin*, 11 S. C. 581, 584; *Campbell v. Sloan & Seignious*, 21 S. C. 308; *Gregory v. Rhoden*, 24 S. C. 94, 99; *Brook v. Kirkpatrick*, 60 S. C. 346, 38 S. E. 779, 85 Am. St. Rep. 847; *Brantley v. Bittle*, 72 S. C. 189, 51 S. E. 561; *Tucker v. Weathersbee*, 98 S. C. 410, 82 S. E. 640.

For other cases, see Descent and Distribution, Cent. Dig. § 503; Dec. Dig. ⇨143; Equity, Cent. Dig. § 204.]

[Descent and Distribution ⇨143.]

Real estate of an intestate was partitioned among his heirs in 1855, a large amount of assets being left in the hands of the administrators to pay the debts. On a sealed note of the intestate, due in 1854, judgment by default was recovered against the administrators in 1860. Execution was issued and lodged with the Sheriff, but nothing more was done to enforce payment until 1868, when this bill was filed to subject the real estate in the possession of the heirs to the payment of the debt. Both the administrators had died insolvent not long before the bill was filed: *Held*, that the plaintiff was barred by his laches of his remedy in equity, and the bill was dismissed without prejudice to plaintiff's right to pursue the heirs by action at law.

[Ed. Note.—Cited in *Wheeler v. Floyd*, 24 S. C. 421; *Brook v. Kirkpatrick*, 72 S. C. 505, 52 S. E. 592.

For other cases, see Descent and Distribution, Cent. Dig. § 503; Dec. Dig. ⇨143.]

[Executors and Administrators ⇨438.]

[Cited in *Lowry v. Jackson*, 27 S. C. 322, 3 S. E. 473, to the point that in equity the administrator is a necessary party.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765-1785, 1790; Dec. Dig. ⇨438.]

Before Thomas, J., at Lancaster, October Term, 1869.

Thomas K. Cureton, the elder, died intestate on 3d July, 1854, leaving a large estate, real and personal. His heirs and distributees were his widow, Eliza R. Cureton, and his five children, James E. Cureton, Thomas K. Cureton the younger, Samuel J. Cureton, Virginia Cureton, and Eliza J. Cureton—the three last named being minors. Samuel B. Massey and James E. Cureton

became his administrators. Shortly after the death of the intestate proceedings in equity were commenced for partition of his

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estate, and in December, 1854, a writ for that purpose was issued. Under this writ a large portion of the lands, consisting of several plantations and one hundred and twenty slaves, were divided between the widow and children, and on the 26th June, 1855, the return to the writ was confirmed by the Court.

A large amount of assets, consisting of thirty-seven slaves, valued at from \$20,000 to \$25,000, horses, mules and farming implements of the value of \$10,000, ten thousand bushels of corn, worth \$1 per bushel, pork valued at \$2,000, and grain and fodder, valued at from \$1,600 to \$2,000, was not divided, and remained in the hands of the administrators to pay debts. Some three hundred and fifty or four hundred bales of cotton, or the proceeds thereof, and a large amount of debts due the intestate, were also retained by the administrators for the same purpose.

A portion of the real estate of the intestate was also left undivided. This was afterwards sold under an order of the Court made in a cause wherein the administrators were plaintiffs and the heirs-at-law were defendants, and by a further order, made in the same cause in June, 1859, the proceeds of the sale, amounting, on the 8th January, 1860, to \$13,685.03, were turned over to the administrators, they giving bond with sureties for the due application of the same.

On the 22d May, 1859, the administrators filed another bill against the heirs of the intestate. It was entitled a bill for contribution and relief, and seems to have been filed to subject some of the assets in the hands of defendants therein to the payment of debts. The record in this case was destroyed.

The intestate was indebted, at the time of his death, to the plaintiff, Biggers Mobley, by sealed note, in the sum of \$1,373.88. This note bore date February 23, 1854, and fell due March 18, 1854. The interest thereon was payable annually. The administrators made three small payments on the note, amounting, in the aggregate, to \$150, but failing to pay the balance, the plaintiff, on the 3d March, 1860, commenced an action at law thereon against them, and no appearance being entered he recovered judgment by default, at Fall Term, 1860. The judgment was for \$1,959.53, besides costs. It was entered 16th October, 1860, and on the same day execution against the administrators was issued and lodged with the Sheriff.

Samuel B. Massey, one of the administrators, died intestate, and utterly insolvent, in November, 1866, and John M. Beaty sued out letters of administration on his estate.

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James E. Cureton, the other administrator, also died intestate and insolvent, in July, 1868.

The plaintiff's execution having been renewed on the 19th October, 1866, was returned nulla bona on the 19th November, 1868.

Eliza R. Cureton, the widow of the intestate, died in 1862, leaving a will, by which she appointed Thomas K. Cureton, the younger, executor. He proved the will, and qualified thereon.

Virginia, one of the daughters of the intestate, intermarried with Francis D. Green; and Eliza J., the other daughter, intermarried with James M. Green.

The bill in this case was filed on the 28th November, 1868, against Thomas K. Cureton, the younger, Samuel J. Cureton, Francis D. Green and Virginia his wife, James M. Green and Eliza J. his wife, and John M. Beaty, and its object was to subject the real estate which had been partitioned in 1855 to the plaintiff's debt.

The principal grounds of defence were the Statute of Limitations and the laches of the plaintiff, in failing to pursue the administrators with reasonable diligence.

His Honor the presiding Judge held that the plaintiff's demand against the heirs of the intestate was "only an indebitatus assumption;" he, therefore, sustained their plea of the Statute of Limitations, and dismissed the bill.

The plaintiff appealed, and now moved this Court to reverse the decree of the Circuit Judge, and grant the relief prayed for in the bill, on the grounds:

1. Because the plaintiff's claim was not barred by the Statute of Limitations.

2. Because the plaintiff was entitled to the relief he sought against the heirs-at-law of Thomas K. Cureton, deceased.

3. Because, in any event, plaintiff was entitled to a decree against the administrator de bonis non of T. K. Cureton, deceased.

4. Because the decree was founded in error as to the facts in evidence, in this: That the bill for contribution, on the part of the administrators, referred to in the decree as still pending, was abated by the death of James E. Cureton, surviving complainant, and was so marked at the February Term, 1869; and that the same was filed May 22, 1859, within four years after the order confirming the partition, and not in 1860, as stated in the decree.

Kershaw, for appellant:

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*Is the Statute of Limitations a bar? Plaintiff argues that it is not:

1. Because the cause of action is a specialty, and twenty years had not elapsed. The analogy is to an action of debt on a specialty. —3 Bac. Abr. Tit. Heir and Ancestor (F) pp. 25, 26; Stat. 5, Geo. 2, ch. 7; 2 Stat., 571; Stat. 3 and 4, W. & M., ch. 14, (2 Stat., 534); Vernon v. Valk, 2 Hill Ch., 259; Cumming v. Berry, 1 Rich. Eq., 114; Smith v. Smith, McM. Eq., 126; McMullen v. Brown, 2 Hill Ch., 466; Fripp v. Talbird, 1 Hill Ch., 144; Singleton v. Moore, Rice, 128, 130.

2. The analogy is not with the action of "indebitatus assumpsit." In that class of cases there is no direct right to action against the party, legatee or distributee.—*Trescott v. Trescott*, 1 McC. Ch., 417; *Buckhan v. James*, *Speer's Eq.*, 376; *Brewster v. Gillison*, 10 Rich. Eq., 437; *Miller v. Mitchell*, *Bail. Eq.*, 441; *Massey v. Massey*, 2 Hill Ch., 496; *Alexander v. Williams*, 2 Hill, 522; *Fisher v. Tucker*, 1 McC. Ch., 176; *Beckford v. Wade*, 17 Ves., 97; *Bird v. Houze*, *Speer. Eq.*, 250.

Moore, for Samuel J. Cureton:

1. The defendant, Samuel J. Cureton had been in the peaceable adverse possession of the land derived from his father for more than ten years. This possession would have conferred title as against the strongest paper muniments of title in another.—*Acts of 1712*, 2 Stat., 584; and 1824, 6 Stat., 238. A fortiori where there is nothing to oppose but a mere implied trust. His title would have been perfect even if the land had been bound by the lien of a judgment.—*Lamar v. Raysor*, 7 Rich., 511.

2. His position is that of an executor who has settled up an estate without notice of a claim. It is in the nature of a demand upon him to refund; to which the Statute of Limitations is a bar after four years.—*Miller v. Mitchell*, *Bail. Eq.*, 441.

3. He was not bound by a judgment against the administrators.—*Vernaud v. Valk*, 2 Hill Ch., 257.

4. His land, being in his exclusive possession, could not have been levied on and sold under execution against the administrators.—*Bird v. Houze*, 1 *Spear. Eq.*, 253.

5. He held the land, subject merely to an implied trust, to pay the debts, which, after the lapse of four years, was barred.—*Buchan v. James*, *Spear. Eq.*, 382; *Alexander v. Wil-*

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hams, 2 Hill, 522; **Massey v. Massey*, 2 Hill Ch., 496; *Tucker v. Tucker*, 1 McC. Ch., 176; *Miller v. Mitchell*, 1 *Bail. Eq.*, 437.

6. A bond creditor no exception to the rule. Four years a bar to a claim by a creditor against a legatee whose creditors have been called in under a bill.—*Brewster & Dickinson v. Gillison*, et al., 10 Rich. Eq., 435.

Personal estate primary fund for the payment of the debts. Where a surety to an administration bond had paid a debt, it was held that he could not resort to the real estate to be refunded.—*Richardson v. Inglesby*, 13 Rich. Eq., 60.

Allison, for J. M. Green and wife, and F. D. Green and wife.

1. Appellees took, and they now hold, the property derived by them from the estate of T. K. Cureton, by virtue of the decree for partition, and they have had vested rights, by the effect of said decree, in said property, ever since the 5th of December, 1854. *Huson v. Wallace*, 1 Rich. Eq., 1.

2. The claim attempted to be set up by the appellant is now (after the lapse of fourteen

years since the property was vested by the said decree) barred by the Statute of Limitations.—*Buchan v. James*, *Speer Eq.*, 375; *Brewster v. Gillison* and others, 10 Rich. Eq., 435; *Massey v. Massey*, 2 Hill Ch., 476; *Alexander v. Williams*, 2 Hill Ch., 522; *Fisher v. Tucker*, 1 McC. Ch., 176.

3. The debt of appellant is not a bond debt against the distributees and heirs-at-law of T. K. Cureton, deceased; but their liability arises from the doctrine of the common law as to indebitatus assumpsit for money had and received. And if they hold the property under trust, the trust is merely implied and liable to the bar of the Statute of Limitations.—*Buchan v. James*, *Speer*, 375, and *Brewster & Dickson v. Gillison*, 10 Rich. Eq., 437.

The distributees hold the property by virtue of the decree of the Court aforesaid, which must, on direct application, be vacated before the appellant can have any right to establish his demand; and it is now too late to do this, more than four years having elapsed since the decree was made.—*Brewster & Dickson v. Gillison*, 10 Rich. Eq., 437; *Clark v. Jenkins*, 3 Rich. Eq., 339; 1 Rich. Eq., 6; *Bailey Eq.*, 468.

5. The argument of appellant that his bill is a mere continuation of the bill by the administrators of Cureton, (which abated,) is fallacious. A continuance to prevent the bar of the statute, must be a continuance of the same suit or action from first to last, and a

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several writ is not a continuance of a joint writ. See *Chapman v. Mayrant*, 2 *Speer*, 584; *Ex parte Hanks*, *Cheves*, 203.

Nov. 15, 1870. The opinion of the Court was delivered by

WRIGHT, A. J. The Statute of Geo. II, (2 Statutes at Large, 571,) makes land liable to and chargeable with debts by simple contract and specialty "in like manner as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty."

If the action on the bond here had been at law against the heir it would not have been barred, except from the presumption of payment arising from the lapse of twenty years, or a shorter period, with such circumstances as would contribute to strengthen it.

To prevent circuity of action, and particularly where there may be several heirs, having estates of different value, all derived from the same source, Courts of Equity take jurisdiction by allowing the creditor to call on the heirs who had lands descended, so that the administrator who held assets sufficient for the payment of the debt might make satisfaction to the heir of the amount he may be found bound to pay. Personal assets being first liable for the debt of the ancestor, the heir may require a reimbursement from the fund primarily answerable.

The Court of Equity, in the administration

of its exclusive jurisdiction, does not consider itself tied down by the strict rules which apply in a Court of common law in regard to the Statute of Limitations. It adopts them, however, where the principles on which they are founded satisfies it that they should be entertained, and they are then by analogy applied.

When the demand, however, is purely a legal one, but so affected with equitable considerations that it is bound, according to its practice, to take cognizance of the whole case presented, it applies the statute "in the same manner as a Court of law would apply it if the debt were sued in that tribunal."—*Cumming v. Berry*. 1 Rich. Eq., 121.

The demand of the plaintiff is on a sealed note of the intestate, executed in February, 1854. The Circuit Judge, in his decree, held that, as against the heirs, the claim was only an *indebitatus assumpsit*, and, therefore, barred by the Statute of Limitations.

The decisions cited by the counsel for the appellees, in the argument here, have relation to an entirely different class of cases. Where the creditor never had an immediate right

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of action against the legatee or distributee, but, having exhausted his remedy against the personal representative, is allowed to set up his equity against such legatee or distributee holding property to which, *ex equo et bono*, he is entitled. The case of *Brewster & Dickson v. Gillison*, 10 Rich. Eq., 435, which is the last reported in our State on the subject, and which was among those so quoted, decides no more than that the right of the creditor to subject the property in the hands of the legatee to the payment of his debt, is barred, if the legatee has had exclusive possession for four years. There never was a right of action at law against the legatee on the bond, but there is such right against the heir.

The Chancellor delivering the judgment of the Court in the said case, says: "Their liability is not by bond, and arises only from their possession of estate as volunteers, which, in the hand of their testator, was liable for the payment of his debts before his donation could take effect." They were neither heirs or devisees. "The demand of the creditor against the legatees is a mere personal demand for money, and the same provision will apply that would bar such a demand at law."—*Miller v. Mitchell*, Bail. Eq., 441.

This Court does not concur with the judgment of the Circuit Judge, that the demand here against the heirs was only an *indebitatus assumpsit*, and that it was barred by the statute.

It does not follow, from this reversal of the said judgment in regard to the application of the statute by the Circuit Judge, that the plaintiff is entitled to the relief which he asks.

The primary fund for the payment of the

debts of a deceased is the personal estate. That must first be pursued in the hands of the personal representative, until exhausted, or until it appears that, by proper diligence on the part of the creditor, it cannot be made available for his demand. When, having no judgment against the heir, but holding one against the administrators, he asks the aid of equity to subject the lands held by the heirs to the payment of his said judgment, if it appears that his failure to make satisfaction of his debt has been the consequence of his own laches, without prejudice to his pursuit of the heirs as he may be advised on his sealed note in a Court of Law, the aid of the Court of Equity will not be extended to him.

What are the facts here? The intestate died on July 3d, 1854, leaving a large real and personal property. The note of the testator, held by the plaintiff, was due the March before. Samuel B. Massey and James E. Cureton administered on the estate, for

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the partition of which, in December, 1854, a writ was issued, the return to which was confirmed on June 26, 1855. The administrators were parties to the proceedings, and a large amount of property was, by the order of the Court, transferred to them for the payment of the debts. Included in the assets, which went directly to the administrators for this purpose, were thirty-seven negroes, horses, mules and farming implements, and which (independent of the negroes, whose value was proved to be from \$20,000 to \$25,000,) sold for about \$10,000. Besides the debts due the intestate, which went into their hands for collection, they received the proceeds of the cotton crop of 1854, which, with the portion of that of 1853 remaining, amounting in all to from 350 or 400 bales, if not more, 10,000 bushels of corn, worth \$1 per bushel, pork, valued at \$2,000, and grain and fodder, worth from \$1,600 to \$2,000.

With the view apparently of providing full and adequate means for the payment of the debts, the Court, by an order in a bill, entitled "*J. E. Cureton and S. B. Massey, administrators, v. Eliza B. Cureton, T. K. Cureton, et al.*," bill for sale of real estate, and to pay debts," made in June, 1859, directed the Commissioner to turn over to the said administrators certain bonds taken on sale of real estate of the intestate made by the Commissioner, aggregating, with interest to January 8, 1860, \$13,685.03, on their executing bond, with sureties for the due application of said proceeds; all of which was done.

The impression derived from the bill is, that the plaintiff had knowledge of these facts. Shortly after the death of the intestate, he gave notice of his debt to the administrators, and received some small payment on account, but did not bring suit against them until March Term, 1860, and

no appearance or plea being entered, he obtained his judgment in October, 1860, and lodged his *fi. fa.* on the 16th of that month.

Without proceeding under it to levy on any of the lands so allotted in severalty. (*De Urphey v. Nelson*, 1 Brev., 476; *Martin v. Latta*, 4 McC., 128.) which, at least, would have been notice to the heirs that a specialty debt of their intestate had not been paid by his administrators, and without any proceeding against the administrators, who had admitted sufficient assets by allowing the recovery of a judgment by default, to obtain a return of *nulla bona*, which would have been such evidence of a *devastavit* as would allow a resort to the administration bond, he remained inactive until, as he alleges, he was prevented by the force of the supposed stay

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law *from taking any further action. There was no such impediment in his way certainly from October, 1860, to December, 1861. In May, 1866, the stay law, under which he seeks excuse for his delay, was declared unconstitutional, and, therefore, void, the two administrators being both then alive. Up to Massey's death, in November, 1866, no proceeding was taken against him, nor any against his survivor, Cureton, who did not depart this life until July, 1868. After his death, a return of *nulla bona* was had in November, 1868, and immediately thereupon this bill was filed. Both the administrators died insolvent.

Chancellor Dunkin, in *Goodhue v. Barnwell*, Rice Eq., 239, says: "In *Vernon v. Valk and Wife*, 2 Hill Eq. 257, it was determined that a bond creditor might maintain his action in this Court against the heir-at-law. But the principle was distinctly recognized that, when the creditor comes into equity, it was requisite that the executor should be made a party." Why? Because the personal estate is the primary fund for the payment of the debts, and before the heir can be made to answer in this Court, he must have the opportunity afforded him to require an account from the administrator of that primary fund which is to respond to him in the event of his being required to pay the debt.

Here, since the judgment, no proceeding was had against the administrators in their lifetime, and there was nothing to prevent a resort to the Court of Equity from the lodgment of the *fi. fa.* to their death.

The plaintiffs can gain nothing from the fact that the administrators supposed themselves in advance for the estate, and, on 22d May, 1859, filed a bill against the heirs and distributees for contribution and relief, in which, apart from an order for an account, which, it appears, never was completed, if ever taken, no action was had until June, 1868, after the death of Massey, when an order, on motion of the surviving administrator was taken, referring all matters of

litigation to the umpirage of G. W. Williams, Esq. This suit abated by the death of Cureton, in 1868, and was never revived. The very fact of the pendency of the said bill, and the knowledge it communicated, was calculated to excite prompt and quick action by the plaintiff against the administrators and their sureties after he had obtained his judgment. Not only had he a remedy through the administration bond, but also through that which was given to the Commissioner in Equity when the proceeds of the real estate sold was turned over to the administrators in aid of the payment of debts.

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*If either party is to suffer from the difficulty of ascertaining who were the sureties to the administration bond, why should the consequences of that want of information prejudice the heirs? They never stood in a position to claim its benefit when the means of such information were at hand; while, on the other side, the plaintiff, if he had not allowed his judgment to remain inactive, even while there was no stay law in the way, could have brought his action on the bond, suggesting a *devastavit*, and thus all the results of the destruction of the bond and of the books of the Ordinary's office, in February, 1865, would have been avoided.

There was still another remedy open to the plaintiff, certainly to December, 1861, and which was probably unaffected by the stay law during the whole period of its supposed existence. What prevented the filing of a bill by the plaintiff, calling on the administrators to account, and making parties to it the sureties on the administration bond and the bond executed to the Commissioner on the receipt of the proceeds of the real estate sold by order of the Court, and turned over to the administrators, to be applied to the debts?—*Gayden v. Gayden*, McM. Eq., 435; *McBee v. Crocker*, *Ibid*, 485.

At the death of the intestate, besides his wife, he left five children, one of which was then sixteen years of age, another eleven, and another five. From the order confirming the partition to the filing of the bill over thirteen years have elapsed, and looking to the course of the plaintiff, marked, as it has been, with such laches, the aid sought from the Court of Equity cannot be accorded.

It is ordered and adjudged that, without prejudice to the plaintiff in any remedy he may be advised to pursue in a Court of law, his bill, so far as it seeks here to make the heirs of the late T. K. Cureton liable for his said debt, by reason of lands descended to them, be dismissed; each party to the cause paying his own costs as accrued up to this date.

That the bill be retained, so far as the plaintiff, or any other creditor now a party, or hereafter called in, may desire an account of the administration of the estate of the said T. K. Cureton, either from his

immediate administrators, or the administrator de bonis non, with leave to move the Circuit Court for Lancaster County for the orders necessary therefor.

MOSES, C. J., concurred.

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*THE STATE ex rel. THE ATTORNEY GENERAL v. HON. Z. PLATT, Circuit Judge.

THE STATE ex rel. THE ATTORNEY GENERAL v. N. G. W. WALKER, Sheriff.

(Columbia. April Term, 1870.)

[Statutes 39.]

On March 1, 1870, the General Assembly of the State passed an "Act to revise, simplify and abridge the rules, practice, pleadings and forms of Courts in this State." The 19th Section of the enrolled Act, to which the Great Seal of the State was affixed, and which was signed, in the Senate Chamber, by the President of the Senate and the Speaker of the House of Representatives, and received the approval of the Governor, provided that the Courts for the County of Barnwell should be held at Barnwell; but it appeared by the Journals of the two Houses of the General Assembly, that the same Section of the Bill, as it finally passed both Houses, provided that the Courts for that County should be held at Blackville. By the law, as it stood at the passage of the Act, the place last named was the County seat of Barnwell County. Held, that the 19th Section of the Act was void, and, consequently, that Blackville remained the County seat of Barnwell County.

[Ed. Note.—Cited in State ex rel. Attorney General v. Hagood, 13 S. C. 58.]

For other cases, see Statutes, Cent. Dig. § 42; Dec. Dig. 39.]

[Statutes 64, 285.]

The enrolled Act, duly authenticated as the Constitution prescribes, and approved and signed by the Governor, is not conclusive evidence of the terms of the Bill, as it passed the Houses of the General Assembly, but the Journals of the Houses, or other appropriate evidence, may be received, to show what those terms were; and, whenever it appears that the enrolled Act differs from the Bill as it passed, in a substantial matter, the Judiciary department of the State may declare the whole Act, or the part affected by the change, unconstitutional and void.

[Ed. Note.—Cited in State ex rel. Attorney General v. Hagood, 13 S. C. 56; Curtis v. Renneker, 34 S. C. 492, 13 S. E. 664; State v. Town Council of Chester, 39 S. C. 313, 17 S. E. 752; State ex rel. Lindsey v. Tollison, 100 S. C. 172, 84 S. E. 820.]

For other cases, see Statutes, Cent. Dig. §§ 58, 384; Dec. Dig. 64, 285.]

[Statutes 11.]

Every substantial part of a proposed enactment is a "Bill," within the constitutional sense of the term, and must pass through all the constitutional stages of enactment before it becomes law.

[Ed. Note.—Cited in State ex rel. Attorney General v. Hagood, 13 S. C. 53.]

For other cases, see Statutes, Cent. Dig. § 8; Dec. Dig. 11.]

[This case is also cited and overruled in State ex rel. Hoover v. Town Council of Chester, 39 S. C. 308, 17 S. E. 752; State ex rel. George v. Aiken, 42 S. C. 227, 20 S. E. 221, 26 L. R. A. 345.]

These were petitions to the Supreme Court for writs of mandamus: in the case first stated, to command the Hon. Zephaniah Platt, Circuit Judge of the second Circuit, to hold the Courts of General Sessions and Common Pleas for the County of Barnwell, at the town of Blackville, in said County; and, in the second case, to command N. G. W. Walker, Sheriff of said County, to keep his office, as Sheriff, with its books, records and papers, and office furniture, at the same place.

Under the provisions of two Acts of Assembly, one passed 2d March, 1869, (14 Stat., 202,) and the other approved 26th March, 1869, (14 Stat., 250,) the County seat of Barnwell County had been removed from the town of Barnwell, to the town of Blackville, in that County, previous to the 1st of March, 1870.

On the day last mentioned an Act entitled "An Act to revise, simplify and abridge the rules, practice, pleadings and forms of Courts in this State," was passed by the General Assembly of the State. It was duly enrolled, had the Great Seal of the State affixed to it,

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was signed, in the Senate Chamber, by the President of the Senate, and the Speaker of the House of Representatives, and was approved and signed by the Governor. It was divided into Parts, Titles, Chapters and Sections, and it contained 475 Sections. Part I, embracing the Sections from 9 to 91, both inclusive, related to "Courts of Justice and their jurisdiction." Part II, embracing the other Sections, except the first eight, related to "Civil Actions."

Part I, Title III, relating to "Circuit Courts," contained Section 19 of the Act, and this Section of the enrolled Act directed, inter alia, that the Circuit Courts for Barnwell County should be held at Barnwell, and this was the condition of the Act when it was filed in the office of the Secretary of State. In that office the word "Barnwell" was erased and "Blackville" inserted in its place, and with this alteration the Act was printed by the State Printer. "Blackville," therefore, appears in the printed copy of the Act as the place designated by law for holding the Circuit Courts for Barnwell County.

From the Journals of the two Houses of the General Assembly, it appeared that the 19th Section of the Bill, as it passed both Houses, designated "Blackville" as the place for holding the Circuit Courts for Barnwell County.

Upon the foregoing state of facts being brought to the notice of His Honor Judge Platt, Judge of the Second Circuit, to which the County of Barnwell was attached, he held that the question was concluded, by the terms of the enrolled Act; that "Barnwell" was the place fixed by law for holding the Circuit Courts for that County, and he made

an order directing the Sheriff and Clerk of the Court to remove their office books, records, papers and office furniture from Blackville to the last named place.

The Sheriff and Clerk obeyed the order, and thereupon these petitions were filed.

Returns were made admitting the facts, and the cases were argued upon the question of law involved in them.

Chamberlain, Attorney General, Carroll & Melton, for the State.

Maheir, for respondents.

Nov. 23, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The Attorney General asks that writs of mandamus may issue from this Court in the case first above entitled, to the Circuit Judge of the Second Circuit,

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commanding him to hold *the Courts of Common Pleas and General Sessions for Barnwell County at Blackville, instead of Barnwell, and, in the last named case, commanding the Sheriff of Barnwell County to hold his office at Blackville.

The main question involved is, whether Blackville or Barnwell is the place appointed by law for the holding of the Courts of Common Pleas and General Sessions for that County.

It is alleged that Section 19 of the "Act to revise, simplify and abridge the Rules, Practice, Pleadings and Forms of Courts in this State," passed March 1, 1870, as published by law, does not conform to the enrolled Act deposited in the office of the Secretary of State, as that Act stood at the time the enrollment was made.

It is admitted, and is to be taken as one of the facts of this case, that, at the time of the enrollment of the Act, and of its signature by the President of the Senate and Speaker of the House of Representatives, and of its presentation to, and approval by, the Governor, and also at the time of its deposit in the office of the Secretary of State, the 19th Section of the Act provided that the Courts of Common Pleas and General Sessions should be held at Barnwell, but that, since being so deposited, the text of the enrolled Act has been altered, so that the Act, as it now stands, requires that these Courts should be held at Blackville.

It is also alleged by the relator that it appears by the Journals of the two Houses of the General Assembly that the Act, as passed by the General Assembly, required the Courts to be held at Blackville, and that the enrollment did not, in this respect, conform to the law as passed.

It becomes a question for our consideration, therefore, whether we can look into the Journals to see in what form the law actually passed the General Assembly, or whether we are precluded, by the form of the en-

rollment, from further inquiry as to the terms of the Act.

Under the Constitution, the question whether an Act of legislation has the force of law, does not depend merely upon the constitutional majorities of the two Houses having so determined, but upon the performance of certain acts, in part legislative and in part executive, and following each other in a certain order. By Section 21, Art. II, it must have been read three times, and on three several days, in each House: it must have the Great Seal of the State affixed to it, and it must be signed in the Senate-House by the President of the Senate and the

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Speaker of the House of Representatives. By Section 22, Article III, it must have been presented to the Governor, and have been approved and signed by him. But the Governor's signature is not indispensable. If after being returned with his objections, it shall have been reconsidered and approved, in each House, by two-thirds of such House, or if, after being presented for his approval, he shall neither approve it nor return it with his objections, within three days—when these prerequisites are complied with, the Act acquires the force of law under the terms of the Constitution. If either one fails, there cannot be a compliance with the conditions upon which, under the express terms of the Constitution, the force of the Act, as law, depends.

It appertains to the office and authority of the judicial department to enforce the limits imposed by the Constitution upon the authority of the Legislature, by refusing to give force to acts without their sanction, and, accordingly, to determine whether the acts have been duly performed upon which the force of the enactment, as law, depends. Having power to inquire into the existence of these jurisdictional facts, it may resort to whatever evidence, in conformity with the principles and rules of law, is esteemed most conclusive of the fact to be determined.

It is argued, however, that if the enrollment is fair on its face, and if the Great Seal is affixed to it, inquiry must there stop, at least so far as it is a question what are the provisions of the law that has been passed.

The Constitution does not assume to determine what shall, or what shall not, constitute evidence, whether primary or secondary, of the facts upon which the authority of an Act depends. To what source, then, shall we refer, in order to ascertain upon what evidence a judicial inquiry of this nature ought to proceed? This question is substantially answered by Judge Cooley in a manner that commends itself for the breadth and soundness of its reason. He says (Cooley's Constitutional Limitations, 130): "If, when the Constitution was adopted, there were known and settled rules and usages forming a part of the law of the country, in

reference to which the Constitution has evidently been framed, and these rules and usages required the observance of particular forms, the Constitution must be understood as requiring them, because, in assuming the existence of such laws and usages, and being framed with reference to them, it has, in effect, adopted them as part of itself, as much as if they were expressly incorporated in its provisions."

It would be putting too narrow a construc-

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tion upon the language *just quoted to assume that its whole force was confined to cases involving mere questions of technical forms. The rules of evidence which should govern judicial deliberation upon questions of right arising directly out of the Constitution are, in an enlarged sense, observances of form; and the principle laid down by Judge Cooley, and carefully limited by him, embraces fairly matters of form in the sense thus employed. The necessities of this case do not require that this principle should be carried as far as it may with safety be carried. Following this rule thus laid down, in the absence of any express constitutional declaration as to the character and effect of the evidence appropriate for determining the existence of the facts upon which the force of an Act as law depends, we must look to the settled rules and usages forming a part of the law of the country at the time of the adoption of the Constitution, and also to the Constitution itself, to see how far those rules and usages enter into its sense, and have become interwoven with its text. Upon the question, whether the Great Seal should stand as conclusive proof of any of the required facts, other than that of its being fixed as required, Sec. 21, Art. II, furnishes negative evidence.

When several independent acts are required to be performed, in order to accomplish a given result, to say that proof of the performance of one of them shall be admitted as conclusive proof of the performance of the others, is to say, in effect, that that one alone is really requisite. If it should be admitted that the Great Seal possessed, by law, at the adoption of the Constitution, the attributes ascribed to it, in respect of affording final and conclusive evidence of the facts certified under it, still there would be wanting evidence, to be sought for in the Constitution alone, that such force was intended to be given to it in its bearing in weakening the safeguards of the Constitution. Assuming the question to be, whether the Act had passed the Houses by the due number of readings—of which fact the Constitution provided appropriate evidence, namely, the Journals of the proceedings of the Houses (Sec. 26, Art. II)—it is not to be presumed that it was intended that the act of affixing the Great Seal, an act performed apart from the legislative body, in an executive office, should

furnish higher evidence of the proceedings of the body than its own Journals.

Looking carefully into the essential character of the judicial act cast upon this Court, it is evident that, allowing the Great Seal, or the signatures of the presiding officers of the respective Houses, to stand as unimpeachable evidence of the identity of the Act, as en-

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*rolled, with that acted upon by the Houses, would be equally inconsistent with the object and intent of the Constitution, as in the case just supposed. In order to determine whether an Act has passed through all the requisite stages of legislative progress, its identity, in each of those stages, must be determined. If the formalities of enrollment do not prevent us from looking into the Journals, in order to see that the Bill had its proper readings, of what value will that be to us, if we are stopped by the enrollment from enquiry as to what Bill the Journals have relation? To give full force and effect to the Constitution, if an issue of identity is raised, we must look into the Bill or Act, at each step of its progress, to determine that that which has received part of the formalities requisite to its validity as law is the same with that which has received the residue of such formalities. Hitherto this question has been considered in the simplest form in which it is likely to arise, that is, upon the supposition that the Act, regarded as a whole, is not the same, as appearing by the enrollment, with that which passed through the preceding stages of enactment. In regard to this assumed case, we have no doubt but that we may look at the Journals for the purpose of ascertaining the action of the Houses, and into any evidence that may be appropriate to show the nature of the Bill, the subject of such action. A more difficult question here presents itself. When, as in the present case, the Act, as a whole, has unquestionably passed through all the requisite stages, but some part, either of a section or clause, or, as in the case in hand, a mere word, is found to constitute the difference between the Act in its different stages of progress, it is necessary to look beyond the expressions of the Constitution, to its substantial meaning and intent. As regards the general question, it is much simplified by the fact that the alleged error does not affect the general integrity or efficiency of the Act, nor enter into any of the limitations and conditions by which the Legislature sought to bound the sphere and scope of its provisions. It was, indeed, urged upon the argument that, in the course of legislative complications attending the passage of the Bill, the choice between Barnwell and Blackville became an element of importance, as bearing on the composition of the vote that was relied upon to pass it; but that is a matter with which we have no concern, as we are not called upon to analyze the majority that voted for the Bill, or to say

what considerations might, or what might not, have influenced any portion of that majority to a different course of action. From the

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stand-point of legal construction, we must regard it as a matter of indifference, so far as the general scope of the Act is concerned, whether the selection fell upon Barnwell or Blackville, or whether the subject was included or excluded from the Bill. It is evident that a Bill, having in contemplation a complete change in the modes and forms of legal procedure, could not be prejudicially affected in its general usefulness, and perverted from the objects it was intended to secure, by uncertainty as to whether the Circuit Courts of Barnwell County were to be held at the one place or at the other.

It follows, as a necessary consequence, from what has been said, that if the clauses of the Constitution in question operate to the extent of withholding force from a subordinate part of an Act, on the ground that the formalities required for the Act, as a whole, cannot be ascribed to such subordinate part, then we not only have power so to declare, but may resort to such evidence as, in conformity with the ordinary rules of procedure, may be appropriate to make such fact appear.

There remains the important question, whether the Constitution, in prescribing the formalities that should attend legislative enactment, can be regarded as looking to the several parts of which an Act is composed, as well as to the Act as a whole. Section 22, Art. II, of the Constitution, declares that "every Bill or Joint Resolution which shall have passed the General Assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the Governor, and if he approve he shall sign it."

There are but two modes of viewing this clause as it regards the present question: either the term "Bill" is to be regarded as exclusively applicable to the entire enactment as a whole, or else each substantial part thereof is to be regarded as a separate Bill, dependent for its force upon its relation to the several stages of legislative and executive action.

It will be proper here to remark that this doctrine does not lead to the rejection of amendments, notwithstanding they have not received all the readings, for one of the main objects in requiring these separate readings is to increase the facility of amendment. This may, therefore, be regarded as an exception to the general doctrine we have stated above, not springing as a limitation out of the principles fundamental to that doctrine, but imposed by the Constitution itself, as read by the light of the usages and laws of the country prevailing at the time of its adoption.

In a technical sense, the term "Bill" is ap-

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plicable properly to the enactment as a whole. Although the technical sense of words should prevail, where not inconsistent with the clear intent of the instrument, yet when such intent requires that words should be used in the larger sense, it is competent so to regard them. If we should hold that the Constitution regards the enactment as a whole, in an exclusive sense, we would be led to the inevitable conclusion that to become a law all the substantial parts of the measure must have together passed through all the requisite stages. The consequences of this would be, that alteration in a substantial part during such progress would be fatal to the whole Bill.

By a substantial part, is meant any Section, clause or word, that conveys a distinct expression of the legislative will which cannot be supplied by construction from the other parts of the Act, leaving out of view that part in which the defect lies. Whether it is to be regarded as substantial, does not depend upon its importance or unimportance to the rest of the Act, but upon its being, in itself, an expression of the legislative will, capable of being the subject of a separate Act. It would lead us to the conclusion, in the present case, that, if the law in question, although, in substance, a code of legal procedure, differed, as it passed the Houses, from the enrolled Act, in respect of any matter, though a mere word, that covered a distinct expression of the legislative will, not capable of being made out by construction, applied to the rest of the Act, the whole must be regarded as unconstitutional. That the Constitution intended no such absurdity is manifest. When a deed or contract cannot be carried into full execution by reason of error, the law invariably eliminates the error, either by construction or reformation, when that can be done without the substantial destruction of that in which it inheres. This principle is constantly applied to statutes where some independent matter, capable of severance from the body of a statute, is inoperative under the Constitution. The rules of construction are based, in part, upon this principle, so vital to them that they would not only lose their scientific character, but fail to express that common sense fundamental to all legal systems if deprived of it.

Forced upon the opposite construction, that every substantial part of a Bill is to be regarded as a Bill in the sense of the Constitution, we find nothing in our way but the technical import of the term "Bill." It is not easy to perceive why, if any detached part of a statute is a law within the meaning of the Constitution of the United States forbidding States passing laws impairing the obligation

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of contracts, any part of a Bill is not a Bill under a clause intended to secure deliberation on the passage of legislative enactments.

Such a conclusion is inevitable, if regard is had to the fixed principles governing constitutional construction. The objects had in view, by a Constitution of government, are habitually substantial; matters of form are usually left to the legislative body, as subject to change with the progress of ideas and events. The great objects in view, in framing a Constitution, are the division and distribution of the powers of government, the establishment of limits and boundaries beyond which they shall not be exercised, and the creation of an efficient responsibility tending to restrain and furnish the means to correct neglect or abuse of public authority. Clauses having for their object the creation of responsibility in the exercise of political functions are, to a large extent, intended to act upon the motive, either by way of creating inducements for right action, or removing the temptation or opportunity to such abusive exercise. This is, in part, accomplished by fixing the responsibility for all political action in some defined person, or body of persons, by securing deliberation in the performance of public acts, and by ascertaining modes of authentication and action in important cases vitally affecting the welfare of the State. It is obvious that, in construing clauses of this class, substance, rather than form, is to be considered. The object to be secured is to be sought for, not alone in the formal expressions of the Constitution, nor yet in the technical character of the means employed to secure its ends, but, in the nature of the subject, intended to be acted upon through such means. In a word, the language of the Constitution, in such cases, is to be construed in the largest sense fairly attributable to it, and that will best subserve the objects it has in view.

The clauses of our Constitution under examination belong to the class just specified, their objects being to prevent abuses in the exercise of the most important function of the government, namely, that of making laws, by securing deliberation and solemnity of authentication in such form as to fix a personal responsibility at every stage in the progress of an Act of legislation. It is altogether a mistaken view to suppose that the object of these clauses was either to confer upon the signatures of the attesting officers power to cover up fatal defects in the passage of Acts, or to conserve the outward, visible and tangible form of a law, without consideration for the vital matters that are contained within it. We would altogether fail to appreciate the spirit that animates the

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system of constitutional law, the flower of jurisprudence, native to our own country, should we apply the narrow rules of technical construction contended for to the clauses in question. The principles characteristic of that system have been evolved from the highest reason under the experiences of a politi-

cal system securing the largest field of human action and motive for the enterprise of thought. They are like the atmosphere we breathe, animating and all-pervading, and if not definable with that sharpness of outline that affords the highest qualification to the scientific mind, yet they are capable of reducing to precision and definiteness of outline the institutions and laws which derive their substance and vigor from them.

We are forced to conclude that the safeguards set forth in Section 23, Art. III, of the Constitution, are applicable not only to the title and body of an Act of legislation, but to every substantial matter contained therein, with the same effect as if such substantial matter was an independent Act of legislation in itself.

As we have already concluded that we may look into the Journals, or beyond them, in a proper case, in order to see that there has been a compliance with the terms of the Constitution, it remains for us to ascertain whether the designation of a place for holding the Courts of Common Pleas and General Sessions for the County of Barnwell has been accomplished by Section 19 of the Act in question, in accordance with the requirements of the Constitution.

The Journals of the General Assembly make it to appear that, as the Bill stood on its final passage, Section 19 read Blackville, while it read Barnwell as presented to the Governor for his approval. The consequence is, that so much of Section 19 as attempts to designate a place of holding said Court is without the force of law. In other words, the legal effect is the same as if an independent Act, making Blackville the place of holding the Courts, had passed the General Assembly, and a totally different Act, making Barnwell the place, had been submitted to the Governor, in lieu of that passed by the General Assembly.

Previous to the passage of the Act in question, the place of holding the Courts was fixed by law at Blackville, and, unless that law has been repealed by this Act, that place still remains the place of holding such Courts. Section 471 of the Act of March 1st, 1870, contains the repealing clauses, which only extend to statutory provisions inconsistent with

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that Act. As the Act does not designate *as law any place of holding such Courts, there is nothing inconsistent that can lead to the repeal of the former Act.

Before leaving this portion of the case, it is proper to remark, in view of the important bearing of the Act in question on the jurisdiction and forms of proceeding of the Courts, that, in our judgment, the residue of the Act, beyond that portion held by us not to be of force as law, is unaffected thereby, inasmuch as that is a distinct and independent matter, no way affecting the scope and efficiency of

the Act, according to the intention of the law-maker.

In the case of the application against the Circuit Judge of the Second Circuit, it is sought to obtain a mandamus requiring him to hold his Courts of Common Pleas and General Sessions at Blackville instead of at Barnwell. It is admitted that the last term was held at Barnwell. The next term for Barnwell is to commence on the second Monday of December next. The initiatory step towards the holding of that term is the issuing of the *venire facias*. By Section 8 of the "Act to regulate the manner of drawing jurors," passed September 26, 1868, this writ is to be issued by the Clerk at least fifteen days before the commencement of the term. Unless that act is compelled, or voluntarily performed, the term must, for all substantial purposes, fail. The Circuit Judge has no other power than this Court possesses to compel the performance of this act, namely a writ of mandamus. By mandamus he may compel the Clerk to make his writ returnable at the proper place of holding the Court. Should a writ of mandamus be issued to the Circuit Judge, he could be called upon to yield no further obedience to it than by his personal attendance at the time and place of holding the Court. His presence does not insure the presence of the other necessary component parts of the Court. It is not the office of the writ, when issued by this Court, to forestall such judicial determination as he may make on a writ of mandamus issued by himself, nor to compel him to issue such writ.

The issuing of the writ by us, under such circumstances, is novel, ineffectual and unnecessary. It is to be presumed, in view of the present determination of this Court, that the Circuit Judge will hold his Court at the proper time and place, if the requisite preparations have been made by the other officers whose corporate action is necessary to the assembling of a Court. Should they fail to perform their duty, there is abundant means of compelling such performance; but that cannot be done by means of a mandate addressed to the Circuit Judge.

The Sheriff is bound to hold his office at the

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place of holding the Courts, and that, as we have held, is Blackville. The public have an interest in the performance of this duty, and they have a right to the means of compelling it through their official representative, the Attorney General.

The prayer for a writ against the Circuit Judge of the Second Circuit is denied. A peremptory writ will issue in the case against the Sheriff in accordance with the relator's prayer.

WRIGHT, A. J., concurred.

MOSES, C. J., (dissenting.) The Constitution of the State denies to any Bill passed by

the General Assembly "the force of law," unless it shall have been read three times, and on three several days, in each House, and has had the Great Seal of the State affixed to it, and has been signed in the Senate-House by the President of the Senate and the Speaker of the House of Representatives, (Art. II, Sec. 21.) A restriction thus far is imposed on the action of the Legislature.

The Constitution requires, too, not in fact the aid or co-operation of the Executive in the enactment of laws, but it imposes, in the event of his non-approval, a necessity on the Legislature to reconsider every Bill or Joint Resolution returned, within the prescribed time, with his objections, and unless it passed by a vote of two-thirds of each House, the first expression in its favor by a majority of both branches is altogether negated. It may, therefore, be conceded that these conjoint demands of the Constitution must be complied with to confer on a Bill (or Joint Resolution) the force and power of law.

This admission, however, is far from meeting the case before the Court. The material inquiry is not as to the formalities essential under the Constitution to give binding efficacy to an Act of the Legislature, but it is as to the proof by which the authenticity of the Act is to be established.

When offered in evidence, with the Great Seal affixed, with the signatures of the President of the Senate and the Speaker of the House subscribed in the Senate-House, and the approval of the Governor, is it to be received as a record importing finality, or is it open to change or correction by the Journals of the two bodies? The question is not only interesting, but important, and for the first time arises in the Courts of this State.

It may be proper, before entering into a discussion of the particular point submitted, to

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present the views which we entertain in regard to the distinction which, in our judgment, obtains between the effect of the Journal, as evidence in relation to Bills required to be passed only in conformity with the general provisions of the Article already referred to, and those which can only have "the force of law," through a vote of a fixed number of the two Houses, (over a majority,) to be ascertained by a record or entry of the yeas and nays, as in the passage of a Bill over the veto of the Governor, or for the contracting of a public debt for defraying extraordinary expenditures, (Art. IX, Sec. 7.) because, in those instances, the Constitution demands that the required majority, by yeas and nays, shall appear on the Journal. The entry or record on the Journal is made the condition on which the Act is to have effect, and, if the requisition of the Constitution is not complied with, no matter in what form the Act appears, it will want the essentials which are to give it efficacy.

The Journal, in such cases, is constituted the medium of proof, because the vote on the

passage of the Bill, by the Constitution, is to be entered upon it; and the highest evidence of the compliance with that mandate is the production of the Journal itself. Mr. Cooley, in his *Treatise on Constitutional Limitations*, (page 135,) says, "It will not be presumed, in any case, from the mere silence of the Journal, that either House has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative Acts, unless where the Constitution has expressly required the Journals to show the action taken, as, for instance, where it requires the 'yeas and nays' to be entered."

The distinction for which we contend is founded in reason and good sense. The Journal, though purporting to be a minute of the proceedings of the body, is, at best, but a very general, and usually, a hasty history of them. Though it is designed to follow and record its daily action, yet the mode and manner in which this is done are within the direction of the House, except where the Constitution, in regard to Bills of a particular description, enjoins that entries, of a specially designated character, shall be made. Then the entry of the majority by which such measure is passed, and the names of the members voting, and how voting, are to be recorded as the mode of ascertaining if, within the meaning of the Constitution, it has been adopted, and the entry itself is the highest evidence of the compliance with the fundamental law.

In the *People v. Purdy*, 2 Hill, 34, the question was, whether an Act had received the assent of two-thirds of the members elected,

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*as required by the Constitution of New York. The Journals were received on that point. Bronson, J., said: "The Constitution is explicit in its terms, and, in a particular class of cases, upon which the Legislature may act, it denies to a bare majority of members the power which, in other cases, they undeniably possess. To give efficiency to this provision and secure the people against the exercise of powers which they have not granted, we must, I think, when called on to do so, look beyond the printed statute book, and enquire whether Bills creating or altering corporations have received the requisite number of votes."

We come now to the point made by the case before us. It is admitted that, before the "Act to revise, simplify and abridge the Rules, Practice, Pleadings and Forms of Courts of this State," passed on the 1st of March, 1870, the Circuit Court of the County of Barnwell was required to be held at Blackville. That, by the said Act, as enrolled, sealed and signed by the presiding officers of the two Houses, and approved by the Governor, the said Court for the said County was to be held at Barnwell. It is further admitted that the Journals of both Houses show that, as passed by the said Houses on the third reading, Blackville, and not Barnwell, was the place adopted.

It appears, also, from the return of His Honor, the respondent, who makes his order and judgment a part of his answer, that the "engrossed Bill," as it passed the two Houses, fixed Barnwell as the place at which the Court for the said County was to be held. The single question, therefore, for our decision is, whether the enrolled Act, so sealed, signed and approved, can be corrected by the Journals of the respective Houses?

A statute declares the legislative will. That is to be spoken through the forms prescribed by the Constitution. Even if the intention of the law-makers is ascertained beyond doubt, if it is not expressed in the manner provided by the fundamental law, from which alone it derives its authority to operate, it is void and of no effect, because wanting the formal characteristics necessary to impress it with the power of action on the community which it was intended to affect. Admitting the importance of form, and the necessity of adapting legislation to that mode and manner which are to give it shape, aspect and effect, still the question presented for our solution lies beyond the mere inquiry, whether, in a particular enactment, the directed form has been pursued.

It relates exclusively to the nature and

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character of the evidence *by which it is competent to show that the Act is not perfect and complete, because not passed (as it is averred) with due regard to the formalities which the Constitution provides as essential to invest it with the "force of law."

It will not be insisted that the well established rule of testimony, that the highest evidence of which the case is susceptible, has no application to legislative Acts. If it is held essential to the evolution of truth, in matters between individuals, where private rights alone are concerned, and where issues involving insignificant pecuniary amounts are to be decided, is it to be rejected and cast aside when the validity of a record is the gist of the issue?

The memorials of the proceedings of the Legislature are records, and are authentic beyond all manner of contradiction.—2 Gilbert, 7; 1 Phil. on Ev., 316.

Records are of so high a nature that, for their sublimity, they import verity in themselves, and none shall be received to aver anything against the record itself.—Floyd v. Barker, 12 Coke Rep., 24.

The Journals of Parliament cannot weaken or control a statute which is a record, and to be tried only by itself.—The King v. Arundel, et al., Hob., 109.

The Journal is of good use for the observation of the generality and materiality of proceedings and deliberations as to the third reading of any Bill, intercourse between Houses, &c.: but when the Act is passed the Journal is expired.—Ibid.

Does not the fact that it is a record im-

part verity, and exclude the idea that it can be tested or tried by anything but itself?

It may, however, be objected that the Journal, so far as it indicates the action and progress of the House, in regard to a Bill before it, would be without avail, and of no practical use, although required by the Constitution to be kept. The objection, when examined, will be found to be without reasonable ground. The Journal, so far as it exhibits the action of the House as to a particular Bill, is the medium through which the members are kept informed and advised of its progress, so that knowledge may be afforded of what action is required for its perfection. The very fact that the body converts the engrossed Bill into an enrolled one, through the proper Committee, affixes the Seal of the State, the signatures of the presiding officers, and presents it to the Governor for his approval, import that at least the mind of the General Assembly has agreed on a definite conclusion, and these formal acts

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speak the result. *Except where the entry on the Journal is demanded as one of the incidents indispensable under the Constitution to the perfection of an Act, it has "expired" when the sealing, signing, and executive approval, by their united operation, affirm that all constitutional requisitions have been fulfilled.

It is said that English authorities and precedents are not applicable, because our Legislature acts under a written Constitution, while Parliament is omnipotent.

It is not necessary to pursue the course and history of the English Parliament in regard to its mode and usage of legislation. It is enough to say that, at the adoption of our Constitution, the manner of that body, in the passage and enactments of statutes, in no essential mode differed from the course which the Constitution prescribed for the government of our own Legislature. Whether the forms observed and practiced in England are through written rules, or derive their force from long established usage, they scarcely vary, in any particular, from the requirements of our Constitution in regard to the passage of Bills. Even if they had not been incorporated into our Constitution, then, as Mr. Cooley well remarks, at page 130 of his work already referred to: "If, when the Constitution was adopted, there were known and settled rules and usages forming a part of the law of the country in reference to which the Constitution has evidently been framed, and these rules and usages required the observance of particular forms, the Constitution itself must also be understood as requiring them, because, in assuming the existence of such law and usage, and being framed with reference to them, it has, in effect, adopted them as part of itself, as much as if they were expressly incorporated in its provisions."

In fact, the Legislative Assemblies of the United States were all constituted upon the model of the two Houses of Parliament; the forms and proceedings which prevail in the latter have been adopted by them as their common Parliamentary law.—Cushing on Law and Practice of Legislative Assemblies, Sections 215, 697, 777.

The House of Lords and the House of Commons each keep a journal of its proceedings; the Bill, in both, is to be read on three separate days, and the concurrence of the three distinct bodies of which it is composed, (King, Lords and Commons,) each acting independent of the other, is necessary to the perfection of a statute.

When an Act is sent forth by our Legislature as completed by it, receiving the approval of the Executive, or, in the absence of it, passed over his veto by the required ma-

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ajority in the form prescribed *by the Constitution, it is as potent and effective as an English statute, (each operating within its own territorial jurisdiction), unless it violates some prohibition by which the Legislature is interdicted, either by the Constitution of the State or of the United States, as, for instance, that it shall not impair the obligation of contracts.

Mr. Cushing, in his work, at page 120, says, "If a Bill which has been duly authenticated as having passed both Houses, receives the Executive approval, and is signed by him, it will become a law, notwithstanding the agreement of the two Houses is certified thereon by "mistake;" and, to sustain his position, he refers to J. of H., 23d Congress, 2d Ses., 433, 434; J. of S., 23d Congress, 2d Ses., 162.

In Section 2404, he proceeds to shew how, "after a Bill has passed through all its regular stages in either House, for that House to discover that an amendment to the Bill has been improperly adopted or rejected, and to desire a correction of the erroneous vote," and concludes, the "mistake" may be corrected by a re-consideration, so as to reach the stage at which the amendment was voted upon, and then to pass upon it.

It appears not to have entered into the contemplation of either House of any legislative assembly, to correct the mistake by the Journal, when the Bill had passed through "all its regular stages." It surely would appear to be more competent for a House to correct its error by its own Journal, than for a Court to do so, after the Bill had been converted into an Act, ratified by the signing and sealing, and approved by the Governor.

In the case of Hunt v. Van Alstyne, 25 Wendell, 610, Nelson, C. J., a Judge distinguished for his learning, accurate conception and sound judgment, although the point was not necessary for the decision of the cause, expressed himself as to the character of the

proof afforded by the certificate of the presiding officers, to a Bill even required to be passed by a two-third vote, and to be so certified. On the said page, he says: "But suppose it (the certificate) did appear—would it be conclusive? It seems to me it would be so. There are only two modes of contradicting it: 1. By the Journals of the two Houses; and, 2. By parol testimony. The presiding officer had all the benefit of the first; the ayes and noes are taken, and the Journal made up under his supervision and control. His means of ascertaining and determining the fact, when he declares the law to be passed, exceed those of any other tribunal that

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might afterwards be called upon to inquire into it. Besides, the hurry and looseness with which the Journals are copied, and the little importance attached to the printed copies, necessarily impair confidence in their correctness. They are most uncertain data upon which to found a judicial determination of the rights of property, much more of great constitutional questions. As to the second mode of contradicting the certificate, the evidence would, if possible, be still more fallible and unsatisfactory."

It is true the case, as adjudged, did not turn on the point to which he so addressed himself, although it incidentally arose, but the opinion of so eminent a jurist, arrived at apparently with deliberation, is entitled to much consideration and respect.

In *Pacific Railroad Company v. The Governor*, 23 Miss., (2 Jones,) 353, it was held, that the statute roll is the absolute and conclusive proof of a statute, and resort cannot be had to the Journals of the Legislature to impeach the validity of the law by shewing that in its passage some of the forms prescribed by the Constitution were not observed.

In *Binney's case*, 2 Bland., 99, it was ruled, that no parol proof, nor any part of the proceedings of either branch of the Legislature, can be admitted to explain the language of an Act of Assembly, except as to private Acts, in which there may be a latent ambiguity.

The object of the mandamus is, in effect, to strike from the Act "Barnwell," as the place for holding the Court for that County. If it had so happened that the seat of justice for the County was, for the first time, to be fixed by law, the result would be to deprive the County of the very privilege it was intended to confer, for no place being then indicated, it would be left without the power of holding a Circuit Court, through which justice could, by law, be administered within its limits. It is not pretended that the Journals are of such potent efficacy that, through their aid, another place could be substituted in the stead of the one to be erased. Indeed, no objection is urged even to this course, except that the Act so amend-

ed by the Court would not then be the Act which had been signed by the respective presiding officers, and approved by the Governor, thus admitting, at least by implication, the force and effect which these signatures afford.

Suppose Blackville had been the place named in the enrolled Act when it was presented to the Governor for approval, is it not fair and reasonable to conclude that, preferring

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Barnwell, in his judgment, as the County seat—for he thus indicated by his signature—he would have returned it with his objections, and so, possibly, the very word or clause which the Court is to strike out may be the identical one which saved the Bill from the Executive veto.

It was admitted, in the argument, that the material question with the Legislature, in regard to this Section of the Bill, was as to the County seat for Barnwell. The views of the General Assembly differed as between Barnwell and Blackville. No intimation of choice of another place was made. Then if, at the time of the introduction of the Bill, Aiken had, by law, been fixed as the seat of justice for the County, the effect of the erasure of Barnwell by the Court would continue Aiken as the place, which, so far as could be ascertained from the discussion in the Legislature, was not in the contemplation of a single member.

It is submitted that the Journal is to correct the enrolled Act, (properly enrolled by and from the engrossed Act, under the supervision of the Standing Committee charged with that duty,) sealed, signed and approved, as the Constitution required, by striking out Barnwell. Is this to give truth and efficacy to the Act? The Journal will not perform the duty which is exacted of it if it falls short of accomplishing what it is proposed to do by its aid, to make Blackville the place really intended by the Legislature, and under the force and power of this Act.

The question is one of evidence, whether the statute is to prevail, or whether it is to be overcome by the Journals? If the latter are to predominate, then the most solemn of records is to be controlled and deprived of the purpose it was designed to effect by testimony lower and inferior in degree. Suppose, however, that the Journals are to be viewed in the light of records; where they are not required by the Constitution to shew that its demand, as to particular subjects and modes of legislation, has been respected and obeyed, is it competent to correct one record by the force and effect of another? Are not the use of, and purpose of, the Journals exhausted, when the Act is enrolled, sealed, signed and approved, except when they are made, by the Constitution, the evidence of a compliance with its specific requirements?

I shall purposely refrain from discussing

the effect of this interpolation. Whether, ignoring the official Acts of the presiding officers of the two Houses, the seal and approval of the Governor, as to the particular matter in hand, invalidates the whole Code, is too important and serious a point to be decided,

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unless specially made by the *pleadings. When that question shall be in proper form brought before the Court, I prefer to adjudicate it, without an intimation of opinion not necessary for the decision of the case now before us.

I have also withheld my views as to the right of the Court to issue the writ against the Circuit Judge in a matter probably arising in the exercise of his official functions, to be decided by his judgment, which, if erroneous, could only be corrected by appeal, because his counsel waive any question of that character, desiring a decision on the material point submitted.

To issue the writ, holding that the enrolled Act, sealed, signed and approved in the manner required by the Constitution, can be controlled by the Journals, is to my mind establishing a precedent fraught with danger, opening a door to frauds of the most pernicious consequence, because affecting the legislation of the country, and without a single authority of a decided case submitted in the argument on the part of the relator.

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J. A. NEELY and Wife, Plaintiffs in Error, v.
J. M. McFADDEN, Defendant in Error.

(Columbia. April Term, 1870.)

[Evidence \hookrightarrow 457.]

Action on a sealed note, dated December 22d, 1863, and payable twelve months after date. The plaintiffs offered testimony to prove the real consideration of the contract, and that it was not with reference to Confederate States notes. The presiding Judge ruled the testimony out. The defendant offered no evidence, and the presiding Judge instructed the jury to reduce the debt according to the scale of values set forth in the "Act to determine the value of contracts made in Confederate States notes or their equivalent." *Held*, that there was error, both in the ruling and the instruction.

[Ed. Note.—Cited in *Parker v. Wilson*, 3 S. C. 297; *Id.*, 492; *Moore v. Johnson*, 7 S. C. 308.

For other cases, see Evidence, Cent. Dig. § 2108; Dec. Dig. \hookrightarrow 457.]

[Payment \hookrightarrow 14.]

In an action on a contract made in South Carolina during the late war, where no mention is made on its face of Confederate currency, but payment is called for in "dollars" or "lawful money" alone, the fact that the parties dealt with reference to Confederate currency may be proved by extrinsic evidence.

[Ed. Note.—Cited in *McKeegan v. McSwiney*, 2 S. C. 202; *McNeel v. Smarr*, 3 S. C. 199, 200; *Earle v. Stokes*, 4 S. C. 310; *Pickens v. Dwight*, *Id.*, 368; *Wilson v. Braddy*, 16 S. C. 520; *Stokes v. Wallace*, *Id.* 620.

For other cases, see Payment, Cent. Dig. § 93; Dec. Dig. \hookrightarrow 14.]

[Payment \hookrightarrow 65.]

In such case the terms "dollars" or "lawful money" must receive, in the first instance, their technical and usual construction, and it is for the defendant to show that the parties looked to Confederate currency as the medium of payment.

[Ed. Note.—Cited in *McNeel v. Smarr*, 3 S. C. 199; *Halfacre v. Whaley*, 4 S. C. 177.

For other cases, see Payment, Cent. Dig. § 197; Dec. Dig. \hookrightarrow 65.]

[Constitutional Law \hookrightarrow 164.]

When it appears that the parties dealt with reference to Confederate currency, the Act aforesaid may be used as evidence of the value of that currency, but it is not final or conclusive. Evidence contradictory of the Act may be resorted to for the same purpose. And in this view, the Act is not in conflict with any constitutional provision.

[Ed. Note.—Cited in *Harmon v. Wallace*, 2 S. C. 210; *Johnstone v. Crooks*, 3 S. C. 203; *De Saussure v. McClenaghan*, 6 S. C. 87; *Walker v. State*, 12 S. C. 308; *Wilson v. Braddy*, 16 S. C. 522; *Chalmers v. Jones*, 23 S. C. 468.

For other cases, see Constitutional Law, Cent. Dig. § 497; Dec. Dig. \hookrightarrow 164.]

[Payment \hookrightarrow 3.]

That the Act fixes the date of the contract as the time at which the value of the Confederate currency is to be ascertained, is no ground of objection to it, that being the rule, independently of the Act, as appears by the decision of the Supreme Court of the United States, in *Thorington v. Smith*, 8 Wall. 1 [19 L. Ed. 361].

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 39; Dec. Dig. \hookrightarrow 3.]

[This case is also cited in *Johnstone v. Crooks*, 3 S. C. 204, as to the construction of contracts during the period when Confederate notes were the only medium of payment.]

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*Before Thomas, J., at Chester, September Term, 1869.

Writ of error to the Circuit Court. The case was heard upon a report of the Circuit Judge, as follows:

"This case came on for trial at the September Term, 1869.

"The plaintiff offered in evidence a note, under seal, made by the defendant, for \$1,345, dated 22d December, 1863, and payable twelve months after date. The handwriting being admitted, the plaintiff closed his case, with the privilege of replying. The defendant offered no testimony, contending that the Act of March 26, 1869, operated immediately to reduce a note made within the periods named in the Act, where it appeared that the note was in the ordinary form, according to the "usual custom of trade." In this position the defendant was sustained by the Court. The plaintiff then offered testimony to prove the real consideration of the contract, and that the contract was not in Confederate States notes, or with reference to Confederate States notes. The Court refused to allow such testimony, as varying a written contract, to go before the jury, and, under such instruction of the Court, the jury found a verdict for the plaintiff, for \$136.

"The plaintiff moved for a new trial upon the two grounds of the ruling of the Court above stated, which said motion was refused.

"Which said rulings of the Court the plaintiff assigns and alleges as error.

"1st. On a motion for a new trial:

"1. That His Honor erred in deciding that the defendant was not obliged to offer testimony going to show that the contract was in Confederate States notes, or with reference to Confederate States notes.

"2. That His Honor erred in not allowing the plaintiff to prove the real consideration of the contract.

"And in arrest of judgment:

"1. That the Act of March 26, 1869, entitled 'An Act to determine the value of contracts made in Confederate States notes or their equivalent' is void, as being violative of Article I, Section 10, of the Constitution of the United States."

Hamilton, for plaintiff in error.

The Act of the General Assembly, approved March 26, 1869, entitled "An Act to determine the value of contracts in Confederate

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*States notes or their equivalent," was intended merely to establish a rule of evidence.—Acts 1868 and 1869, p. 277. This rule of evidence has been recognized, outside of any express provision by statute, by the Supreme Court of the United States.—*Thorington v. Smith*, 8 Wallace, 1.

The Act of March 26th, 1869, can have no greater scope.

There was manifest error in the ruling of His Honor the Judge, in the above stated case, in deciding that the contract made in 1863 was, by mere operation of the Act of March 26, 1869, immediately diminished without need of proof.

The Ordinance of the Convention of 1865 was a legislative enactment.—*Journal of Convention of 1865*, p. 177.

That these legislative enactments are everywhere inferentially acknowledged, where not conflicting with the law as at present established.

The Ordinance of 1865 in no wise conflicts with the Act of the General Assembly, approved March 26, 1869.

It applies to an entirely different class of cases, where the contract was evidently made with reference to the value of the property sold, estimated by the value of Confederate currency in gold.

The Act of March 26, 1869, entitled "An Act to determine the value of contracts made in Confederate States notes or their equivalent," is clearly violative of the 1st Art., Sec. 10, of the Constitution of the United States.

The rule to be observed in such cases has been laid down by this Court.—*Goggins v. Turnipseed*, Unpublished Decisions of this Court.

Hemphill, contra.

Nov. 26, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiff sues on a promissory note, dated December 22d, 1863, payable in twelve months after date. On the trial the defendant introduced no testimony; but insisted that under the operation of the "Act to determine the value of contracts made in Confederate States notes or their equivalent," passed March 26th, 1869, the debt was reduced to the sum which, according to the scale of values set forth in that Act, was the equivalent in the currency of the United States of the face of the note at its date. The Court sustained this view. The plaintiff, thereupon, offered testimony to prove the real consideration of the con-

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tract, and that it was *not with reference to Confederate States notes. The Court excluded such testimony as varying a written contract, and under such instructions the jury found a verdict for the plaintiff. It is evident that this verdict must be set aside, unless the proposition is established that all contracts made between the dates to which that Act relates are exclusively controlled thereby, without regard to extrinsic evidence of the real intent of the parties, or the facts of the case, in the following respects: first, that all such contracts are to be held as made in contemplation of Confederate currency; and, second, that the value of Confederate currency is to be determined according to the rule laid down in that Act.

The Act relates to contracts created or contracted in Confederate States notes, or with reference to such notes as a "basis of value," made during the years 1861, 1862, 1863, 1864 and 1865. It declares that the obligation of such contracts shall be determined by the value of said Confederate States notes in the lawful money of the United States at the time such debts or obligations were created or contracted. Section 2 commences as follows: "Pursuant to the preceding Section, the value of one dollar of lawful money of the United States in said Confederate States notes is declared as follows, namely:" then follows a tabular statement of the relative values of such currency during the different months or parts of the year extending through the period of years before mentioned. This table places the nominal amount of \$13.50 of Confederate States notes, on the 1st of December, 1863, at the value of one dollar lawful money of the United States. To ascertain the value of that amount of Confederate notes, on the 22d of December, 1863, the rate of increase during the month of December, as ascertained by comparing the values set down for December 1, 1863, with those for January 1, 1864, must be taken into account, and the value from December 1 actually increased accordingly.

The following questions are to be consid-

ered: 1st. Where no mention is made on the face of a contract, of Confederate States notes, but the contract calls for "dollars," or "lawful money," alone, can the fact that the parties dealt with reference to Confederate currency be made out by extrinsic proofs? 2d. When that fact appears, can resort be had to the Act in question as the means of ascertaining the value of such Confederate currency? 3d. Is the Act final and conclusive between the parties, as it regards the class of contracts to which it applies?

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or may the parties introduce *evidence contradictory of the declarations of the Act as to the true state of relative values?

I. Can the parties resort to proof outside of that afforded by the instrument itself, to convert an obligation to pay "dollars," or "lawful money," into one to pay according to the value of the notes of the Confederate States? These notes were not lawful money under the Constitution and laws of the United States, and, therefore, could not, as a question of legal conclusion alone, satisfy the expression, "lawful money." It is necessary, therefore, to show, as matter of fact, that where the parties said lawful money, they did not mean that which the law adjudged to be lawful money, but certain promises to pay, having current commercial value, but not answering the description of "lawful money." This question must be looked at both on grounds of substantial justice and of technical law. The object of technical rules is to afford lights by means of which justice may be attained. What is justice, in a legal sense, is determined by the conscience of the community as revealed in the spirit of the laws, and not by the conviction of any single individual mind, however gifted.

In December, 1863, the parties to this controversy resided in the State of South Carolina. The Constitution and laws of the United States, although obligatory upon them, were practically inoperative for the time being. The State of which they were citizens was, in common with certain other States, engaged in making war upon the Government and people of the United States. Though a war in form, it was in effect a rebellion against the sovereignty of the United States. The confederated States assumed, among other things, to exercise national power, to make war, to maintain military forces, to levy taxes and contributions, and to establish standards of values. The gold and silver coin of the United States had ceased to be the actual representative of values in the dealings of these communities, not only in the Confederate States, but throughout the territorial limits of the United States. This was not alone due to its insufficient supply for commercial purposes, but to the additional fact that in that portion of the country maintaining the authority of the United States the paper issues of the Government,

made a legal tender, had replaced gold and silver in current transactions, and, as a consequence, the prices of all commodities had adjusted themselves to the nominal value of such issues; and, as such issues had a relative value as compared with gold and silver, less than its nominal value, commercial deal-

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ing *no longer rested upon the standards of coin values. The language of commerce was unchanged in form, the terms that were employed to express the measures of values, as a general thing, still continued in use, but the import and force of those terms had been changed through the legislation that sought to give commercial value to the bills of the Government. In the Confederate States a still more complicated state of facts existed. Here, also, gold and silver coin had ceased to control the values of commodities as dealt in by the communities. The war having destroyed commercial intercourse between the sections of the country, the currency put in circulation by the Government of the United States did not, and could not, enter into the local circulation here to a sufficient extent to influence values. The Confederate States put in circulation obligations which, from the necessity of the case, became the basis of values, determining the prices of commodities dealt in by the people. Here, also, the language of commerce remained unchanged; but the terms intended to express monetary values were, according to the common understanding, assumed to relate to the notes of the Confederacy then in circulation. In December, 1863, if we may assume the correctness of the table to which reference has been made, Confederate currency stood to the United States currency in the ratio of about fourteen to one.

Such was the general state of affairs. Of much we can take judicial notice; of the rest, it has become part of the history of the country, and, as such, forms, at least, a fair basis for testing the principles involved in the present question.

If the parties really understood Confederate currency as the medium of discharging the obligation expressed by the note in suit, then it is apparent that the plaintiff, in recovering the face of the note, would recover many times the value of the consideration that he must be assumed to have parted with in exchange for the note. Such a result would be obviously unjust. The injustice of such a course has been recognized in many cases, involving this question, which have arisen in other States. It remains to be seen whether such injustice is the inevitable consequence of the rules of law by which we are bound.

All technical rules of construction have for their object the discovery of the actual and fair intent of the parties. The best evidence of that intent is the instrument professing to express it. Parties must be deemed to

use words according to their ascertained legal effect, or according to common accepta-

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tion and usage, and not *according to individual standards. The language of the country is the coinage of the whole people who speak it, and common use, in the absence of a technical standard, must determine its import.

It is, therefore, perfectly correct, in principle, to preclude a party to a contract from saying that he employed words according to a meaning peculiar to himself. What is true of words is equally so of expressions. When parties employ technical formulas to which a definite signification is attached, they are generally, though not universally, intended to have used such expressions according to the received technical sense; but ordinarily the sense must be made out by applying general rules of construction to the language employed. These rules do not look to the mental habits of the individual whose expressions are examined by them, but to the common mind.

It is in harmony with these obvious principles that parties to a written contract are ordinarily held to that proof of their intent which appears on the face of their contract. Applying this rule to the case in hand, if the defendant had, on the trial, offered to prove that, at the time he made and delivered his note, he understood "dollars," or "lawful money," to mean Confederate currency, that proof should have been excluded; but had proof been offered tending to show that what the whole community regarded and dealt with as money was Confederate currency, then the question of the admission or rejection would have directly involved the distinction now under consideration. In the case of the offer first supposed, the attempt would be to construe the contract according to an individual standard, while, in the case last supposed, the inquiry would be as to what, at the time and place of the contract, was the standard according to the common understanding and usage.

The exact question here is, as to the true import of terms used in a contract, with the intention of referring the obligation of that contract to a known money value. It has been already said that there may be two modes of ascertaining the import of these terms, either by referring them to the coinage of the country, the fixed legal standard, or by referring them to the standard of values adopted for the time being by the commerce of the country, or State. Ordinarily these standards are the same, and no question like the present one can arise. Two cases, however, may be conceived, where the commercial standard might differ from the legal: first, where, for the time being, the laws, ascertaining such legal standard of values, are inoperative; and, second, where

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the medium *of exchange contemplated by

such standard is withdrawn from circulation. Both of these causes were operative in the State of South Carolina at the date of the contract under consideration. The question then arises, where such a state of facts actually has existed, that the commercial standard of value differs from the legal, which is to control the import of terms employed in commercial dealings during such exceptional state of affairs?

One or two propositions may assist this enquiry. In the first place, parties are under no legal obligation to employ the legal standards of value at the time and place of contract. They may contract with reference to foreign money, or a medium of exchange not recognized as money by any system of laws. They may base their contracts on pounds sterling, or Mexican dollars, or anything else possessing value capable of being measured, that is to say, of being compared with other objects of known value. Although the policy of laws of this class is to induce uniformity in contracts, they have never attempted to compel it. In the next place, it is not an invariable rule that parties are to be held to be familiar with the technical force and effect of legal terms and expressions.

It is true that a wrong cannot be justified on the ground of ignorance of law. But that is a very different proposition from the one that parties contracting together in terms having a fixed legal signification, are to be held, under all circumstances, bound to intend such signification.

What is meant by a power of attorney is as much the subject of legal ascertainment as what is meant by a lawful dollar, and yet, in *Hunt v. Roasmaineer*, (8 Wheat., 174.) the Supreme Court of the United States reformed a contract, on the ground that the parties, acting under the advice of counsel, had misconceived the import and effect of a power of attorney, and, in view of their real intention, would be regarded as meaning a mortgage where they mentioned a power of attorney as the instrument of effectuating the general object of their contract. Here was an exception to the ordinary rule that parties are to be regarded as intending the legal force and effect of their expressions made out on narrower grounds than the present case affords. In the first place, it had to be brought within the class of mutual mistakes; in the next place, the mistake was not induced by the common understanding and usage of the whole political community, but by the misapprehension of a single legal adviser; and in the last place, the effect was to put the parties in a specifically new relation to the subject-matter of the contract.

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*In that case a borrower gave a power of attorney to the lender as security for money loaned, the object of the power being the creation of a lien for the security of the money. The borrower died before the power

was put in exercise, and it was found to be revoked by his death. The result of the decision was to give to the contract the effect of creating the lien at once, instead of that of merely originating a power which, by due exercise, might be made to produce such lien. It was not, as in the present case, an effort to limit the nominal force of the contract to a fair relation to its consideration, but, on principles of construction, to import a new active energy into the contract itself.

The doctrine of *Garner v. Garner*, (1 DeS., 437.) and *Lawrence v. Beaubien*, (2 Bail., 623 [23 Am. Dec. 155].) that mutual mistakes of law, induced by mistaken legal advice, may be corrected, could not be upheld if the rule is to prevail that parties are, in all cases, to be bound to have intended the legal consequences of the expressions employed by them according to their technical sense. They certainly recognize an exception to that rule. The principle of these cases would clearly reach to a case where the parties have been controlled in their expressions by the common understanding and usage of the whole community, comprising the political body from which the laws emanate, and including, as it does, not only all private legal advisers, but the judges who are to speak the voice of the political body itself. If, in point of fact, the whole community united in using the notes of the Confederate States as money, and calling them money, even to the extent of ascertaining commercial values with reference to them as a standard; and it also appears, as either matter of proof or presumption, that the present parties considered that the expressions employed by them would be referred to that commercial standard; and if in all this they have mistaken the law, then it is clear that they have as good justification for such mistake as if it had arisen from the erroneous advice of any one legal gentleman professionally consulted by them.

To arrive at such a conclusion, involves a question of fact proper for submission to a jury. We therefore conclude that it was competent for the defendant, on the trial, to go into proof of extrinsic facts and circumstances of what, at the time of the contract, was commonly used and dealt in by the community as money, in order to show the intent of the parties to a contract calling for the payment of "dollars" as "lawful money."

The extent of evidence to which parties

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may resort in such cases, *it is not for us to consider. It may be proper now to add that, in addition to such proof as may tend to show what commodity or representative of value fulfilled the part of money in commercial dealings, proof of the value of the consideration may be, in many cases, important as a means of showing according to what standard of values the parties acted. If it

should appear, for instance, that the sale of an article of merchandise constitutes the consideration, and it should further appear that the price to be paid reasonably agreed with the market rates for that class and quality of goods, as adjusted to the value of Confederate notes, and it further appeared that, regarded as United States currency, the price agreed to be paid is grossly in excess of the value of the commodity sold, it would lead to the inevitable conclusion that the parties had reference to the actual rather than the legal representative of value current at the time of sale.

Proof of the value of the consideration is not in such cases admissible as affording a basis for reforming the contract, but as showing what the parties intended by the use of the terms "dollars" or "lawful money."

The Act of March 26th, 1869, does not assume to determine what contracts are, nor what contracts are not, based on Confederate notes. Its operation is limited in terms, first, to contracts made within certain years, and, second, to such thereof as were based on the values of Confederate States obligations. The Act does not obviate the necessity of the defendant's showing that the contract falls within its provisions, notwithstanding it was made in one of the enumerated years. Where a note on its face calls for the payment of "dollars," or "lawful money," although made during the enumerated years, yet in the absence of a finding of fact sufficient to form the basis of a different construction, the law adjudges the established legal currency of the United States to be intended by the parties.

2d. The next question is, whether, when it appears that the parties dealt with reference to the Confederate currency, resort can be had to the Act in question as a means of ascertaining the value of such Confederate currency. This question is intimately connected with the next, namely: Is the Act final and conclusive between the parties, as it regards the class of contracts to which it applies? or, may the parties introduce evidence, contradictory of the declaration of the Act, of the state of relative values?

So far as the Act is reconcilable with the

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relations between the *parties springing out of the contract in suit, it is obligatory, and cannot be said to impair the obligation of such contract. The question of constitutionality, when presented in any case to a Court, assumes the single form and aspect of an enquiry, whether the particular contract obligations in question are, in point of fact, impaired by the statute.

The proper subject of a legal controversy is not the authority of an Act of legislation, considered as a general question, but the rights of the parties before the Court. Where a question of the constitutionality of a statute actually affects these relations,

it must be considered on that ground, and on that alone. We are not to consider, in the present case, the merits or demerits, legal or otherwise, of the means set forth in the Act in question in their relation to contracts at large, based on Confederate currency, but the effect of the Act on the immediate rights of the parties before the Court exclusively.

Section second declares a state of facts as having existed at a particular time. It declares what was the relative value of Confederate States notes and United States currency at the date of the contract, or at least furnishes the means of fixing that relation, according to the principles of the Act. If it had been made to appear, in the present case, that the declaration was not in accordance with the fact, then the question would arise, whether a legislative declaration of a fact could preclude parties to a contract from giving proof of the actual state of the facts under which the extent of the obligation is to be judicially ascertained, without either directly or indirectly impairing the obligation of such contract. No testimony was offered on the trial for the purpose of showing that the actual relative values of the two descriptions of money differed from the declarations of the Act. If the declaration was in accordance with the actual fact, then the contract cannot be prejudicially affected by it, because the rights of the parties are the same under the statute as under the actual state of facts existing. In the absence of proof to the contrary, we are bound to regard the declarations of the Act as conformable to the fact, unless the Legislature was actually precluded from making any declaration on the subject, and the present parties have a right to insist on such want of legislative authority.

It is not our intention to enlarge the authority of that class of cases in which the Supreme Court of the United States has given a construction to the clause of the Con-

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stitution of the United States *forbidding States from passing laws impairing the obligation of contracts. The Legislature may rightfully establish rules of evidence, and such rules may be made binding upon antecedent contracts. The limit of this right is, that such rule must not impair the obligation of the contract. It is within the limits of this authority to declare what presumptions shall be made in the absence of proof, and, in the course of such legislation, the onus probandi is shifted from the one party to the other. So long as that results from a rule of general convenience, and is not, in substance, an effort to impair the obligation of a contract, parties have no right to complain. The declaration, in the present case, relates to matters of public concern, and is intended to save parties litigating from the inconvenience and expense of col-

lecting proof on so difficult and intricate a question. If the parties are dissatisfied with the result of the declaration, they are at liberty to resort to other proof of the real state of the case. We cannot find, either in the Constitution of the United States or of the State, authority for saying that the Legislature may not declare the existence of a fact of general interest, and forming part of the public history of the State, so as to justify the Courts in assuming the truth of such fact in the absence of evidence to the contrary. As this case stands, we must conclude that it was competent for the Circuit Court to submit to the jury the provisions of the Act, and, in the absence of proof to the contrary, for the jury to base their conclusions upon the declaration set forth in the several Sections of the Act.

On the other hand, the parties are not precluded from showing that the declaration of the second Section, in its bearing on the present case, is inconsistent with the actual state of facts. We do not regard the Act as assuming to do more than this. If it had intended to bind the parties absolutely to the state of facts declared, it must be assumed, in view of the doubtful character of such legislation, that language would have been employed distinctly expressing such intent.

It is evident, from its carefully guarded language, that it was intended to confer upon it just that amount of authority that could rightfully be conferred by a statutory declaration of a fact of that character, and no more. In our judgment, that rightful authority can only extend to laying down a basis for determining the rights of the parties in the absence of proof of a conclusive character to the contrary; and, therefore, we must conclude that such was the intent of the Legislature that passed the Act.

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*The Act in question adopts the date of the contract as the time with reference to which the comparison of relative values is to be made. Independent of this legislative determination, it might be found embarrassing to lay down a uniform rule on this subject. If called upon to consider, a priori, the question, whether the conversion of values should have relation to the date of the contract or its maturity, two classes of cases would have to be considered, namely, those of obligations maturing while Confederate money possessed commercial value, and those maturing afterwards. But we are not compelled to enter upon this difficult question; for, unless the Act in question is in conflict with the Constitution of the United States, or of this State, in this respect, we must regard the question as settled by legislative authority. The question then arises, is the Act imperative, under the Constitution of the United States, on the ground that, by the statute, the obligation is to be

tested by the relative values of the two kinds of currencies at the date of the contract, whereas the contract itself contemplated the value of Confederate money, at the date of payment, as the measure of liability. On a question of this kind, the authority of the Supreme Court of the United States is conclusive. In *Thorington v. Smith*, (8 Wallace 1 [19 L. Ed. 361],) the conclusion of that Court, on this very question, is stated in the following language: "We are clearly of opinion that the party entitled to be paid in these Confederate dollars can receive their actual value at the time and place of the contract in lawful money of the United States."

It is true that, in that case, the question whether the date or the maturity of the contract was to govern, was of little practical importance, for the note sued upon was payable one day after date; still there was a theoretical difference, and it would seem that that Court took into consideration that distinction, in order to lay down a general rule, which was done in the language above quoted. We must, therefore, consider the question arising under the Constitution of the United States as settled in favor of the constitutionality of the Act.

Our State Constitution (Art. I, Sec. 21.) contains a similar clause, prohibiting the Legislature from passing any law impairing the obligation of contracts. If this clause is to be considered precisely as if no similar provision existed in the Constitution of the United States, then, in giving effect to it, we would have to regard ourselves as bound by the decision in *Thorington v. Smith*, only so far as that decision rested upon sound

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reasoning. We are of opinion, *however, that the clause in question, as appearing in our State Constitution, ought to be read in connection with the corresponding clause in the Constitution of the United States, and effect given to both as forming part and parcel of one system of measuring the constitutional powers of the State Legislatures. It is very evident that if a rule of construction should be applied to that clause, regarded as a part of the Constitution of the United States by the State Courts, following the authority of the Supreme Court of the United States, and another rule of construction should be laid down as applicable to the same expression found in the State Constitution, an inconvenient and contradictory state of the law would arise. This inconvenience is avoided by reading the clause in the State Constitution as intended for the enforcement of the same rule of duty imposed by the Constitution of the United States. This is, undoubtedly, the true view of the rule of construction, as applicable to the clause of our domestic Constitution under examination, and it would follow that

the construction, settled by the highest judicial authority of the nation, in respect to the effect of the clause in question as occurring in the Constitution of the United States, should be adopted as the basis for construing the same clause as it appears in the State Constitution.

In the consideration of the questions that have been discussed, it has not been found necessary to examine the nature and legal consequences of the authority of the Governments existing in the confederated States, either unitedly or individually, during the rebellion, for the reason that, although the existence of the Confederate obligations depended on the action of the power set up by the Confederate States, still their value and significance, as a medium of exchange and standard of value, depended wholly upon the convenience and action of commerce. There was and could be but one legal standard, and that was enforced by the Constitution and laws of the United States. Nor is it of importance whether the convenience of commerce or the power and influence of the Confederate States controlled the use of Confederate currency by the commercial community; for, in the view that we take of the case, it is the fact that a certain commercial value was ascribed to this currency, and not the motive that led to its ascription, that is decisive.

The Circuit Judge erred in holding that, as matter of law, the amount of the note was to be reduced, under the operation of the statute, having regard simply to the date

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of the contract, and irrespective of the actual intent of the parties. He also erred in excluding testimony of the real consideration of the contract offered on the part of the plaintiff.

The verdict must be set aside, and a new trial ordered.

MOSES, C. J., and WRIGHT, A. J.—
We concur in the result.

2 S. C. 183

W. E. JAMES and J. J. JAMES v. JACK SMITH and ADAM BRISTOW, in re THOMAS C. COX, Sheriff.

(Columbia, April Term, 1870.)

[Contempt ⚡33; Sheriffs and Constables ⚡125.]

The Circuit Court of Common Pleas has no jurisdiction, upon a mere rule to shew cause, to attach a Sheriff for contempt in failing to execute a warrant, issued by a Magistrate in a civil proceeding, directed to the Sheriff, and legally in his hands for execution.

[Ed. Note.—Cited in *Gibbs v. Morrison*, 39 S. C. 371, 17 S. E. 803.]

For other cases, see Contempt, Cent. Dig. § 97; Dec. Dig. ⚡33; Sheriffs and Constables, Cent. Dig. § 248; Dec. Dig. ⚡125.]

[Habeas Corpus ⇨27.]

Where the Circuit Court attaches a Sheriff for contempt in a proceeding in which that Court had no jurisdiction, the Sheriff may be discharged under habeas corpus by a Justice of the Supreme Court.

[Ed. Note.—Cited in *In re Stokes*, 5 S. C. 72; *State ex rel. Bruce v. Rice*, 67 S. C. 239, 45 S. E. 153.

For other cases, see *Habeas Corpus*, Cent. Dig. § 22; Dec. Dig. ⇨27.]

[Judgment ⇨489.]

A co-ordinate tribunal may not disregard, much less set aside, the judgment of another Court, for mere errors of judgment or irregularities of procedure; but where the Court is without jurisdiction its judgment is void, and must be so held whenever it comes before another Court.

[Ed. Note.—Cited in *Gilliam v. McJunkin*, 2 S. C. 451; *Gibbs v. Morrison*, 39 S. C. 372, 17 S. E. 803.

For other cases, see *Judgment*, Cent. Dig. §§ 924, 925; Dec. Dig. ⇨489.]

[Contempt ⇨21.]

[Cited in *State v. Nathans*, 49 S. C. 203, 27 S. E. 52, to the point that a sheriff is in contempt in refusing to obey an order or precept of the circuit court which he is required to execute without regard to its validity.]

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. § 63; Dec. Dig. ⇨21.]

[This case is also cited in *Gibbs v. Morrison*, 39 S. C. 373, 17 S. E. 803, without specific application.]

Before Rutland, J., at Darlington, July Term, 1870.

Appeal from an order directing an attachment for contempt to issue against the Sheriff.

The facts were these: Under the Act of 1866, entitled "An Act to amend the law in relation to tenancies," (13 Stat., 416,) W. E. James and J. J. James instituted proceedings, in January, 1870, before a Magistrate of Darlington County, against Jack Smith and Adam Bristow, and on the 24th January, 1870, the Magistrate issued a warrant, under his hand and seal, directed to Thomas C. Cox, Esq., Sheriff of said County, commanding him to eject Smith and Bristow, "and all and every other person whatsoever, in possession of the premises, and deliver" to W. E. James and J. J. James full possession of the same.

The warrant was lodged with the Sheriff, and he having failed to execute it, the plaintiffs therein applied to, and obtained from, the Court of Common Pleas, for Darlington County, a rule on the Sheriff to shew cause why he should not be attached for a contempt, because of his failure to execute the warrant according to its exigency.

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*The Sheriff answered the rule, and for cause submitted, inter alia, that the plaintiffs "have no right to procure an attachment against him for contempt of Court for failing to execute the process of another and inferior jurisdiction."

His Honor overruled the return, and or-

dered "that the rule be made absolute, and that the said Thomas C. Cox, Sheriff as aforesaid, do proceed forthwith to execute the said warrant according to its exigency, and that, upon his failure so to do, on or before the 18th day of July instant, he be fined in the sum, &c., and be imprisoned, &c., till he purge his contempt; and that a writ of attachment do issue to enforce the provisions of this order."

Thomas C. Cox appealed on the ground, inter alia, that his Honor the presiding Judge had no right to entertain a rule against the Sheriff for failing or refusing to execute the process of an inferior tribunal, or any tribunal except his own Court.

Pending the appeal, the plaintiffs issued an attachment under the order, and Cox was arrested thereunder. He applied to the Chief Justice, at his Chambers, at Sumter, for a writ of habeas corpus, which was granted, and on a return thereto being made he moved for his discharge. At the first hearing, His Honor the Chief Justice overruled the motion for a discharge, but on a rehearing he granted it, and filed an opinion and order, dated the 27th August, as follows:

Moses, C. J. This second application on the part of the petitioner enables me to correct an error which, I now think, I committed in my decision rendered, ore tenus, immediately after the close of the first argument. If I am right in the conclusion which I have reached, I do not regret the opportunity to reform my judgment, according to my present conviction, after some consideration and reflection.

The return to the writ recites the whole proceeding which resulted in the imposition of the fine and the imprisonment of the petitioner. All the facts on which the order made by the Circuit Judge is founded are incorporated into the writ of attachment, by virtue of which the party is held under arrest.

It, therefore, appears that the writ issued for a supposed contempt on the part of the petitioner, who is the Sheriff of Darlington County, "because of his failure to execute a warrant of ejectment, issued (in the case therein stated) by E. W. Lloyd, Esq., Magistrate, and lodged with the said Sheriff, according to its exigency."

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*The Sheriff is the ministerial officer of the Circuit Court, bound to enforce all its orders, mandates and judgments in matters properly cognizable by it as a superior Court. If it has a general jurisdiction over the subject, its conclusion, even if erroneous, is binding until reversed by appellate authority.

Its decision, while it stands, must be accepted as effectual as if pronounced by a Court of the last resort. If a Sheriff, therefore, assumed, in a case thus arising, to

question the validity of the order or precept which he is required to execute, and refrained from enforcing it, he would, without doubt, be liable to a rule, and, under it, to such punishment, by fine and imprisonment, as the Judge might see fit to impose for the contempt.

It is necessary, therefore, to consider whether, by virtue of the official relation of the Sheriff to the Circuit Court of his County, he is liable to answer to it as for a contempt in not obeying the precept of a Magistrate's Court, which, in conformity to law, may be directed to him, without in any way bringing to its review and revision the proceedings of the said Court on which it was founded, save by the rule to shew cause why an attachment should not issue.

It is not pretended that the Circuit Court, though a Court of Record with the general jurisdiction which pertains to tribunals of that character, has such right at Common law. The exercise of the power is claimed by force of the 10th and 20th Sections of the "Sheriff's Act of 1839," (11 Stat. at Large, 28, 30,) which are as follows:

"Sec. 10. The Sheriff, or his regular deputy, shall serve, execute and return every process, rule, order or notice issued by any Court of Record in this State, or by other competent authority; and, if the Sheriff shall make default herein, he shall be subject to rule and attachment as for a contempt, and he shall also be liable to the party injured in a civil action."

"Sec. 20. Any Sheriff shall be liable to be proceeded against in any Court of Record in this State for a contempt for misconduct or malpractice in presence of the Court, or for neglect of duty; in the former case, he shall be liable to be attached forthwith, and, in the latter case, a rule shall issue against him, requiring him to shew cause why he ought not to be attached: Provided, in all cases, interrogatories may be propounded," &c.

Are these Sections to be so construed as to extend their provisions to contempts alleged to be committed, either by neglect in executing the process of a Magistrate's Court,

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or by willful default in obeying it? or, in other words, do they do more than express and declare the power which the said Court already had in the matter of contempts by its officers? The 10th Section only recites obligations which already attached on the Sheriff, and sets forth the mode of his punishment, which in no way differs from that which was before prescribed by law. The 20th Section provides for procedure against him, "in any Court of Record, for a contempt, for misconduct or malpractice in presence of the Court, or for neglect of duty." In the former case he is made liable to attachment forthwith, and in the latter he is first to shew cause. If the Sheriff, by this Section, is to be held amenable to attach-

ment by the Circuit Court for a contempt of a Magistrate's Court, "for misconduct or malpractice in its presence," and, as the last named Court possesses the identical power, it might follow, that the Circuit Court could take notice of a matter as a contempt in the inferior Court, which that Court did not so consider. If the words can be construed as extending to any Court of Record jurisdiction over contempts in another Court, the consequence would be, that the Circuit Court would notice a contempt of the Court of Probate, or either of them notice a contempt committed against the Supreme Court. The mere reference to this anomalous result, which is the legitimate inference from the argument, shows that the construction contended for cannot prevail.

The Section never contemplated that one Court should judge and determine in a contempt charged to have been committed against another. It would be an extra judicial proceeding, and where it is claimed, the authority must be shown by positive direction.

The purpose of the Act referred to was to bring together, in as convenient and concise form as possible, the duties, rights and liabilities of Sheriffs, as the Legislature also did in regard to Magistrates, Clerks, Ordinaries, Commissioners and Coroners, that these officers might have the opportunity of readily informing themselves of the duties exacted of them, and the obligation which the office imposed. A reference to the several Acts will shew that, save as to the Commissioner, they demand scarcely any duty which, either by common law, or statute, was not already required of them, and as to him, it was but a recital of his duties by statute, or the practice of the Court of Equity, with some extension of his powers.

The Act of 1866, (13 Stat., 416,) does require the Sheriff to execute process of ejectment when directed to him by a Magistrate.

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*Does it follow, however, in the event of his refusal or neglect, that he is amenable to attachment by the Circuit Court?

By what process did the said Court possess itself of the case before the Magistrate, so as to ascertain if the proceeding was within the jurisdiction, for, being an inferior tribunal, if it has exceeded it, the judgment is absolutely void.—*Kempe v. Kennedy*, 5 Cranch, 173 [3 L. Ed. 70]; *Ex parte Watkins*, 3 Pet., 193 [7 L. Ed. 650]; *Geyger v. Stoy*, 1 Dall., 135 [1 L. Ed. 70].

The Sheriff certainly might demand that the question of jurisdiction should be decided before he is subjected to punishment for not obeying a precept which might be a nullity. Is the Circuit Court, by a mere proceeding by rule, to bring the cause from the inferior Court before it, so that it may examine and decide on a jurisdictional question which might be involved?

This would be a method of bringing up the proceedings of an inferior Court for review which would not only be without precedent, but in the face of all those forms which the law prescribes for the exercise of that power by the Circuit Court.

Holding, therefore, that the Circuit Court, by virtue of the said Sections of the Act of 1839, have no authority in the premises to rule and attach the Sheriff, I am now to inquire whether it can refer its action, in that behalf, to its general common law powers as a Court of record?

Ch. J. Marshall, in *Ex parte Watkins*, 3 Pet., 206 [7 L. Ed. 650], says: "The cases are numerous which decide that the judgment of a Court of record, having general jurisdiction of the subject, although erroneous, is binding until reversed." Does this general jurisdiction of the Circuit Court, in matters of contempt against its own authority, preclude an inquiry into its power to draw within the scope of its conceded authority a right to judge of contempts committed by a disobedience of the process of an inferior and limited Court?

Unless the proceedings can be brought up by appeal, where it is allowed, or by a writ of certiorari, or where they are necessarily before the Court by the return to a writ of prohibition or mandamus, so that the judgment, when given, proceeds directly from such Court, in the matter thus before it, it cannot regulate, interfere with, or enforce the process of such inferior Court. It has not, in this view, "a general jurisdiction of the subject."

The same eminent and distinguished jurist, (Ch. J. Marshall,) in *Rose v. Himely*, 4 Cranch, 269 [2 L. Ed. 608], said: "Upon principle, it would seem that the operation of

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every judgment must depend on the power of the Court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined." Mr. Justice Trimble, in delivering the opinion in *Elliott v. Peirsol*, 1 Pet., 340 [7 L. Ed. 164], says: "Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause. Whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But if it acts without authority, its judgments and orders are regarded as nullities.—They are not voidable, but simply void, and form no bar to a recovery sought, even when prior to a reversal in opposition to them.

"They constitute no justification, and all persons concerned in executing such judgments or sentences are considered, in law, as trespasses. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any Court exercising authority over a subject, may be inquired into in every Court where the proceedings of

the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

This principle was not only recognized in *Thompson v. Tolmie*, 2 Pet., 163 [7 L. Ed. 381], and adopted in *Wilcox v. Jackson*, 13 Pet., 511 [10 L. Ed. 264], but was referred to as the distinguishing rule in regard to the inquiry, permitted to another Court, into the validity of a judgment of a co-ordinate tribunal collaterally brought before it.

In *Lessee of Hickey, et al., v. Stewart*, 3 How., 762 [11 L. Ed. 814], the ruling, in *Elliott v. Prescott* was again sustained; and the same conclusion may be found in *Borden v. Fitch*, 15 Johns., 141; *Mills v. Martin*, 19 Johns., 33; *Latham v. Edgerton*, 9 Cowan, 229, and in many decisions of the Courts of the several States.

In *Miller v. Miller*, 1 Bailey, 245, Colcock, J., delivering the opinion, says: "It never could have been intended to give effect anywhere to a judgment pronounced by a Court which had no jurisdiction of the cause in which it was rendered. The validity of every judgment depends upon the authority which the Court possessed over the subject of its adjudication, and the judgment of a Court, on a subject over which it had no jurisdiction, is no judgment, but a mere extra judicial opinion." The case, in the matter of *Metzger*, 5 Howard, 191 [12 L. Ed. 104], relied on in the argument as an authority against the power of the sitting Justice here to discharge, conceded "that the legality of the commitment could be inquired into, and that, however erroneous the judgment of the

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Court be, *either in a civil or criminal case, if it had jurisdiction, and the defendant was duly committed under an execution or sentence, he cannot be discharged by the writ." I have examined with care the English authorities brought to my attention by the learned counsel who resists the motion. In *Brennan & Gabius' Case*, 59 E. C. L., 492, no objection was made to the return that it did not show jurisdiction in the Court to punish the crime of burglary, but it was said to be bad for not showing power to punish by transportation. Lord Denman, C. J., said: "That the Court, having competent jurisdiction to try and punish the offense, and the sentence being unreversed, the Court could not assume that it was invalid; we are bound to presume, prima facie, that the unreversed sentence of a Court of competent jurisdiction is correct."

In *Dime's Case*, 68 E. C. L., 544, the only question was, "whether the order of committal made by the Vice Chancellor was valid," and, as he had right to adjudge whether there was a valid injunction and a breach of it, the Court held it could not review, on a writ of habeas corpus, his judicial decision. Earle, J., said: "The return shows a

committal by a Court of competent jurisdiction, acting within its jurisdiction."

It is not to be questioned, that all Courts possess the inherent right to maintain their own dignity, by compelling, in their presence, a due observance of respect and of propriety. They must have the power to punish for all acts, which, if unchecked, would bring the administration of justice into odium and disgrace, no matter how inferior the Court may be. In this attribute there is no distinction between the highest legislative body, acting in a judicial capacity on a question of breach of privilege, and a Court confined to the trial of small and mesne causes. Nor is it to be doubted that all Courts of Record may punish their own officers, by fine and imprisonment, for default of obedience to their mandates. This is incident to their powers at Common Law.

If, however, a Circuit Court of this State can punish a Sheriff for his failure to execute, not its precept, but that of a Magistrate's Court, where the cause in which the supposed contempt has been committed, is not brought before it by some adequate and competent process, by the force of which it may properly assume jurisdiction, but simply by its order to answer a rule, the power must be shown to exist by the force of some statute, clearly and distinctly so declaring.

The rights and prerogatives of all Courts

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must be maintained. *Within their jurisdiction, until reversed by appellate authority, they are supreme; but, whenever these are transcended, their judgments and their orders, wanting the sanction which alone can give them force and effect, are nullities, and therefore void.

Holding that the petitioner, Thomas C. Cox, is not detained in custody by legal warrant, it is ordered and adjudged, that he be discharged.

Let all the papers be filed in the office of the Clerk of the Circuit Court for Darlington County.

The appeal of Cox was heard on the 7th September, 1870, to which day the April Term of the Court had been continued.

Harlee, for appellant.

Spain, contra.

PER CURIAM. The judgment of the Court will be confined to the following single question arising out of the brief and grounds of appeal:

Has the Circuit Court jurisdiction, under a mere rule, to require a Sheriff to shew cause why he should not be attached for a contempt for failure to execute a warrant issued and directed to him by a Magistrate, though the Magistrate had, by law, the right to direct such warrant to him for execution?

Under a rule so issuing to shew cause, to which a return was in due form made,

Thomas C. Cox, Sheriff of the County of Darlington, was attached, by order of the Circuit Court for the same County, and applied to His Honor the Chief Justice of this Court at Chambers for a writ of habeas corpus, which was issued.

The return submitted, as the cause of the caption and detention, the attachment issued by the Circuit Court, under the rule to shew cause why the Sheriff had not executed the warrant so directed to him by the Magistrate.

The question as to the legal custody of the petitioner, Cox, involved the consideration of the jurisdiction of the Circuit Court in passing the very order which the motion now on behalf of the Sheriff seeks to set aside.

The Chief Justice, after hearing full argument, discharged the Sheriff from custody, and filed an opinion, discussing at length, the power of the Circuit Court to grant the said order, arriving at the conclusion that it was without authority. The identical question there passed upon is the one now presented for our judgment.

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*We adopt the opinion of the Chief Justice referred to, of which a copy is herewith filed as the opinion of this Court, and the motion is accordingly granted.

2 S. C. 191

JOHN McKEEGAN v. DANIEL McSWINEY.
Ex parte McKEEGAN, in re O'NEILL
v. McKEWN.

(Columbia. April Term, 1870.)

[Bonds \S 134; Payment \S 12, 14.]

Bond for \$15,000, dated 4th August, 1864, and payable with interest, two years "after the blockade of the port of Charleston shall have been effectually raised." The bond was made in South Carolina, and was given for one-half the price of land sold by the obligee to the principal obligor—the other half having been paid in Confederate currency. The Court being satisfied that the intent of the parties was that payment should be made in Confederate currency, the majority held, reversing the Circuit decree, that the amount the obligee was entitled to recover was the value, in national currency, of the \$15,000 in Confederate currency, at the date of the bond, with interest.

[Ed. Note.—Cited in Parker v. Wilson, 3 S. C. 297; Moore v. Johnson, 7 S. C. 308.]

For other cases, see Bonds, Cent. Dig. \S 238; Dec. Dig. \S 134; Payment, Cent. Dig. \S 38, 93; Dec. Dig. \S 12, 14.]

Moses, C. J., dissenting, held, that having regard to the particular circumstances of the case, substantial justice had been done by the Circuit decree, which fixed the amount of the recovery at one-half the value of the land, in lawful money, at the date of the contract, with interest thereon, and that the decree should be sustained.

Before Carroll, Ch., at Charleston, November, 1868.

Appeals from the Circuit decree.

The case first stated, of McKeegan v. McSwiney, was a bill to foreclose a mortgage

of real estate given by the latter to the former, to secure the payment of a bond conditioned for the payment of \$15,000 two years "after the blockade of the port of Charleston shall have been effectually raised," with interest, payable semi-annually; both instruments bearing date the 4th August, 1864.

The Rev. Patrick O'Neill, deceased, was surety in the said bond, and the case, secondly stated, was a petition for leave to prove the debt due on the bond in the case of Eliza F. O'Neill v. Maria T. McKewn, and others, which was a bill to settle up the estate of the decedent.

The Master, to whom the cases had been referred, submitted a report as follows:

"On the 19th instant the following order was made: 'On hearing the solicitors in these causes, it is ordered that it be referred to the Master to take testimony and re-

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port upon the true value and *real character of the consideration of the bond at the time it was made, mentioned in the pleadings in the latter named cause, and report the amount due them.' I have taken the testimony of several witnesses, including that of the plaintiff and defendant, on the matters referred to me. I find that the property described in the mortgage was valued by several witnesses at from \$5,500 to \$6,000 before the war, and about \$4,000 now; but no estimate is made of its real value at the date of the execution of the bond and mortgage, on the 4th of August, 1864. A paper was produced by plaintiff, containing an estimate, by William Thompson, the builder, (who is now dead,) of the cost of the buildings and of filling up the lots, amounting to \$10,601.54; and the plaintiff, in his testimony, estimates the costs of the whole property to him, up to the time of the sale to McSwiney, at \$12,000.

"The testimony shows that the sale of the property from John McKeegan to Daniel McSwiney was negotiated by the Rev. Patrick O'Neill, as the friend of both parties. The first terms proposed were to pay the whole purchase money in Confederate notes, but they were changed afterwards, at the instance of Rev. P. O'Neill, for the payment of fifteen thousand dollars (\$15,000) in those notes, and fifteen thousand dollars in the bond of Daniel McSwiney, with the Rev. Patrick O'Neill as surety, with a mortgage of the property, as the bond and mortgage now show.

"I find that the bond bears date the 4th of August, 1864, from Daniel McSwiney and Rev. Patrick O'Neill to John McKeegan, in the penalty of thirty thousand dollars, conditioned to pay the sum of fifteen thousand dollars, at the full end and expiration of two years from and after the effectual raising of the blockade of the port of Charleston, with legal interest thereon at the rate of seven per cent. per annum from the date, pay-

able semi-annually, until the whole amount of principal and interest due shall be fully paid and satisfied. The mortgage bears even date with the bond, and is duly recorded the 22d August, 1864, in the Register of Mesne Conveyance office, in Book Q, No. 14, page 249.

"The testimony shows that the object of the parties in extending the time of payment of the bond, in the terms of the condition, was to obtain a more settled currency than that which existed at the date of the bond.

"I have accepted the statement submitted by plaintiff's counsel of the amount apparently due on the face of the bond, \$19,060.88, on the 4th instant, but this, according to the

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result I have arrived *at, ought to be reduced to United States Treasury notes as they compared with Confederate notes in August, 1864, which, according to the table, was \$8.85 of the latter for one of the former, so the actual sum will be \$8.85—\$19,060.88—\$2,153.77, with interest on the principal, \$2,110.17, to payment.

"The plaintiff also claims to rank as a bond creditor on the estate of Father O'Neill at the time of his death.

"The defendant claims a discount of \$1,250 for rents of houses due him, which the tenants had notices from the plaintiff, in 1866, not to pay over to defendant, but to himself. There is no proof that any of these rents were received by Mr. McKeegan, nor that they will be lost to Mr. McSwiney—at least they may be submitted to another tribunal—and I have not allowed the claim."

To this report exceptions were taken by McKeegan, as follows:

First Exception. For that the Master reports that the testimony shows that the sale was negotiated by the Rev. Patrick O'Neill, as the friend of both parties, whereas the fact was, and the testimony shows that he, the Rev. P. O'Neill, was the agent of Daniel McSwiney exclusively, and, as such, negotiated with the petitioner and complainant.

Second Exception. For that the Master reports that the change from all cash to part in a bond, was made at the instance of the said Rev. P. O'Neill, whereas the testimony shows that the petitioner and complainant insisted upon this, and the peculiar condition of the bond, as the essential condition and consideration of his contract to sell.

Third Exception. For that the Master has simply scaled the amount claimed to be due on the bond, without regard to anything else than the value of Confederate Treasury notes in United States Treasury notes at the date of the bond, while he, at the same time, reports that the bond was made payable as it was with a view to a better currency, which was indeed the true consideration, and he should so have reported.

On hearing the report and the exceptions thereto read, His Honor Chancellor Carroll was pleased to recommit the same to the Master, who made a second report, as follows:

"By the order of Chancellor Carroll, my report in this cause was recommitted to me to take further testimony as to the real value of the mortgaged property in lawful money at the time of the contract.

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"I respectfully report that, in pursuance of said order, I have had other witnesses before me, but find nothing in their testimony which enables me to fix the real value of the property in July, 1864."

Carroll, Ch. On the part of the plaintiff and petitioner McKeegan, it is contended that the Constitution and Ordinances framed and enacted in September, 1865, with the State government thereby established, and all Acts of legislation or quasi legislation under that authority, have passed away and become wholly inoperative. It is urged that all of these were provisional merely, and that all have been abrogated and swept away by the adoption of the present Constitution and the organization of the present State government. A different view seems to have been entertained, as well by the Convention, last assembled, as by the present legislative authority of the State. The former, by the Ordinance of 15th March last, repealed all Acts of legislation passed since the 20th December, 1860, which pledge the faith and credit of the State for the benefit of any corporate body. Of the Acts thus sought to be repealed, some of the more important seemed to have been passed during the continuance of the so-called Provisional Government of the State. The third Section of the Act of 15th September, 1868, 14 Stat., 23, repeals in terms the eleventh Section of the Act of the General Assembly, ratified the 21st of December, 1865, entitled "An act to raise supplies for the year commencing in October, 1865." Had the Convention last assembled, and the present General Assembly, considered those Acts of the late State Government already abrogated and inoperative, then their proceedings to repeal them was without purpose or meaning. But if any of the legislative Acts of the late State government survive the establishment of its present government, then all have survived except such as have expired by their own limitation, or are in conflict with the present Constitution of the State, or with some enactment of the Legislature under it.

It cannot be maintained that the Joint Resolution of the General Assembly in November, 1865, approving and ratifying the 13th Amendment of the Constitution of the United States, was in its nature temporary and provisional merely. Surely the legislative Acts of the late State government cannot have less force or permanence than

would be accorded to the Acts of the General Assembly whilst the State was engaged in open war with the Government of the United States. They must be considered, at least,

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as having not less force and validity than would be conceded to them by international law as legislative Acts of a conquered State. In *Mitchel v. The United States*, 9 Peters, 748-9 [9 L. Ed. 283], it is said that "according to the established principles of the law of nations, the laws of a conquered or ceded country remain in force until altered by the new sovereign." "The law, usages and municipal regulations in force at the time of the conquest or cession," says Chancellor Kent, "remain in force until changed by the new sovereign."—1 Kent's Com., 178, 2, b. The provision of the fourth section of the Ordinance of September, 1865, as to suits upon certain contracts therein designated, are regarded, therefore, as still obligatory and of force. To the defence set up, the further objection is made that the provisions of the Ordinance of September, 1865, as expressed in its fourth Section, operate to impair the obligation of contracts, and being thus in conflict with the Constitution as well of the United States as of this State, are, therefore, invalid and void. It is sufficient to say that it was otherwise adjudged by the Court of Errors in the case of *Copes ads. Rutland*, and *Thomas v. Raymond*, 15 Rich., 84.

Yet another reply to the defense is made on behalf of McKeegan. He contends that the provisions referred to of the Ordinance of September, 1865, are inapplicable to the contract between himself and the defendant, *McSwiney*, which he here seeks to enforce. The ground assumed on the part of McKeegan is held to be untenable, upon the authority of the decisions which have been cited.

The Ordinance of 1865, in its provisions respecting suits upon contracts made between the 1st of January, 1862, and 15th May, 1865, (as I have had occasion to remark in a case recently considered,) seems to have proceeded upon the assumption that, by reason of the extraordinary condition of the country, and the thorough derangement of all the received standards of value during the period mentioned, exactitude in ascertaining the amounts in lawful money for which men then became bound by contract, was, in the general, wholly unattainable. An approximation to the real debt, as near as practicable, and nothing more, appears to have been contemplated. In the apprehension of the Court, the true value of the consideration, at the date of the contract, should form the basis of such approximation, and then should be considered the influence and effect of the particular circumstances of the case.

The necessity of conforming to this rule

seems to be manifested here by the gross injustice that would result from disregarding

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it. *According to the weight of the evidence, as apprehended by the Court, the true value of the property bought by McSwiney, at the date of the purchase, may be set down at six thousand six hundred dollars. But if his bond be understood, according to his construction, as an obligation for the payment of \$15,000 in the currency of Confederate Treasury notes, or its equivalent, then McSwiney will have obtained the property for a price which, if expressed in the United States Treasury notes, would be about the half, and, if expressed in gold, would not be the one-fourth of its real value at that date. On the other hand, if, as contended by Mr. McKeegan, the bond be read as payable in gold, then he will have obtained for the property a price more than fourfold its gold value, and greatly beyond that proportion if computed in the Treasury notes of the United States at the same date. Such results seem not to have been within the contemplation of either party. It is further urged, on the part of McKeegan, that the \$15,000 on account of the purchase money actually paid by McSwiney should not be treated as a satisfaction of one-half the debt, but as payment of a sum equal to the value of that amount of Confederate Treasury notes computed in lawful money. In the written contract for the purchase between McKeegan and McSwiney, represented by the Rev. Patrick O'Neill, as his agent, the price of the property, as set down, is "the full sum of thirty thousand dollars, payable as follows: One-half thereof in Confederate States Treasury notes of the last issue, and the balance in bond, bearing date this day, (4th August, 1864,) payable two years after the blockade of the port of Charleston shall have been effectually raised, with interest thereon, semi-annually, from date." The contract of purchase and sale between the parties is set forth in the bill, and in the same terms. Whatever may have been the real debt to McKeegan, incurred by McSwiney under this contract, it is, in the language of both, expressed by the words "thirty thousand dollars;" and it is expressly stipulated that "one-half thereof should be payable in Confederate States Treasury notes of the last issue." The one moiety of that sum, \$15,000, was accordingly paid by McSwiney, and accepted by McKeegan, as and for the one-half of the purchase money.

It is not perceived how else the transaction can be regarded. The deed of conveyance recites the consideration to be \$30,000, paid to John McKeegan by Daniel McSwiney. But how was such payment made? It was effected according to the terms of their

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*contract. One-half of that sum (the purchase money) being paid in Confederate

States Treasury notes of the last issue, and the balance in McSwiney's bond. That bond and the mortgage securing it have relation to the balance, the latter moiety of the debt exclusively. It has no reference whatever to the former moiety, for so much of the debt had been already satisfied and paid. To that extent the contract, on the part of McSwiney, is regarded as executed, and the result is that his indebtedness must be set down at three thousand three hundred dollars, with interest to be computed as stipulated in the condition of the bond. (See *Austin v. Kinsman*, 13 Rich. Eq., 259.)

The task of ascertaining the real debt, now due by McSwiney, might have been more satisfactorily performed through the Master, or by means of an issue at law. It has been reluctantly assumed by the Court, and the pressure of its engagements precludes a more elaborate consideration of the case.

The Rev. Patrick O'Neill became the surety of McSwiney, on his bond to McKeegan, and has since died insolvent. The obligee and petitioner, McKeegan, appears before the Master under the order calling in the creditors of Patrick O'Neill, in the case of *Elisa F. O'Neill, his administratrix, v. Maria T. McKewn, administratrix, et al.*, and claims to be paid as a bond creditor out of the assets of O'Neill's estate. It is objected, on behalf of the other creditors of Patrick O'Neill, that McKeegan should be required to exhaust his remedies against McSwiney, the principal, before resorting to the estate of his surety. It appears to be a necessary condition of the Court's interposition, in such cases, that the remedy, to which it is proposed that the creditors should resort, must be shown to be as certain, prompt and effectual as that which he is required to forego. This condition will not be disregarded if the obligee, McKeegan, is directed to seek payment of his bond primarily out of the mortgage security. All necessary parties are before the Court, and the decree of foreclosure, to be pronounced, seems to furnish him with a remedy certain, prompt and effectual for enforcing payment of his bond. It is considered that he should proceed accordingly, and not resort to the estate of Patrick O'Neill, until exhausting his remedy under the mortgage.

The blockade of a port may properly be said to be raised "whenever it is made free to ingress and egress." Such form of expression imports any determination or cessation of a blockade, whether by the appearance of superior hostile force or by the voluntary act

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*of the blockading power, and more upon this topic, it is apprehended, need not be said.

As to the exception to the Master's report, taken by the defendant, McSwiney, the Court concurs with what is said by the Master in his first report, "that there is no proof that any of the rents referred to were received by McKeegan, or that they will be lost to

McSwiney," and that exception is overruled.

Of the exceptions on the part of the plaintiff, McKeegan, a consideration in detail is not deemed necessary, and it will suffice to say that they are sustained or overruled to the extent herein above indicated.

It is ordered and adjudged, that this opinion stand for the decree of the Court.

It is further ordered and decreed, that the defendant, Daniel McSwiney, pay to the plaintiff John McKeegan, by the first day of February next, the sum of three thousand three hundred dollars, with interest to be computed according to the tenor and effect of the condition of his bond hereinabove mentioned, together with the plaintiff's costs and charges of suit, and, upon his failing so to do, that the said defendant be debarred and foreclosed of and from all equity of redemption of, in and to all and singular the several lots and parcels of land, comprised within his mortgage of the same, exhibited with the bill, and that, thereupon, the Master of this Court, or such other person as may be thereunto authorized, proceed to sell the said premises, at public auction, for cash, as to one-fourth of the purchase money, and as to the residue, upon a credit of six months, with the interest from the day of sale, twenty-one days' notice of such sale, by public advertisement in one of the Charleston newspapers, to be first given, and the credit portion of the purchase money to be secured by bond with adequate securities; and that out of the proceeds of the sale the plaintiff be paid said mortgage debt, with interest to be computed as aforesaid, together with his costs of suit; and that the surplus of the said proceeds of sale, if any, be paid to the defendant, McSwiney.

And it is further ordered, that the parties severally have leave to move for such other orders as may be necessary or proper in this cause.

McKeegan, the plaintiff and petitioner, appealed from so much of the decree as allows to him only three thousand three hundred dollars, with interest, as the debt due to him under the provisions of the 4th Section of an Ordinance of the Convention, pass-

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ed on *the 27th day of September, 1865, entitled "An Ordinance to declare in force the Constitution and laws heretofore in force in this State, and the Acts, official, public and private, done, and appointments and elections made under authority of the same," instead of allowing the whole amount expressed in the condition of the bond, the subject-matter of these suits, with interest, or else rescinding the contract of purchase and sale altogether, upon equitable terms; and, in support of such appeal, relied upon the following grounds:

First. That the Ordinance of the Convention of September, 1865, was the act of a Provisional Government, and ceased with the

extinction of the Government by which it had been adopted.

Second. That whatever rule may be enforced in relation to contracts made between the periods of time referred to in that Ordinance, such rule is not applicable in cases where the contract was not made with reference to Confederate Treasury notes.

Third. That the said Ordinance was not intended to apply, and is inapplicable to, the contract expressed in the peculiar condition of the bond, which is the subject of this suit.

Fourth. That if the said Ordinance was intended to apply, or to be applied, to such a contract, then that it is unconstitutional and void, by the provisions of the Constitution of this State then adopted by the said Convention, Article VII, Section 2; of the present Constitution, Article I, Section 21; and also of the Constitution of the United States, Article I, Section 10, Clause first; as the said Section of the said Ordinance would, if so construed, manifestly impair the obligation of this contract, so explicitly made and wholly unambiguous in its meaning and legal construction.

Fifth. That the construction given to the Ordinance that all contracts, regardless of the terms used in them, but with reference only to the date of the same, should be regarded as embraced in the provisions of the Ordinance, is against common sense and common right.

Sixth. That, by the decree in this case, the plain language of the bond was varied, without evidence of any kind, and against the just impressions of the defendant, who, when he saw the bond, understood it as an obligation to pay in good money, and relieves himself by what he says was stated to him by the Rev. P. O'Neill; and, while it is submitted that such is not competent evidence, it is further submitted that, if it was evidence of the highest kind, it would be but parol evi-

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dence, varying the terms of a contract *as expressed in writing, and concerning which there was no ambiguity.

Seventh. That, from the testimony of the defendant himself, it is plain the condition was not only susceptible of, but naturally indicated the construction for which the complainant contends; and yet, according to his own account, he made no application for any explanation to the complainant, or to his counsel, but was content to yield his own judgment in so important a matter to the statement of his own agent, and must take the consequence, and not seek to visit that misrepresentation, or misconstruction, upon the complainant, who, on his part, testifies that the same party, defendant's agent, knew that he, the complainant, understood it in the same way that defendant did at first.

Eighth. That where the parties differ as to the terms of the contract, and the Court has no mode of determining what was the

intention of both parties to it, and that both understood it in the same manner, equity will restore the parties, if possible, to the condition in which they were before the contract was made.

Ninth. That, if there was any ambiguity in the words employed in the contract, it is certain, by the testimony, that the complainant then construed them as he does now, and that was the consideration he expected to receive for, and for which only he agreed to part with, his property; and it is equally certain that defendant perceived that they would bear that meaning, and the most that equity can do for the defendant is to rescind the contract, and restore him, as far as possible, to his position before the contract, that is, as was proposed by the complainant, that the defendant should be decreed to reconvey the premises, and take back the value of the Confederate Treasury notes paid by him, upon such terms, as to rents, on the one hand, and interest on the other, as may seem just.

Tenth. That there is nothing in the contract or in the facts admitted, or in the testimony in the cause, to warrant His Honor's conclusion that the complainant received half of the consideration for which he sold his property; but, on the contrary, his testimony that he considered the cash paid in Confederate currency as nothing, and looked principally to his bond as the real consideration, is wholly uncontradicted, and is corroborated and sustained by the circumstances of the time when the contract was made.

Eleventh. That to bind the complainant to the estimate of other people for his property, and to refuse to estimate the value of

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the *part payment in the same way, is unfair and unequal, and ought not to be sustained in equity; and, in fact, is inconsistent with the Ordinance itself, which puts the whole consideration upon both sides upon inquiry.

Twelfth. That the precise terms of the condition of the bond conclusively show that the complainant parted with his property, and the defendant purchased it upon their respective estimates of the effects of a future contingency distinctly contemplated by both, and their bargain thus made with the eyes of both of them fully open ought not to be interfered with.

Thirteenth. That under all the circumstances of this contract, the complainant is entitled to have the benefit of the highest value which can be set upon it by honest men, and two such witnesses have valued the property from \$8,500 up to \$9,000, and the Chancellor should have estimated it at \$9,000, at least at \$8,500, and the decree should be modified accordingly.

The defendant, McSwiney, also appealed, for the causes and upon the grounds as follows:

1st. That the Chancellor erred in overruling his exceptions to the Master's report.

2nd. That the Master's calculation of the value of complainant's claim ought to have been sustained; and it was error to change the same.

McCrady, for McKeegan.

Phillips, Campbell, for McSwiney.

Nov. 26, 1870. The opinion of the Court was delivered by

WILLARD, A. J. The first of the above entitled cases is a bill to foreclose a mortgage of land. The second is a petition on the part of the mortgagee, intervening in the case of O'Neill v. McKewn, in order to make the amount of the bond which the mortgage was given to secure, and to which P. O'Neill, deceased, was surety, a charge upon the estate of said P. O'Neill, the settlement of which estate is involved in the last named suit. The cases were heard and decided together; and, as they depend upon the same questions, they will be here considered together.

The bond and mortgage in suit were made August 4, 1864. The contract of sale called for the payment of \$30,000, as follows: One-half thereof in Confederate States Treasury notes of the then last issue, and the balance

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in a bond bearing date August 4, 1864, *payable in two years after the blockade of the port of Charleston shall have been effectually raised, with interest thereon, semi-annually, from date, to be secured by a good surety to the bond, and also a mortgage, &c. The first payment was made as called for by the agreement, and the bond and mortgage in suit given, following the terms of the contract. The principal question raised by the bill and answer was, whether the parties intended the bond as payable in Confederate currency, or in such medium as should be lawful money at the maturity of the bond.

Testimony was taken before a Master, and his report made, by which it was held that the bond called for the payment of Confederate money, according to the true intent and understanding of the parties. The Master converted the sum called for in the bond into United States money as of the date of the bond, and reported the amount due according to such basis of calculation.

Upon the hearing before the Chancellor, the conclusion of the Master, so far as it related to the character of the currency which the parties had in view, was sustained, but a different view taken of the mode of arriving at the amount due upon the bond from that adopted by the Master. The basis adopted by the Chancellor was the value of the property mortgaged at the time of the sale, as ascertained by testimony.

We have already held, in Neely v. McFadden, decided at this Term, (ante, p. 169,) that it was competent to look into the real intent

of the parties as to the medium of discharging the obligation of the bond by the aid of extrinsic evidence.

The conclusions of the Master and of the Chancellor, as to their intent, in this respect, rest in part on the contract of sale and in part on parol proofs. The question is one of fact, and we find no sufficient ground for disturbing their conclusions in this respect.

As it regards the other point, what was held in *Neely v. McFadden*, and in *Harmon v. Wallace* [2 S. C. 208], following that case, fully dispose of the present question. The basis adopted by the Master was substantially correct, while that adopted by the Chancellor is not, in our judgment, conformable with the contract of the parties.

Neither party having excepted to that part of the Master's report that sets forth the relative value of Confederate currency and lawful money of the United States at the date of the contract, they are not entitled to call it in question at the present time; nor have they alluded to that subject in their grounds of appeal.

The decree of the Chancellor might be al-

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lowed to stand, after *being modified as to the amount due upon the bond and mortgage, but for the fact that it may be found desirable that the terms of sale as stated by the Chancellor should be modified; and, also, for the fact that the decree, as it regards the petition of McKeegan, is interlocutory, and calls for further action in the suit in which such petition was filed.

The Circuit decree will, therefore, be reversed, and the report of the Master confirmed, and the cause will be remitted to the Circuit Court for a decree and further proceedings on the Master's report, upon the principles here laid down.

WRIGHT, A. J., concurred.

MOSES, C. J., dissenting. In the opinion of the Court, it is assumed that the Master, in his report, "held that the bond called for the payment of Confederate money, according to the true intent and understanding of the parties."

It is further assumed, that the said report, so far as it relates to the character of the currency which the parties had in view, was sanctioned by the Chancellor. Regarding this as an established fact, the Court applies to the case the rule it adopted in *Harmon v. Wallace*.

The opinion of the Court thus gives effect to a question of fact as concurred in both by the Chancellor and Master. With proper deference, I submit that there is nothing in the decree of the Chancellor to sustain the conclusion.

The Master did reduce the amount apparently due on the bond to the value of na-

tional currency, as compared with Confederate Treasury notes at its date; and if this act was to intimate his judgment as to the intention of the parties in regard to the character of money through which the payment was to be made, the effect is entirely destroyed by his statement, in this respect, "that the testimony shows that the object of the parties, in extending the time of payment of the bond in the terms of the condition, was to obtain a more settled currency than that which existed at the date of the bond."

So far from adopting this report, the Chancellor recommitted it to the Master, who, on 24th October, 1868, reported "that, in pursuance of said order, he had other witnesses brought before him, but found nothing in their testimony which enabled him to fix the real value of the property in July, 1864." It obviously appears that the object of the Chancellor, in the remittal, was to ascertain

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*the value of the premises at the time of the execution of the agreement.

The decree, not holding that the character of the currency, which the parties had "in view," was that which the Master adopted, is based upon an entire repudiation of his conclusion, and establishes the amount of the debt by reference to all the facts presented by the testimony "showing the true value and consideration of the bond at the time it was made." This constituted, too, the very matter of inquiry submitted to the Master by the first order of reference.

We are, therefore, free from the effect of a concurrence between the Chancellor and Master on a question of fact, which is usually held conclusive on this Court.

I propose, now, to present my views of the case before us.

On the fourth of August, 1864, an agreement, in writing, was entered into between John McKeegan, the plaintiff and petitioner, and the Rev. Patrick O'Neill on behalf of Daniel McSwiney, the defendant, for the sale and purchase of certain real estate in the city of Charleston.

By its terms, as alleged in the bill, the price was fixed at \$30,000, one-half thereof to be paid in Confederate notes of the last issue, and the balance to be secured by the bond of the defendant with a good surety, "payable two years after the blockade of the port of Charleston shall have been effectually raised, with interest thereon, semi-annually, with a mortgage of the premises." The agreement was carried into effect by the payment of the \$15,000 in Confederate Treasury notes, and the execution of the title, bond and mortgage, the Rev. P. O'Neill (since deceased) having signed the bond as surety.

The bill was filed for foreclosure of the mortgage, and the material question before the Court involved the value of the obligation to the plaintiff, and this depended on the

amount which he had a right to exact for its payment.

While, on the one hand, he avers and contends by his bill that he is entitled to the whole sum, in such money as was current when the bond fell due, the defendant, on the other, denies that his liability can be extended beyond the value of Confederate notes converted into national currency at its date.

The grounds of appeal which question the constitutionality of the Ordinance, and its applicability to this contract, are disposed of by the decision of the Court of Errors, in

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December, 1867, in *Rutland v. Copes et al.*, and *Thomas v. Raymond*, 15 Rich., 84: the last named case will be more particularly noticed hereafter.

Nor is it necessary to consider whether a proper construction of the Ordinance requires that regard is to be had to the real consideration of the contract as its value, or that this is to be estimated by the worth of the obligation. In either view, the purpose proposed is accomplished. Without violating or impairing the obligation of the contract, it seeks to attain its true intent, as understood between the parties, and to give it that effect which was designed to attach to it by those who best knew its import, and were to be mutually affected by it.

The issue between the parties is as to the amount for which the defendant is to be held liable on the bond for \$15,000. Is he to be held to its payment in specie, or the present prevailing currency? or, is he entitled to any abatement by reason of the true value and real character of the consideration of the contract at the time it was made, and the particular circumstances which attended its inception, and, if so, to what extent?

In the written contract for the purchase, the price, as set down, is, "the full sum of \$30,000, one half thereof in Confederate Treasury notes, of the last issue, and the balance in his bond, bearing date this day (4th August, 1864,) payable two years after the blockade of the port of Charleston shall have been effectually raised, with interest thereon, semi-annually, from date."

The language of the agreement would seem to imply a conviction, on the minds of the contracting parties, that when the blockade should be effectually raised, it would be through the success of the Confederate arms, and that the circulating medium, prevailing at the time of the agreement, would continue to be the currency in use in the State, whether increased or diminished in value it was not easy to predict.

They must have had, too, each for himself, some standard by which the value of the property was to be measured. According to the conclusion of the Chancellor, its "true value, at the date of the purchase, may be set down at \$6,600," and it would be difficult to conceive of any view which the seller

could have taken to enhance it to the amount he now requires, or what consideration could have urged the purchaser to depreciate it, as he now claims.

The sum fixed being so exorbitantly above its value in gold, we are obliged to assume that the price at which it was rated was not measured by that standard. One-half of the

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purchase money *was paid in Confederate Treasury notes, "and the balance was to be paid two years after the blockade of the port of Charleston shall have been effectually raised, with interest," &c. To confine the plaintiff to the value of Confederate money, as of August, 1864, would not comport with his intention, evident on the face of the contract, not to sell the property at \$30,000 in that currency. To hold the defendant to the payment of \$15,000, either in specie or United States currency, as the one-half of the value of the property, when, in the language of the agreement, \$15,000 in Confederate money was to be received as payment of one-half of the stipulated price, would so clearly violate what appears to have been the manifest intention of both of them, that the conclusion need only to be seen to be discarded.

This view disposes of the point made in the tenth ground of appeal, which resists the conclusion of the Chancellor that the plaintiff received half of the consideration for which he sold the premises.

It is not necessary to enquire how far the defendant would be bound by any promise or undertaking of the late Rev. Mr. O'Neill, as his agent or attorney. This would depend on the extent of the power and authority conferred. These have not been shown.

It is true that where, as in this case, parol testimony is admitted for the purpose of affording aid in arriving at the intention of the parties, all that was said by either, brought home to the other, no matter through what medium, would be heard and considered as bearing on the result.

It is not alleged or proved that the defendant understood that the balance of the purchase money was to be paid in specie. Mr. McKeegan, in his testimony, nowhere states that he expressed, even to Mr. O'Neill, his purpose that it was to be paid in specie. It is true, he says in his bill, that he averred to Mr. O'Neill such purpose. It appears, however, from his testimony, (before the Master,) that Mr. O'Neill understood, at first, that the transaction was to be closed by the payment of the whole price in Confederate notes, for he says: "Father O'Neill went off and brought a title drawn;" he, (witness,) examined the title, carried it back to him, and said to him: "I did not intend to sell my property, in that way, and will not sell it." "Some time after he called on me again, and for some time after followed me up about selling him the property. At

length, I told him the only way I would sell this property would be in this way: you pay me \$30,000, one-half in Confederate money,

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new issue, and the other half two years after the effectual raising of the blockade of the port of Charleston." He said, "if you sell in that way, you will get more for it than if you put it in market after the war is over." "The understanding between Father O'Neill and myself, in making the trade, was that, at the time when the bond became due, there would be a settled currency of some kind or another, and that I should be paid something towards what the property was worth, as the money I was getting was worth nothing. It was perfectly understood betwixt Father O'Neill and myself," as he (witness) now expresses it, "and made in good faith."

Taking this as a whole, it does not impress the mind with the conviction that Father O'Neill looked to the bond as one on which specie was of right to be claimed.

This case cannot be distinguished from that of *Thomas v. Raymond*, above referred to. There the plaintiff, in August, 1863, sold a house and lot in the town of Greenville to the defendant, Mary Raymond, for the sum of \$7,000, payable six months after the ratification of peace with the United States, or before, at his option, with interest, payable annually. To secure the payment, the defendant gave her sealed note, and also a mortgage of the premises. In May, 1866, the bill for foreclosure was filed. The defendant submitted that the note was subject to the Ordinance of the Convention of the 27th September, 1865, which the plaintiff resisted: First, because the provisions of the Ordinance were not applicable to this particular transaction, as, from the terms of the note, it was apparent that it was the intention of the parties that it should be paid in good money, or that the plaintiff should have the right to wait until six months after the termination of the war, and demand such currency as might be in use at the time. Secondly, because the Ordinance violated the Constitution of the United States, as impairing the obligation of a contract. Both objections were overruled by the Chancellor, who referred the case to the Commissioner, to inquire and report what was the value of the premises on the 25th of August, 1863. After fully and minutely examining and considering all the testimony reported, he decreed that the sum due on the note was \$2,500, the value of the property on the day of sale. On appeal, his judgment was sustained by the Court of Errors.

I do not desire to be understood, in citing this case, as holding the Chancellor restricted, in his inquiry as to "the true value and real character of the consideration," to

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the value of the property *at the day of sale. He is to look to "the particular circumstances" of the case, "and effect substantial justice," so far as it is within human ability and power to do so.

The evidence touching the value of the property before the war, at the time of the contract, and since the war, was brought to the notice of the Chancellor on Circuit, and was fully heard and considered by him. On a question of fact, his judgment should not be interfered with, unless manifest error is made to appear, or the testimony so preponderates against his conclusion that a dissent from it would be compelled.

In my view, the reversal of the Chancellor's decree, for the reasons assigned, is not in conformity with equity or justice.

2 S. C. 208

THOMAS F. HARMON and Others, Plaintiffs
in Error, v. BENJAMIN WALLACE,
Defendant in Error.

(Columbia. April Term, 1870.)

[Payment \hookrightarrow 12.]

In an action on a sealed note, dated 20th October, 1863, and payable, with interest, on 1st January, 1866, in "current funds," the consideration of which was land purchased by the maker from the payee, evidence of the real value of the land at the date of the purchase, and that by "current funds" the parties meant "Confederate money," was given, and the Judge instructed the jury that they could not resort to the Act "to determine the value of contracts made in Confederate States notes or their equivalent," in fixing the amount of the recovery, because it not only impaired, but actually annulled the contract made by the parties, and was in conflict with Article I, Sec. 21, of the State Constitution, prohibiting the enactment of any law impairing the obligation of contracts: *Held*, that there was error in the instruction, and for this a new trial was granted.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 38, 42–54, 59–61, 128; Dec. Dig. \hookrightarrow 12.]

[Constitutional Law \hookrightarrow 164.]

The Act may be used as evidence to determine the value, in lawful money, of contracts made with reference to Confederate States notes, as the medium of payment, and, in this view, it does not impair the obligation of contracts.

[Ed. Note.—Cited in *Earle v. Stokes*, 4 S. C. 310.]

For other cases, see *Constitutional Law*, Cent. Dig. § 497; Dec. Dig. \hookrightarrow 164.]

[Payment \hookrightarrow 70.]

Evidence as to the value of the land, and other circumstances, to show that the parties looked to Confederate currency as the medium of payment, was competent, but it was error to instruct the jury to ascertain the value of the land at the date of the contract, in national currency, and find for the plaintiff a sum equal to such value, with interest.

[Ed. Note.—Cited in *McKeegan v. McSwiney*, 2 S. C. 202; *Smith v. Prothro*, Id., 376; *Parker v. Wilson*, 3 S. C. 297; *Halfacre v. Whaley*, 4 S. C. 177, 178; *Parker v. Wilson*, 5 S. C. 493; *Wilson v. Braddy*, 16 S. C. 522.]

For other cases, see *Payment*, Cent. Dig. §§ 203, 204, 206–218; Dec. Dig. \hookrightarrow 70.]

[*Payment* ⇐12.]

The jury should have been instructed, as the Ordinance of 1865 provides, that having "regard to the particular circumstances" of the case, they should find such verdict as would effect substantial justice between the parties—*Semble*.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 38, 42-54, 59-61, 128; Dec. Dig. ⇐12.]

Willard, A. J., concurred in the result, but held that the jury should have been instructed to find the value in lawful money, at the date of the contract, of the amount in Confederate currency which the parties had agreed should be paid, with interest.

[This case is also cited in *Johustone v. Crooks*, 3 S. C. 204, as to the construction of contracts made when Confederate notes were medium of payment.]

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*Before Orr, J., at Newberry, October Extra Term, 1868.

The case came up by writ of error, the defendants below being plaintiffs here, and it was heard by this Court upon a report of His Honor the presiding Judge, which is as follows: "This was an action against the defendants on a sealed note for \$6,000, payable 'in current funds' the 1st January, 1866, with interest from the 1st day of January, 1864, interest payable annually, and dated 20th October, 1863. The plaintiff sold and conveyed to the defendant a tract of land, containing 595 acres, for \$18,000, to be paid in three equal installments. The first installment was paid when defendant entered into possession; the second in August, 1864. Both payments were made and accepted in Confederate money, and the note sued on was for the third and last installment. Plaintiff and defendant offered evidence of the real value of the land at the date of the purchase. The witnesses for plaintiff estimated the land as worth, in 'good money,' at from 15 to 20 dollars per acre, and defendant's witnesses at from 6 to 15 dollars per acre. Contiguous lands had been sold before and since the war at from 4 to 27 dollars per acre. The defendant and one other witness testified that 'current funds' used in the note was intended to fix 'Confederate money' as the medium of payment. The foregoing evidence of the value of the land and the currency in which payment was to be made was admitted under the Ordinance of the Convention of 1865. The jury were instructed to ascertain the value of the land in good money (national currency) at the date of the purchase, that two-thirds of that value had been paid by defendant and accepted by plaintiff, and that they should find the remaining third thus ascertained, with interest thereon, computed annually from the first of January, 1864, to the date of the verdict.

The jury were further instructed that they could not resort to the Act of the As-

sembly "to determine the value of contracts made in Confederate States notes or their equivalent," approved 26th March, 1869, in fixing the amount of the recovery on this contract; that it not only impaired, but actually annulled the contract made by the parties, and was in conflict with Article I, Section 21, of the State Constitution, which prohibits the enactment of any law "impairing the obligation of contracts."

"The jury found a verdict for the plaintiff for four thousand two hundred dollars and thirteen cents."

The error assigned was as follows:

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*That your Honor erred in charging the jury that the Act of the General Assembly, No. 187, entitled "An Act to determine the value of contracts in Confederate States notes or their equivalent," approved March 26th, 1869, could not be resorted to, to fix the amount of the recovery of the note sued on, as it not only impaired but annulled the contract made by the parties, in contravention of the Constitution of this State, Article I, Section 21, which declares that no law impairing the obligation of contracts shall ever be enacted; and also the clause of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of contracts.

Baxter, Fair, for plaintiffs in error.
Jones, Sullivan, contra.

Nov. 28, 1870. The opinion of the Court was delivered by

MOSES, C. J. We have, at this Term, held, that the Act of March 26th, 1869, entitled "An Act to determine the value of contracts made in Confederate States notes or their equivalent," is not in violation of the twenty-first Article of the State Constitution.—*Neely v. McFadden*, (ante, p. 169.)

While agreeing with the plaintiffs in error that the presiding Judge did not submit to the jury the proper instructions by which their verdict was to be regulated and determined, we cannot concur in the proposition on which his counsel insists, that, in regard to the note in suit, all which it was competent for the Court to do was to direct the jury to apply the standard of value, as adopted by the parties, when ascertained, to the terms of the contract. If, therefore, the proof disclosed that Confederate notes was the intended basis, then nothing was to be left to the jury but to convert the nominal amount called for into lawful money.

The contract is to be construed according to the intent and meaning of the parties, through such testimony as may be competent and adequate to that end. Owing to the peculiar condition of the State during the war, and the anomalous character of the only cur-

rency which circulated as the medium of exchange, it has been held by the Supreme Court of the United States that it was competent to show, by evidence, that "a contract, payable in the States engaged in and during the rebellion, in dollars, was, in fact, made for the payment in Confederate dollars."—*Thorington v. Smith*, 8 Wallace, 1.

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*An adherence to technical rules, so essential to the attainment of justice through the administration of law, would fail to accomplish the important result in view, if, under no circumstances, a deviation from the stern requisition would be permitted.

The case before us furnishes an apt illustration of the necessity of sometimes looking beyond the mere force of the language employed to discover what was the purpose and object of the parties through the words which they employed to indicate their understanding and agreement.

What did they propose in the use of the words "current funds" as the medium of payment? Did they intend to refer to Confederate notes, current at the time of the contract, or to the circulation which might prevail as the installments respectively fell due, or was their contract based upon a mutual expectation, then expressed, that when the day for the payment of the first, second or last proportion of the debt arrived, the establishment of the Confederacy as an independent Government would impart to the Treasury notes a value equal to gold? Testimony, therefore, was properly admitted to shew that both the vendor and purchaser, in the estimate of the value of the land, looked to a particular currency as the medium of payment.

The exceptional condition of things which existed in South Carolina, during the war, was recognized by the Convention which met in September, 1865, after its close.

While it was waged, contracts had been entered into, the performance of which depended apparently upon the payment of the specified amounts, in a currency which, so far from being that generally used in circulation, was, at the time, scarcely known in the State. The Confederate Treasury notes had substituted every other medium of exchange. The true intention of parties could alone be ascertained by enlarging the rules of evidence, and this necessity was responded to by the Ordinance of 27th September, 1865.

This permitted the introduction of testimony to show, in all contracts made between January 1, 1862, and May 15, 1865, "the true value and character of the consideration at the time they were made." This extension of the rule of evidence would have been illusory if the Ordinance had not applied it to a practical end. It, therefore, enjoined that, under the additional proof allowed, "regard being had to the particular circumstances of each case, such verdict or decree might

be rendered as will effect substantial justice between the parties."

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*In *Rutland v. Copes*, et al., 15 Rich., 84, the Court, which then in South Carolina possessed the highest appellate jurisdiction, held "that the Ordinance did not impair the obligation of contracts, and, therefore, was not in conflict with the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts."

It has been recognized by this Court as of subsisting force in the case of *Boho v. Goss* [1 S. C. 262], decided at November Term, 1869.

It was, therefore, competent for the parties, in the cause before us, to shew the value of the land at the time of sale, as contributing to develop the "real character of the consideration." It was an important element "in the particular circumstances" of the case, all of which might be presented to the jury, whose verdict was "to effect substantial justice between them."

Both the plaintiff and defendant did introduce evidence "as to the value of the land and the currency in which the payment was to be made;" and we hold that the presiding Judge was right in admitting it.

In our view, the error on his part consisted in undertaking to direct a conclusion for the jury, to be based upon the proof as to the value of the land at the date of the transaction, instead of leaving it to them, under the Ordinance, by virtue of which, as it appears by the brief, certain testimony was allowed to be offered, looking to the "particular circumstances" in evidence, to find such a verdict as would "effect substantial justice." It is on a solution of these that the verdict is to be rendered, and that solution is to be by the jury, and not the Court.

It may be objected that a large opportunity is thus allowed for the caprice of a jury, and one that will often operate unjustly and unfairly if the verdict is to be regulated by their sense of substantial justice, to be deduced from a consideration of the "particular circumstances of each case." That is an argument which, even if well founded, cannot influence us. We do not make the law; our duty is but to expound and declare it. The remedy for a perversion of right and justice, on the part of the jury, will find a corrective in the power of the Judge to grant a new trial.

Prices during the war were not always regulated by the standard of the value of the prevailing currency as compared with specie. The paper circulated as money by the National Government was scarcely known in

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the Confederate States. In many *instances, the scarcity of the article required gave it an inflated value, even when compared with the Treasury notes of the said States. To

have enforced contracts entered into within the period fixed by the Ordinance according to their literal import, when the termination of the war left the State in an exhausted condition, and its people with scarcely the ability of daily support, would have led to results involving utter ruin. It was, as must be supposed, the contemplation of this situation which induced the interposition of the Ordinance.

Our view of the case in no way conflicts with the decision of the Supreme Court in *Thorington v. Smith*, 8 Wallace, 1 [19 L. Ed. 361].

The Chief Justice, speaking for the Court, through his opinion, after holding that the contract, before it could be enforced in the Courts of the United States, addresses himself to the admission of testimony "to prove that a promise expressed to be for the payment of dollars, was in fact made for the payment of any other than lawful dollars of the United States," and says: "We are clearly of opinion that such evidence must be received in respect to such contracts, in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract in lawful money of the United States."

The fact that "dollars," expressed in the note, was intended to refer to "Confederate dollars," was established by the evidence allowed to be introduced on that point. No other question was before the Court, except as to its right to enforce any contract for the payment of Confederate money.

There was no offer to prove that the mode by which the "true value and real character of the consideration of such contract" were to be ascertained had been fixed by the highest power of legislation in the State where the contract originated. If the Court, in *Thorington v. Smith*, "in order," as it says, "that justice may be done between the parties," had the right to open the agreement for enquiry as to its true character, and to fix its value, it will not be contended that the State of South Carolina had not the right to confer upon its own Courts the exercise of the same power as to the admission of evidence, and to direct the mode by which they should establish the value of such contracts. The Ordinance does no more.

The verdict is set aside, and a new trial ordered.

WRIGHT, A. J., concurred.

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*WILLARD, A. J. Plaintiff below sued on a promissory note, bearing date October 20th, 1863, for \$6,000, payable January 1st, 1866, with interest from January 1st, 1864, given for the purchase of land. The price of the

land was \$18,000, payable in three equal installments, one of which was paid in 1863, the second in 1864, both in Confederate money, and the last was represented by this note in suit.

On the trial, parol evidence was admitted to show what the parties meant by the terms "current funds." As no objection appears to have been made to this testimony, it is not before us for our consideration. Proof of the value of the land was admitted. There appears to have been two instructions given by the Circuit Judge to the jury: first, that they were to ascertain the value of the land in good money, (national currency,) at the date of the purchase; that two-thirds of that value had been paid by defendant and accepted by plaintiff, and that they should find the remaining third, thus ascertained, with interest thereon, computed annually, from the first of January, 1864, to the date of the verdict; and, second, that they could not resort to the Act of Assembly to determine the value of contracts made in Confederate States notes or their equivalent, approved 24th March, 1869, in fixing the amount of the recovery on the contract; that it not only impaired but actually annulled the contract made by the parties, and was in conflict with Art. I, Sec. 21, of the State Constitution, which prohibits the enactment of any law impairing the obligation of contracts.

The defendant's counsel appears to have excepted to the second proposition charged as above stated, but no exception appears to the first proposition charged. The first proposition was laid down by the Circuit Judge as the rule of damages for the case, and we must assume that the verdict was constructed by that rule. The second proposition was negative in form, and in effect, excluded from the jury the rule on which the defendant relied. Technical accuracy would require that the defendant's counsel should have excepted at the trial, and before the jury left their seats, not only to the refusal of the Judge to submit the proposition contended for by the defendant, but, also, to the rule laid down as contended for by the plaintiff. But as the proposition, brought here by the defendant's exception, in itself, distinctly negates that which controlled the verdict, we are at liberty to regard the defendant as having substantially complied with the rule as to the exceptions.

The proposition involved in the second

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ground of charge has *already been considered and decided by this Court in favor of the plaintiff in error in the case of *Neely v. McFadden*, and, following that decision, the verdict should be set aside.

The instruction requiring the jury to render a verdict for one-third of the value of the land, when ascertained, not only thrust

aside the actual contract of the parties, but sought to bind them with the terms of a new contract, made through the intervention of a Court and Jury. In this respect, the original contract is treated as if it had been agreed that the defendant should pay for the land what it was reasonably worth, leaving a question of value for the jury to determine. The parties, however, when they made the contract, supposed that they themselves had fixed the value of the land, and had no thought of submitting that question to a jury. They agreed upon a price, and fixed the time of payment. All that the Court has to do is to ascertain the mind of the parties as to the amount to be paid at the time of making the contract, and this is accomplished by applying the standard of value adopted by themselves to the terms of their contract.

If this standard was the current value of Confederate currency, then it is only necessary to convert the nominal amount of that currency called for into its actual value in lawful money, and render a verdict for the result. In accomplishing this, as we have already held, resort may be had to the Act of March 26th, 1869; although the parties may, if they choose, go into proof of the relative value of Confederate currency and lawful money of the United States.

The submission to the jury of the question of the value of the land under such instruction involved the erroneous assumption that the price fixed by the parties was intended to be based upon the market value of the land at the time of sale. Although, within certain limits, that market value probably influenced the result at which they arrived, yet it must be assumed that their minds met as to the price on the basis of what the land was worth, or supposed to be worth, to the parties themselves, under all the circumstances by which they were affected. To interpolate into their contract the market value of the land, in the place of the price named by themselves, is to refer their contract to a standard of value that may never have been assented to by one side or the other.

If the purchase happened to be a very favorable one to either of the parties, its effect is to deprive such party of the advantage which he may rightfully claim.

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*I concur with the majority of the Court in the conclusion to which they arrive, namely, that the verdict should be set aside; but cannot assent to the proposition that any other standard for determining the amount of the judgment can be applied than that which existed in the minds of the parties at the time of making the contract, as evidenced by the contract and the attending circumstances.

2 S. C. 216

In re SARAH KENNEDY and Others.

(Columbia. April Term, 1870.)

[Constitutional Law ⇨180.]

Sec. 32, Art. II, of the Constitution of 1868, providing for a homestead exemption, and the Act passed in pursuance thereof, are not unconstitutional and void as against contracts existing before the adoption of the Constitution.

[Ed. Note.—Cited in *Howze v. Howze*, 2 S. C. 231; *Bull v. Rowe*, 13 S. C. 364; *Hardin v. Howze*, 18 S. C. 74; *Lawrence v. Grambling*, 19 S. C. 465.

For other cases, see *Constitutional Law*, Cent. Dig. §§ 498-500; Dec. Dig. ⇨180.]

[Homestead ⇨7.]

Nor are they unconstitutional and void as against the liens of judgments on contracts entered before the adoption of the Constitution.

[Ed. Note.—Cited in *Adams, Frost & Co. v. Smith*, 2 S. C. 228; *Cochran v. Darcy*, 5 S. C. 126.

For other cases, see *Homestead*, Cent. Dig. § 9; Dec. Dig. ⇨7.]

[States ⇨17.]

At the time of the adoption of the Constitution of 1868, South Carolina was bound, as a State within the Union, by all the obligations of the Constitution of the United States.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 21; Dec. Dig. ⇨17.]

[States ⇨17.]

The approval by Congress of the Constitution of 1868 does not give to that Constitution the force and effect of an Act of Congress.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 21; Dec. Dig. ⇨17.]

[Constitutional Law ⇨180.]

Sec. 32, Art. II, of the Constitution of the State, and the Act passed in pursuance thereof, exempting real property of the debtor, of the value of \$1,000, from sale for his debts, are not laws impairing the obligation of contracts, within the Constitutional sense of those terms.

[Ed. Note.—Cited in *Calmes v. McCracken & Koon*, 8 S. C. 97.

For other cases, see *Constitutional Law*, Cent. Dig. § 499; Dec. Dig. ⇨180.]

[Constitutional Law ⇨178.]

A judgment is not in itself a contract, and it cannot originate rights of the class protected by the Constitution of the United States. Its lien is a mere right of preference as among purchasers and creditors, and is an incident of the remedy not in the contemplation of the contracting parties.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 521; Dec. Dig. ⇨178.]

[Homestead ⇨135.]

That the debtor died before the adoption of the Constitution does not preclude his family from claiming the homestead exemption allowed by the Constitution and the Act of Assembly.

[Ed. Note.—Cited in *Howze v. Howze*, 2 S. C. 231; *Ex parte Strobel*, Id., 310.

For other cases, see *Homestead*, Cent. Dig. § 246; Dec. Dig. ⇨135.]

[Homestead ⇨18.]

[Cited in *Ex parte Strobel*, 2 S. C. 311; *Bradley v. Rodelsperger*, 3 S. C. 227; *Garaty & Armstrong v. DuBose*, 5 S. C. 500; *Moore v. Parker*, 13 S. C. 490; *Norton v. Bradham*, 21 S. C. 381, to the point that the homestead ex-

emption applies to the family, the head of it being its representative.]

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 19–27; Dec. Dig. ☞ 18.]

[This case is also cited in *Shelor v. Mason*, 2 S. C. 234, and distinguished therefrom, and cited and overruled in *Cochran v. Darcy*, 5 S. C. 125.]

Before Thomas, J., at Chester, January Term, 1869.

Appeal from the Circuit decree, the case being as follows:

Richard E. Kennedy, late of Chester County, being in his lifetime, and at the time of his death, seized and possessed of a dwelling house and lot in the town of Chester, and two parcels of land near said town, one known as the Robinson place, and the other as the Lee place, departed this life in the year 1855, leaving a widow and several infant children. The widow intermarried with one Sims, and died in 1860. L. C. Hinton administered, with the will annexed, on the estate of the testator, Richard E. Kennedy, and in July, 1863, a decree was rendered against him, as administrator, for \$70,000, and upwards. The decree was founded on

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a contract made *in the year 1839 or 1840. In 1866, the administrator filed a bill in equity against the children of the testator and others, praying, amongst other things, that the entire real estate of the testator be sold for payment of his debts, and in July, 1868, a decree ordering such sale was made, the sale to take place in December then next ensuing. After the decree for sale was made Sarah Kennedy, and others, infant children of the testator, the youngest being fourteen years of age, filed this petition in the Court of Probate for Chester County, praying that a homestead out of the real estate of the testator be set off and assigned to them. Evidence was taken under the petition, and on the 23d of November, 1868, the Judge of Probate made a decree that the Robinson place be set off, and assigned to the petitioners as a homestead. Commissioners were appointed for that purpose, who made a return in conformity with the decree.

James Hemphill, and another, creditors of the testator, appealed to the Circuit Court on the grounds:

1. Because the decree is contrary to both the letter and spirit of the Constitution of this State, in this, that it abstracts the property of testator, pro tanto, from the just claims of creditors, whose claims were contracted more than twenty years ago, and in favor of one of whom a lien by judgment and *fi. fa.* had been established more than five years ago.

2. Because the said decree, for the same reasons as stated in the first ground, is contrary to the express letter of the 10th Section of the 1st Article of the Constitution of the United States.

3. Because the said decree is erroneous in deciding that the petitioners are entitled to the homestead exemption, in the property of their ancestor or head of the family, when the said ancestor or head of the family died more than twelve years before the law providing a homestead exemption was passed, and hence never was vested with such right.

4. Because the said decree is erroneous in awarding a homestead to the petitioners in a tract of land, situated at least three miles from the family dwelling or residence, and wholly disconnected with it.

His Honor the presiding Judge overruled the first three grounds of appeal, but held the fourth ground to be well taken. He accordingly made an order modifying the decree of the Probate Court, and directing a new commission to issue, so that a homestead, consisting of the dwelling house, might be assigned to the petitioners.

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*The appellants below appealed to this Court, and now moved that the decree of the Circuit Judge be reversed on the first three grounds of the appeal to the Circuit Court.

Hemphill, Patterson, for appellants.

Walker & Brice, contra.

Nov. 30, 1870. The opinion of the Court was delivered by

WILLARD, A. J. Richard E. Kennedy died intestate in 1855, largely indebted, and leaving real estate. A decree was recovered against his administrator by certain of the appellants, in 1863, for a large amount. The administrator filed his bill in equity in 1866, alleging that the entire real estate of the intestate would be required to pay his indebtedness, and praying that it might be sold for that purpose. At July Term, 1868, the Court, at Chester, made an order for the sale of the real estate. Subsequently to this order, and previous to the day fixed for the sale, Sarah Kennedy, and three others, minors, and children and heirs-at-law of the intestate, presented, by their next friend, their petition to the Judge of Probate, praying that a homestead might be set off and assigned to them out of the said real estate. The Judge of Probate granted the prayer of their petition, and, on appeal to the Circuit Court, this order was affirmed, so far as it established the right of the petitioners to a homestead, but was modified as to the particular designation of such homestead.

The present appeal is by creditors of the intestate, from the decree of the Circuit Court, on the appeal from the Probate Court, and presents for consideration the following questions:

1st. Whether a homestead exemption can be claimed under the Constitution of 1868, and the Act relating to homestead exemptions passed in pursuance thereof, as against contracts existing prior to the adoption of the Constitution.

2d. Whether such homestead exemption can be allowed as against the rights of creditors under the decree against the administrators recovered prior to the adoption of the Constitution.

3d. Whether the death of the ancestor, previous to the adoption of the Constitution, precludes his family from claiming the benefit of the homestead exemptions.

It is contended by the appellants that Art. I, Sec. 10, of the Constitution of the United States, prohibiting the States from passing laws impairing the obligation of contracts,

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precludes the effect allowed by the decree to the Constitution of this State, and the Act passed under it, in its operation upon their rights now before the Court.

Are these enactments, in their bearing on this case, to be regarded as a law impairing the obligation of contracts, in the sense intended by the Constitution of the United States?

The prohibition is only applicable to the legislation of States. It has been contended that South Carolina was not a State, in the sense of the Constitution, at the adoption of the Constitution in 1868. The Constitution of the United States furnishes no means by which a State may either discharge itself, or be discharged from the obligations imposed upon it by that instrument. Neither the Legislative or Executive authority of the nation have, at any time, recognized any change in the legal obligations of the State, under the Constitution of the United States, as the result of the war or the events following it.

The doctrine contended for is based on the proposition that a State, engaging in an unlawful attempt to throw off its allegiance to the ultimate sovereignty of the people, has power to absolve itself from its legal obligations under the Constitution, to the extent of being able to do, validly, that which the Constitution forbids, and which cannot be done by a State observing its duty of allegiance to the supreme authority. Such a result might be contended for as the consequences of successful revolution, but how it can be claimed as a legal sequence, from suppressed rebellion, is altogether unexplained. This proposition has neither soundness nor the sanction of either authority or precedent. The opposite doctrine lays at the foundation of the decision of the Supreme Court of the United States in *Texas v. White*, 67 Wall., 700 [19 L. Ed. 227], where the provisions of the Constitution were applied to a law, passed by the State of Texas during the recent war, in order to test the validity of such law. The plain proposition that a State can do nothing to discharge itself from its duty under the National Constitution, is at once decisive of the proposition. It may be proper to add that the idea involved in the proposition under consideration has probably arisen from misconstruing the intent and effect of the legis-

lative Acts of Congress, commonly known as the Acts of Reconstruction. Assuming that those Acts determined the status of South Carolina, from their adoption, still they did not, either in name or in substance, assume to establish territorial government in this State, as such government is understood under our system of laws; but, on the contrary,

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provided provisionally for the exercise of the municipal powers of the State as such, leaving the federal power to be exercised in the Constitutional mode as applied to States. The National Executive and Judiciary acted upon this construction, and accordingly restored the judicial and executive functions of the National Government within the State as they existed before the war, and as they only can exist in States known as such to the Constitution.

It has also been contended that the Constitution of the State is not to be regarded as the law of a State, within the sense of the Constitution of the United States, because, having been approved by Congress as a condition of the admission of Senators and Representatives to Congress, it stands virtually as a law of Congress.

If the Constitution of this State is to have the force and effect of an Act of Congress, then Congress may, from time to time, amend or even repeal it, and the State is, in fact and in law, disfranchised, and a stranger to that domestic sovereignty characteristic of the States of the Union.

We are not prepared to accept the logical consequences of the doctrine contended for. The approval of Congress was neither in intention nor effect the enactment of a fundamental law for South Carolina, but was simply what it purported to be, an expression of satisfaction with the form in which she presented herself in claiming representation in the National Legislature.

Even if Congress is to be regarded as having approved not only in its general form and scope, as securing a Government republican in form, but in respect of each individual clause and requirement of that instrument, still its approval could no more authorize the impairing of the obligation of a contract than could a future Act of Congress authorize the passage of a law by the State having that effect. Congress has no power to discharge a State from any of the obligations imposed upon it by the Constitution of the United States. The Constitution and homestead law of this State are to be regarded, as it concerns the present question, in the same light as if adopted while the State was in the full enjoyment and exercise of all the rights and powers secured under the Constitution of the United States to the States of the Union. Accordingly their provisions are to be regarded as the law of a State within the sense of that part of the Constitution under consideration.

The question next arises, whether a State can pass laws exempting real estate in the hands of a debtor from liability under a judgment recovered against such debtor by a

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creditor claiming under a *contract existing prior to the adoption of the law authorizing such exemption.

The validity of exemption laws, as affecting antecedent contracts, does not depend upon the nature of the property exempted, but upon the rights of the creditor in respect of the debtor's property at large. The principle of exemption laws is, that the State will not lend its aid to the creditor, by way of seizing and appropriating the property of the debtor to the discharge of his obligation to such creditor, to the extent of stripping the debtor of all the means upon which his power of making future acquisitions depends. This principle is deeply rooted in a sentiment of humanity, having the force of a moral obligation, binding the creditor to a merciful exercise of his power over his debtor, and in conviction of the public conscience, that it is neither the duty nor the policy of government to enforce the rights of the creditor beyond the limits of a reasonable and humane exercise, nor to the extent of destroying the power of the debtor to obtain usefulness in his civil and domestic relations.

Within the limits imposed by the Constitution of the United States, hereafter to be considered, the State, in the exercise of its Legislative powers, must determine the nature and extent of property which should be included within the exemption, and the cases to which it should extend, and that determination is binding on this Court.

The Constitution of this State (Art. II, Sec. 32.) has, so far as the State has authority to act in the matter, determined that the real estate constituting the homestead of the head of a family, to a limited extent, shall be so exempted, and we are bound to regard such exemption as fairly embraced within the principle just stated as governing legislation of this class.

It has been argued that the right of the State to pass exemption laws binding upon antecedent contracts depends upon its power of regulating the prosecution of remedies in its Courts. This argument places the right on too narrow ground. The question whether the right of enforcement is to be regarded as included within the class of rights springing out of contracts, and protected by the Constitution of the United States, has been long settled.

In *Sturges v. Crownshield*, (4 Wheat., 122 [4 L. Ed. 529].) Chief Justice Marshall, while recognizing the authority of the State to modify the remedy, denied their power to withhold it. He holds that the law binding the party to a contract to its performance constitutes the obligation of the contract.

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*In *Green v. Biddle*, (8 Wheat., 1 [5 L. Ed. 547].) the principle is affirmed that any conditions or restrictions tending to diminish the value and amount of the thing recovered impairs, or tends to impair, a contract right.

Ogden v. Saunders (12 Wheat., 213 [6 L. Ed. 606].) elicited separate opinions from several of the Judges, and is valuable as exhibiting the current of opinion as to the precise subjects embraced within the obligation of a contract as contemplated by the constitutional provision.

Washington, J., holds (p. 256) that a statute that denies validity to, modifies or refuses to enforce, a contract, impairs the obligation. That the civil obligation interpreted by natural or universal law, modified by the municipal law, and not the mere moral obligation, is within the protection of the Constitution. He distinguishes clearly between a statute impairing a contract and one impairing its obligation, holding that the latter, though leaving unaffected the terms and stipulations of the contract, is still obnoxious to the Constitution if it discharges the party from the duty imposed by the contract.

Johnson, J., gives the following definition, (p. 282.) "The obligation of any contract will thus consist of that right or power over my will and actions which I, by my contract, confer on another:" and he holds that this duty is to be measured by the moral law, the universal law, and the law of society, conjointly. He holds that, as the rights of the individual are subservient to those of the whole, contracts must receive a relative, and not a positive, interpretation, and that there is a reasonable limit to the natural right to enforce compliance with an agreement when such right is enforced through the medium of government. He recognizes humanity as interposing such a limit. He further holds that anything that puts an end to the performance of a contract does not necessarily violate its obligation, but that "it is the motive policy, the object, that must characterize the legislative Act, to affect it with the imputation of violating the obligation of contracts," (page 291.) He adds, "It is equally the duty and right of Governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice."

The view thus taken regards the contract as the origin of rights, and of a power of enforcing these rights, by controlling the will and actions of the contracting party, whether that power is exercisable by the party acquiring the right, or by the Government

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alone, as *the proper medium of its enforcement, and imposes a salutary limit to that power when exercised by the Government. Thompson, J., says: "The obligation of the contract consists in the power and efficacy of

the law, which applies to, and enforces the performance of, the contract, or the payment of an equivalent for non-performance." "It subsists in the law applicable to the contract." This definition looks principally to that part of the obligation which imposes on the Government the duty of enforcement, treating the power of enforcement residing in the Government, under the duty imposed by the contract, as an element of value in the contract itself, protected under the Constitution.

He also considers the proper limits of the duty of enforcement imposed on the Government, and, although stated in reference to the authority of a State law over subsequent contracts, it discloses a principle pertinent to the case of antecedent contracts.

He says, (p. 309.) "There can be no natural right growing out of the relation of debtor and creditor, that will give the latter an unlimited claim upon the property of the former," "nor is there any fundamental principle of justice growing out of such relations that calls upon Government to enforce the payment of debts, to the uttermost farthing, which the debtor may possess." He instances exemption laws as exemplifications of this principle. Ch. J. Marshall, speaking for himself and for Duvall and Story, J. J., holds, (p. 343,) that laws act upon a contract, not that they enter into it, and become stipulations of the parties. He says, (p. 354.) "that the obligation of a contract is not identified with the means which Government may furnish to enforce it; and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties."

Bronson v. Kinzie, (1 How., 311 [11 L. Ed. 143].) furnishes an illustration of the distinction that exists between the substantial part of a remedy, which enters into the binding force of a contract, and the form of the remedy, which is always subject to legislative modification.

Taney, Ch. J., in defining the right of a mortgagee, says, (p. 318,) "it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the Court of Chancery, and obtain an order for the sale of the whole mortgaged property, (if the whole is necessary,) free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract,

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and it is the duty of the Court to *maintain and enforce it, without any unreasonable delay." As a consequence of this doctrine, he holds that a statute of a State, passed subsequent to the mortgage, giving the mortgagee a limited time to redeem, was unconstitutional. In other words, he considered the mortgage as creating a power of sale of a

certain character, and that the duty was imposed upon the Court of enforcing that power of sale, according to the intentions of the parties. He admits the power of the State Legislature to modify remedies, and recognizes a limit to the general duty of enforcing the performance of contracts, instancing the case of exemption laws, where considerations of policy and humanity must influence the extent to which aid should be afforded. He also recognizes the fact, that in the exercise of those powers of the State Legislature, they are to be governed by their own sense of the considerations of policy and humanity involved. But he interposes a general limit on this power, namely, that such legislation must not, in effect, impair the obligation of the contract, in which case it is prohibited.

In *McCracken v. Hayward* (2 How., 608 [11 L. Ed. 397].) Baldwin, J., states, very fully and connectedly, the various principles to which we have referred, as set forth in the previous cases. In tracing the force and effect of the obligation into the judgment and execution for its enforcement, he says (p. 614): "The Marshal can do, under the authority of the law, whatever he could do under the fullest power of attorney from the execution debtor, and no State law can prohibit it." It was accordingly held, in that case, that a law of Illinois, providing that property offered for sale under judgment should not be sold, unless two-thirds of its value was offered for it, was, in its bearing on an antecedent contract, inoperative.

In *Planters' Bank v. Sharp*, (6 How., 301 [12 L. Ed. 447].) Woodbury, J., recognizes the validity of exemption laws.

From the foregoing views certain conclusions may be drawn bearing on the present question. The contract of the parties is the basis of the obligation which the law enforces. From the contract arises a duty binding the party, embracing not only the idea of compliance with its terms and stipulations, but of making compensation in the event of the failure of strict compliance for any cause insufficient to justify such failure. There also arises from such contract a right to demand the performance of such duty; superadded to this is a power either special—enabling the party having the right, by his own act, to procure satisfaction, as in case of a power to sell—or general, and which can only be exercised by the Government

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*called upon to enforce the performance of such duty. In virtue of this power, the Government can take the goods of A. and confer them, or their value, upon B., in satisfaction of B.'s demand against A., an act of authority which, but for the contract, could not rightfully be exercised by the Government as between such parties. This duty, right and power, as defined and limited by the municipal law, constitute the obligation of the contract.

When the contract calls for the payment of money, or when, from the inability of the party to comply strictly, or from the policy of the law, compensatory satisfaction is appropriate, it is the right of the creditor to demand that the property of the debtor should be applied to produce such satisfaction. The power lodged in the hands of the Government for execution is commensurate with the right and duty on which it rests; and, although the form of procedure through which satisfaction is to be obtained may be moulded, from time to time, according to the will of the Government, yet, under the Constitution of the United States, satisfaction, according to the nature and extent of such right and duty, cannot be denied.

The right of the creditor to have the property of the debtor thus applied is not unlimited. One well-defined limitation is that involved in the exemption laws, resting, as we have seen, on considerations of humanity and public policy. The foundation of this limitation is too obvious to need argument or illustration. A creditor may press his demand to an extent that would shock the moral sense of all mankind; in such a case it is not the province nor the duty of the Government to lend him its aid, and thus transfer the obloquy from the individual oppressor to the whole community of which he is a member.

It may be said that, conceding the limitation, still, it should remain as defined at the inception of the contract, as the basis of its satisfaction.

The answer to that objection is, that questions of public morals and policy must be resolved as events arise. The abstract principle of right is unchanging, but the duty it enforces varies with the condition of society and the course of public events.

As the relations of men and social bodies change, duties are changed or modified. As important as it is that commercial faith should be maintained, it is equally important that society should faithfully observe its moral obligations, prepared at every change of circumstances to recognize and discharge its recurring duties.

It is within the power of the State to ex-

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empt the lands and personal property of a debtor, to a limited amount, from liability, on account of an existing indebtedness, so long as such exemption does not, in effect and intention, impair the obligation of such contract. There is no ground for ascribing to the exemption laws of this State any such effect or tendency.

The next question to be considered is, whether the lien allowed by the law to a judgment is, apart from the right of the creditor heretofore considered, within the protection of the provision of the Constitution of the United States, so as to invalidate any law passed subsequently to the recover-

ing of such judgment diminishing the effect of such lien.

In *Watson v. Mercer*, (8 Pet., 88 [8 L. Ed. 876].) Story, J., says, (p. 100,) "it is clear that this Court has no right to pronounce an Act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property."

"The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only ex post facto laws."

The vested right must be in the nature of a contract, in order to be brought within the protection thus afforded.

The lien of a judgment is a mere right of preference as among purchasers and creditors.

It is to be regarded as an incident of the remedy not in the contemplation of the contracting parties. The judgment is not in itself a contract, (*Biddeson v. Whytel*, 3 Burr., 1545,) and it cannot originate rights of the class protected under the United States Constitution. Whatever was within the obligation of the original contract may be claimed as against the legislative authority of the State, but not that which is conceded as an incident of a remedy in the Courts of this State.

The decree recovered by the appellants is entitled to have the same force and effect as a judgment in this respect, and no other; and a homestead may be properly reserved out of the lands bound by such decree.

The question of constitutionality, as arising under the Constitution of this State, resolves itself into one of construction merely, as the homestead exemption is allowed by the Constitution itself as broadly as secured under the Act. There can be no question on the terms of the Constitution but that the exemption was intended to apply to all demands, whether antecedent or subsequent.

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"It remains to consider whether the death of the ancestor of the respondents before the adoption of the homestead regulations precludes his family from claiming the benefit of the homestead exemptions.

The language of the Constitution (Art. II, Sec. 32.) is as follows: "The family homestead of the head of each family residing in this State—such homestead consisting of dwelling-house, out-buildings, and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof—shall be exempt from attachment, levy or sale on any mesne or final process issued from any Court."

The exemption is not to the debtor as such, but to the head of a family. The subject of protection is the family, the head of the family being referred to as its representative. It would be an unreasonable and unnatural conclusion to hold that this provision was

not intended for the security of families deprived of their natural protection.

That the head of the family must be the debtor, in order to secure such protection, is neither within the letter nor the spirit of the clause. Whenever there is a family and a family homestead, it is to be presumed that there is a head to the family, or one peculiarly charged with responsibility for the protection of such family, and the homestead is to be regarded as the family homestead of the head of such family, within the meaning of the Constitution. Such a state of facts we must assume to exist in the present case. The immunity from seizure and sale is, therefore, complete, as far as the laws of this State are concerned, and, as we have already seen, effective as it regards the Constitution of the United States.

The decree of the Circuit Court must be affirmed.

WRIGHT, A. J., concurred.

MOSES, C. J. I concur in the opinion, so far as it holds that the homestead exemption allowed by the Constitution of this State can prevail against creditors on contracts existing prior to its adoption.

I also concur in holding that the death of the ancestor before the adoption of the Constitution does not preclude his family from claiming the benefit of the homestead exemption.

I, however, entirely dissent from so much of the judgment of the Court as extends the exemption against creditors holding judgments or decrees obtained prior to the adop-

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tion of the State Constitution, *regarding such application of the provision in conflict with the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

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ADAMS, FROST & CO. v. W. H. SMITH.
G. MULLER v. J. W. EARHEART.
ADAMS, FROST & CO. v. T. P. LIDE.

(Columbia. April Term, 1870.)

[*Homestead* ⇨7.]

The debtor, in a judgment on contract recovered before the adoption of the Constitution of 1868, may claim the homestead exemption allowed by that Constitution, as against the lien of such judgment.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 9; Dec. Dig. ⇨7.]

Each of these cases involved the question decided in the case of *Kennedy*, (ante, p. 216,) namely, whether a homestead exemption may be claimed as against a judgment entered up before the adoption of the Constitution of 1868, and in each the result was the same as in that case; WILLARD, A. J.,

and WRIGHT, A. J., holding that the exemption may be claimed, and MOSES, C. J., dissenting.

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*WILLIAM HOWZE v. THOMAS C.
HOWZE, Jr., and Others.

(Columbia. April Term, 1870.)

[*Constitutional Law* ⇨180; *Homestead* ⇨7.]

The rule in the case of *Kennedy*, (ante, p. 216,) that homestead exemptions in their bearing on antecedent debts are not unconstitutional, re-affirmed.

[Ed. Note.—Cited in *Bull v. Rowe*, 13 S. C. 364.]

For other cases, see *Constitutional Law*, Cent. Dig. § 499; Dec. Dig. ⇨180; *Homestead*, Cent. Dig. § 9; Dec. Dig. ⇨7.]

[*Homestead* ⇨135.]

The homestead exemption allowed by the Constitution may be claimed for the benefit of the family of a decedent in other cases than those provided for by the 4th Section of the Act of September 9, 1868.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 246; Dec. Dig. ⇨135.]

[*Homestead* ⇨210.]

It is competent for the Circuit Court, through its general jurisdiction, to set off and assign homesteads in proper cases.

[Ed. Note.—Cited in *Scruggs v. Foot*, 19 S. C. 279; *Myers v. Ham*, 20 S. C. 528; *Jennings v. Abbeville County*, 24 S. C. 549; *Moore v. Barry*, 30 S. C. 534, 9 S. E. 589, 4 L. R. A. 294; *Ex parte Brown*, 37 S. C. 184, 15 S. E. 926.]

For other cases, see *Homestead*, Cent. Dig. § 391; Dec. Dig. ⇨210.]

[*Homestead* ⇨150.]

Where the head of the family was dead when the Constitution was adopted, it should be made to appear, it seems, that the premises claimed as a homestead were held as a family homestead since the Constitution became operative, and the order setting it off should establish the exemption through the head of the family for the time being.

[Ed. Note.—Cited in *Ex parte Strobel*, 2 S. C. 310; *Garaty & Armstrong v. Du Bose*, 5 S. C. 500; *Moore v. Parker*, 13 S. C. 490.]

For other cases, see *Homestead*, Cent. Dig. §§ 294-305; Dec. Dig. ⇨150.]

[This case is also cited in *Hardin v. Hoze*, 18 S. C. 73, 74, as to facts and points determined, and in *Davis v. Whitlock*, 90 S. C. 241, 73 S. E. 171, Ann. Cas. 1913D, 538, as to the jurisdiction of court of common pleas.]

Before Thomas, J., at Chester, September Term, 1869.

Appeal from the Circuit decree, the case being as follows:

William Howze died intestate in February, 1865, leaving several children, one of whom, Samuel Capers Howze, is a minor. The plaintiff, his administrator, filed this bill against the children and some creditors of the intestate, alleging that the personal assets were insufficient to pay the debts, and praying, inter alia, that the real estate, consisting of a tract of land known as the Home Plantation, and the intestate's share of another tract, of which he and another person

were tenants in common, be sold for payment of debts.

Samuel Capers Howze answered, by guardian ad litem, and, stating that the intestate resided on the home plantation at the time of his death, claimed that a homestead thereon should be set apart for the benefit of the defendant, and whoever else was entitled thereto.

His Honor the presiding Judge made a decree, as follows:

Thomas, J. After hearing the bill and answer of Samuel C. Howze, minor, defendant, by his guardian ad litem, John G. Howze, and on motion of John J. McLure, defendant's solicitor, it is Ordered, That a writ do issue, under the seal of this Court, directed to Elibu Lynn, John O. Harden and Stephen R. Ferguson, Commissioners, commanding and requiring them to admeasure and lay off to Samuel Capers Howze, a homestead in the tract of land described in complainant's bill as the Home Plantation, containing two hundred acres, more or less, and whereon William Howze, deceased, resided at the time of his death, and that they do make their return to this Court.

The creditors, parties defendant to the bill, appealed from this decree, and moved this Court to reverse the same, on the grounds:

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*1. Because the 32d Section of the Second Article of the Constitution of this State, and the Act of the Legislature "to determine and perpetuate the homestead," are in violation of the 10th Section of the first Article of the Constitution of the United States.

2. Admitting the constitutionality of the said Section of the Constitution and Act of the Legislature, this case does not come within the provisions of said Act, inasmuch as the right of homestead, for the benefit of the widow and minor children, only extends to those cases where the right existed in the head of the family at his death, which was not the fact in this case.

3. Because the right of homestead is allowed to the widow and minor children of the head of the family, whereas there is no widow in this case.

4. Because the Act of the Legislature provides that the homestead should be assigned to the head of the family, when his real estate should be "levied upon by virtue of any mesne or final process from any Court," whereas no levy was made in this case, no order for sale was made, or asked for at the hearing by the solicitors of the creditors or administrator, they expressly stating that they asked for no such order at that time.

5. Because, by the Act of the Legislature, the power to set off a homestead for the benefit of the widow and minor children belongs, exclusively, to the Probate Court, and the Circuit Court has no jurisdiction therein.

Hemphill, for appellant, cited Constitution U. S., Art. I, Sec. 10; State v. Carew, 13

Rich., 510; Mathers v. Bush, 16 Johns., 233; 1 Kent Com., 419, 455, 456, and notes; Homestead Act, 14 Stat., 22.

McLure, contra.

Nov. 30, 1870. The opinion of the Court was delivered by

WILLARD, A. J. This is an appeal from an order allowing a homestead exemption to Samuel C. Howze, infant son of William Howze, deceased. The bill was filed by the administrator of the estate of Wm. Howze, making the distributees and creditors parties, and asked, among other things, that the real estate of his intestate might be sold to pay the debts of the estate. S. C. Howze answered by guardian, claiming a homestead out of certain lands of which his father died seized. The allegations of the answer bearing upon the question of homestead are to

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the effect that the *father of such infant defendant was seized and possessed of the land out of which the homestead is claimed, and resided there at the time of his death. That, as defendant is advised, S. C. Howze, being a minor, is entitled therein to the benefit of the Act of the General Assembly to determine and perpetuate the homestead, and he submits that such homestead should be laid off out of said tract of land, and assigned to "respondent and whosoever may be entitled thereto," and that the remainder of the tract may be sold to pay the debts of the estate.

No testimony appears to have been taken in support of the averments of this answer, but an order was made appointing Commissioners to "admeasure and lay off to Samuel Capers Howze a homestead in the tract of land described in complainant's bill as the Home Plantation, containing two hundred acres, more or less, and whereon William Howze, deceased, resided at the time of his death, and that they do make their return to this Court."

The first ground of appeal involves the question of the constitutionality of the homestead regulations in their bearing on antecedent debts. We have already decided this question adversely to the appellant's view in the case of Kennedy (ante, p. 216.)

The second ground of appeal is based upon the idea that homestead exemption cannot be claimed in behalf of the family of a deceased debtor, except in the case provided in the fourth Section of the Act to determine and perpetuate the homestead, passed September 9, 1868.

This is a misapprehension. The Constitution itself (Sec. 32, Art. II,) establishes the right in all cases falling within its terms, leaving to the Legislature the duty of enforcing its provisions by suitable legislation. The purport of Section 4 is to provide for the continuance of the right in the family of one possessed of such right at the time of

his death. In the present case, the ancestor died in 1865, previous to the adoption of the homestead regulations, and as he was not at his decease possessed of such homestead right, the provisions of the fourth Section have no direct application to such case.

As we have already held, in the case of Kennedy, if there was a family and a family homestead existing at the adoption of the Constitution, that instrument immediately acted upon such family, through its proper head, by way of conferring the right of exemption.

The 3rd, 4th and 5th grounds of appeal

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are likewise based upon the idea that the homestead exemption can only be claimed under the terms of the Act and through the modes of proceeding there pointed out.

It is only necessary to say, that when no special mode of proceeding is pointed out by the Act, the Circuit Court is competent, through its general jurisdiction, to afford relief. The Act (Sections 1st and 2d,) provides a mode of proceeding in the case of process affecting the property of the debtor at large. Section 5 confers jurisdiction on the Probate Court in cases arising under Section 4. The present case does not fall within the provisions of either Sections 1, 2 or 5, and therefore the 3d, 4th and 5th grounds of appeal are inapplicable to the case.

There is, however, a difficulty in the way of affirming the order, arising from the fact that it does not appear to have been established that the premises have been held by a family as a family homestead at any time since the provisions of the Constitution have become operative. Nor does it appear that S. C. Howze is the head of any family, so as to authorize the homestead to be laid out to him directly and in name. Assuming that any member of the family has a right to demand, for the benefit of the family, the exemption, still the order for its assignment should conform to the Constitution and the Act, by allowing or establishing such exemption through the head of the family for the time being.

It will be necessary to reverse the order appealed from, and to send the case to the Circuit Court for further proceedings.

It is ordered, adjudged and decreed, that the order in the above entitled cause appealed from be reversed and annulled, and that the cause be remanded to the Circuit Court, with liberty to the parties to offer such proofs touching the claim of right to a homestead exemption, made by the infant defendant, S. C. Howze, as they may be advised, and for a hearing and final order upon the pleadings and such proofs as may be offered thereunder.

MOSES, C. J., and WRIGHT, A. J., concurred.

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***J. R. SHELOR v. JOHN MASON, Sr.**

(Columbia. April Term, 1870.)

[*Constitutional Law* ⇐180; *Homestead* ⇐7.]

A homestead exemption cannot be allowed, under the Constitution of this State, as against a mortgagee claiming under a mortgage executed before the Constitution was adopted.

[Ed. Note.—Cited in *Kibler v. Bridges*, 3 S. C. 46; *Homestead Ass'n v. Enslow*, 7 S. C. 21.

For other cases, see *Constitutional Law*, Cent. Dig. § 499; Dec. Dig. ⇐180; *Homestead*, Cent. Dig. § 9; Dec. Dig. ⇐7.]

Before Orr, J., at Oconee, July Term, 1869.

Appeal from the Circuit decree in a bill for foreclosure of a mortgage of real estate.

On the 25th August, 1866, the defendant gave to the plaintiff a mortgage of a tract of land to secure the payment of a sealed note for \$1,098, executed on the same day, and payable one day after date. The mortgage embraced the family homestead of the defendant, and it was claimed by the answer that the homestead was exempted from sale, to satisfy the mortgage debt, by Sec. 32, Art. II, of the Constitution of the State, and the Act passed 9th September, 1868.

His Honor the presiding Judge allowed the claim of the defendant, and made a decree for foreclosure, directing the Clerk of the Court to set off and assign to the defendant the family homestead, and lands appurtenant thereto, within the mortgaged premises, and to sell only the residue of the mortgaged premises.

The plaintiff appealed, and moved this Court to reverse the Circuit decree, on the grounds, inter alia:

1. That if the provisions of the Constitution, in reference to homestead exemptions and the Act passed in pursuance thereof, are so construed as to allow the claim of a homestead in premises mortgaged previous to the adoption of the Constitution, they will impair the obligation of such contracts, conflict with Art. I, Sec. 10, of the Constitution of the United States, and be null and void.

2. That such a construction of said provisions would conflict with Sec. 21, Art. I, of the State Constitution.

Whitner, Trescott, for appellant.

Brown, contra.

Nov. 30, 1870. The opinion of the Court was delivered by

WILLARD, A. J. This appeal involves the question whether a homestead exemption can be allowed, under the Constitution of this State, as against a mortgagee claiming under a mortgage made and executed prior to the

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adoption of the Constitution. If this question is determined in the negative, it disposes of all questions in the case.

We have fully considered the general question of the bearing of the homestead provi-

sions on antecedent debts, in the case of Kennedy (ante, p. 216.) The present question is clearly distinguishable from the one there decided.

It is the right of the mortgagee, in default of payment by the mortgagor, according to the terms of the mortgage, to have the whole mortgaged premises, or so much thereof as may be necessary for such purpose, sold, and the proceeds applied to the satisfaction of the mortgage.—Bronson v. Kinzie, 1 How., 311, 318 [11 L. Ed. 143]. This right constitutes, in part, the obligation of the contract expressed by the mortgage. The principle of the exemption laws is inapplicable to such a case, as the interest created by the mortgage is specific, while, from its nature, such exemption can only be brought into discussion when the remedy goes against the whole property of the debtor.

If the provisions of the Constitution were to receive such a construction as to extend to the case of a sale under an antecedent mortgage, they would not only be brought in conflict with the Constitution of the United States, but would be found equally out of accord with the principles of Art. I, Sec. 21, of the State Constitution, which provides as follows: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be enacted."

The homestead exemption provision of the Constitution ought to be construed with Art. I, Sec. 21, as they constitute parts of the same instrument. Such a construction leads to the conclusion that the terms "attachment, levy or sale on any mesne or final process issued from any Court," employed in Sec. 32, Art. II, do not include a sale for the satisfaction of a mortgage made and executed prior to the date of the adoption of the Constitution.

It is ordered, adjudged and decreed that as to so much of the decree of the Circuit Court, in the above entitled cause, as adjudges that John Mason, Sr., is entitled to have set off to him, as such, and assigned, a homestead within the mortgaged premises, and as orders, adjudges and decrees that the Clerk of the Court of Common Pleas for Oconee County do, on or before the day of sale therein ordered, set off and assign to John Mason, Sr., the family homestead, and lands appurtenant thereto, within the mortgaged premises, pursuant to the provisions of the Act of the General Assembly entitled

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"An Act to determine and perpetuate the homestead," passed the 9th September, 1868, and also as reserves from sale, under said decree, such set off and assigned homestead for the defendant, the said decree of the Circuit Court be, in all things, reversed.

And it is further ordered, adjudged and decreed that the whole mortgaged premises, or so much thereof as shall be necessary, be

sold, under said decree, according to the terms thereof, and that said decree, in all other respects, be confirmed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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A. H. ABRAHAMS & SON v. KELLY & BARRETT.

(Columbia. April Term, 1870.)

[*Appeal and Error* ⇐1005.]

The Supreme Court has no power to correct an error of fact committed by the Circuit Judge in refusing a motion for new trial, made on the ground that the evidence was insufficient to support the verdict.

[Ed. Note.—Cited in Gilliland, Howell & Co. v. Gasque, 6 S. C. 409; Steele v. Charlotte, C. & A. R. Co., 14 S. C. 332.]

For other cases, see *Appeal and Error*, Cent. Dig. § 3872; Dec. Dig. ⇐1005.]

[*Appeal and Error* ⇐263.]

A mere omission by the Circuit Judge to charge a particular proposition of law, or a mere misstatement of the law by him, is no ground of exception to his charge. The party desiring the charge made, or the misstatement corrected, must bring the matter to the attention of the Judge, and request him to make the charge or correct the misstatement, as the case may be, and then, if he neglects or refuses, exception may be taken, and the matter brought by appeal before the Supreme Court.

[Ed. Note.—Cited in Fox v. Railroad Co., 4 S. C. 544; Powers v. McEachern, 7 S. C. 299; Coleman v. Heller, 13 S. C. 493; Ancrum v. Wehmann, 15 S. C. 122; Ellen v. Ellen, 16 S. C. 139; Ellen v. Ellen, 18 S. C. 492; Sawyer, Wallace & Co. v. Macauley, Id. 545; Carter v. Columbia & G. R. R. Co., 19 S. C. 26, 45 Am. Rep. 754.]

For other cases, see *Appeal and Error*, Cent. Dig. § 1518; Dec. Dig. ⇐263.]

Before Carpenter, J., at Charleston, February Term, 1870.

The statement and grounds of appeal upon which the case was heard by this Court are as follows:

This was an action brought by the plaintiffs on a judgment recovered by them against the defendants, on the fifth day of February, 1859, in the Court of Common Pleas for Charleston District, in this State. Both fi. fa. and ca. sa. were issued on the same day. The record of the judgment was produced in evidence. But neither the fi. fa. or ca. sa. were shewn, and no official evidence was offered as to the return upon them. The attorney for plaintiffs testified as to his impression that they had been returned, and sent by him to Columbia for safety, and there burned, in February, 1865, but the particulars of the return, or by whom made, he did not remember.

It was proved that the partnership of Kelly & Barrett had been dissolved before this judgment was obtained and that Barrett had assumed the payment of this debt. Also,

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that he was resident in *Charleston at the time the fl. fa. and ca. sa. were lodged. That, subsequently, another judgment in favor of Gidiere was obtained against the same parties; and that, in September or October, 1859, the Sheriff arrested Barrett—whether upon both, ca. cas. or only one, does not appear—but Mr. Dingle, the attorney for Gidiere, testified that the amount due upon Gidiere's judgment was paid by Barrett at that time. Some time after this Barrett left this State, and has not returned.

The defendant, Kelly, testified that he always understood that Barrett had settled everything before he left the State; that he, the other defendant, had always lived in Charleston; was the owner of a good house and lot; the title was in his own name, and it was so returned for taxation. That his ownership of said house was open and notorious; yet it had never been levied on under said judgment; nor had he ever been applied to for payment of said judgment.

William Aiken Kelly, son of defendant, testified that, in the last year, desiring to raise some money for his business purposes upon mortgage of his father's house, it was discovered, in examining the title, that the judgments against Kelly & Barrett, in favor of plaintiffs and Gidiere, had never been entered as satisfied. That he applied for such satisfaction, which was promptly given by Mr. Dingle, as attorney for Gidiere. Plaintiff said he believed his judgment had been paid, but could not positively remember. He, witness, went with plaintiff to his attorney, and he said he could not remember whether it had been paid. After this the suit was instituted to revive the judgment.

The case was submitted to the jury without argument, the Judge charging that it was a question of fact, under all the circumstances, for the jury to decide whether the judgment had been paid or not.

The jury found for the defendant.

A motion for a new trial was made before the Circuit Judge, on the 8th April, 1870, and it was refused on the same day.

The plaintiffs appealed from the verdict of the jury and the decision of the Judge refusing a new trial, on the following grounds, viz.:

1. Because there was no proof that the judgment sued on was ever paid.—3 Hill, 279, *English v. Cleary*.

2. Because no legal presumption of payment could arise but from the lapse of twenty years, and eleven years only had expired since the judgment had been recorded in

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1859.—7 Johnson's Reports, 556, *Thomson v. Skinner; 2 Tr. Cons., 617, *Kennedy v. Ex'ors of Denoon*; 2 Mills' Con., 146, *Adm'rs of Cohen v. Ex'ors of Thomson*.

3. Because the facts of a subsequent judg-

ment having been paid, the liability of the Sheriff for an escape, and one of the defendants owning real estate and being able to pay the judgment, did not warrant the presumption that the plaintiffs' judgment was paid; the plaintiffs had the right to hold on to their judgment and obtain payment for the solvent partner, and not to incur the risk and expense of suing the Sheriff for not arresting Barrett, the other partner.

Phillips, for appellants.

Pressley, Lord and Inglesby, contra.

Jan. 5, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The appellants brought an action on a judgment. On the trial evidence was introduced tending to prove that the judgment had been satisfied. The verdict was for the defendant. A motion was made before the Circuit Judge for a new trial, which was denied. The present appeal brings here a single ruling of the Circuit Judge as a subject of review upon exception. It is embraced in the charge of the Judge, and is to the effect "that it was a question of fact, under all the circumstances, for the jury to decide whether the judgment had been paid or not."

Evidence bearing on this question of actual payment and satisfaction had been submitted to the jury without objection, as far as appears to us, and it was a matter of course for the jury to determine the weight of evidence, so submitted, and for the Circuit Judge so to instruct them. This is the whole purport of the charge as brought before us.

The first proposition advanced by the appellants is that there was no proof that the judgment had been paid. There was, however, some evidence of payment, and whether it amounted to proof it was for the jury to say. If the evidence was insufficient to support the verdict, that was ground for a motion for a new trial before the Circuit Judge. We have no power to correct any error of fact that may have been committed by the Judge in refusing such motion.

The third proposition of the appellants is sufficiently answered by what has been said in reference to the first proposition.

The second proposition is to the effect that the legal presumption of payment does not arise unless the full period of twenty years

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*has elapsed. It does not appear that this proposition was brought to the notice of the Circuit Judge at the trial. It was not touched upon in the charge, nor was there any request to charge made in respect of it. The presiding Judge is not bound to submit to the jury any particular proposition of law, unless his attention is called to it, and a request made to that effect. However important to the case such proposition may be, error cannot

be alleged, unless, after request, he has refused to submit it. Nor is a misstatement of the law error, unless his attention is called to it, and he neglects or refuses to correct it. It is the office of exceptions to bring before us only such matters of law as were the subject of contest upon the trial.

It does not appear that the verdict would have been different had the Circuit Judge charged that there was no legal presumption of payment in favor of the defendant in the case. The issue did not go to the jury on the strength of such legal presumption, but on the question of payment in fact. Had the case stood before the jury on the lapse of time alone, the proposition of appellants would have been decisive of it. But such was not the case. That lapse of time, though less than twenty years, may have influenced the view taken by the jury of the facts and circumstances offered in proof of payment, is probable. If the plaintiff desired to guard the jury against giving too much weight to the mere fact of lapse of time, by bringing before them the proposition under consideration, it was his duty to request the Judge so to charge, and such request and refusal should appear in the exceptions before us.

No error appears in the rulings before us. The motion for a new trial must be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*J. EDWIN MATHEWS v. T. SAVAGE
HEYWARD and Others.

(Columbia. April Term, 1870.)

[Trusts \hookrightarrow 206.]

Where a trustee, having no such authority by the terms of the trust, invests the trust funds in the purchase of land, and gives a mortgage thereof to the vendor for an unpaid balance of the purchase money, he is guilty of a breach of trust; and if the vendor has notice, he is so far responsible for the equitable delict that he cannot enforce his mortgage without providing that the trust funds be replaced out of the proceeds of a sale of the mortgaged premises before any part thereof be applied to the mortgage debt.

[Ed. Note.—Cited in *Ex parte Mackay*, 8 S. C. 49; *Barrett v. Cochran*, 11 S. C. 35; *Elliott v. Mackorell*, 19 S. C. 238; *Bonar v. Gist*, 25 S. C. 347; *Green v. Green*, 56 S. C. 213, 34 S. E. 249, 46 L. R. A. 525.

For other cases, see *Trusts*, Cent. Dig. § 287; Dec. Dig. \hookrightarrow 206.]

[Mortgages \hookrightarrow 257.]

Where a mortgagee is responsible for a breach of trust committed by the mortgagor, his assignee, with notice, is subject to the same equity in enforcing the mortgage to which he was subject.

[Ed. Note.—Cited in *Elliott v. Mackorell*, 19 S. C. 241.

For other cases, see *Mortgages*, Cent. Dig. § 684; Dec. Dig. \hookrightarrow 257.]

[Infants \hookrightarrow 27.]

Where a trustee committed a breach of trust in giving a mortgage of land held in trust,

and the adult cestuis que trust exhibited a bill in equity against the trustee and infant cestuis que trust, making statements which showed that the plaintiffs had full knowledge of the circumstances, and praying that the mortgaged premises be sold—that the mortgage debt be paid out of the proceeds of the sale, and that the balance thereof be distributed among the cestuis que trust, and obtained a decree to that effect; *Held*, that the plaintiffs had waived their right to complain of the mortgage as a breach of trust, but that the decree was no estoppel in favor of the assignee of the mortgagee, who was no party to the proceeding, and, therefore, that the infant defendants were not barred by the decree.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 35; Dec. Dig. \hookrightarrow 27.]

[Trial \hookrightarrow 59.]

At what stage of the trial of a case evidence shall be received is a matter within the discretion of the presiding Judge.

[Ed. Note.—Cited in *Kairson v. Puckhaber*, 14 S. C. 627; *State v. Clyburn*, 16 S. C. 378; *Lowndes v. Miller*, 25 S. C. 123; *Petrie v. Columbia & G. R. R. Co.*, 27 S. C. 69, 2 S. E. 837; *State v. Howard*, 35 S. C. 200, 14 S. E. 481; *State v. Symmes*, 40 S. C. 388, 19 S. E. 16.

For other cases, see *Trial*, Cent. Dig. §§ 138–140, 142, 143, 145; Dec. Dig. \hookrightarrow 59.]

[This case is also cited in *Barrett v. Cochran*, 11 S. C. 30; *Green v. Green*, 56 S. C. 194, 34 S. E. 249, 46 L. R. A. 525, and distinguished therefrom.]

Before Carpenter, J., at Charleston, April, 1870.

The decree of His Honor the Circuit Judge is as follows:

Carpenter, J. This was a bill, filed by J. Edwin Mathews, executor, to foreclose a mortgage given by Thomas Savage Heyward, trustee, to Richard F. Reynolds, and assigned by him to the complainant in this case.

The facts appeared to be as follows: On the 15th July, 1857, Richard F. Reynolds conveyed to Thomas Savage Heyward, trustee, for the separate use of Georgiana Heyward, his wife, and of her children, appointed by the will of Miss Harriet Ann Ashe, the lot described in the pleadings, and, on the same day, T. S. Heyward, as such trustee, mortgaged the same to Richard F. Reynolds to secure a bond executed by T. S. Heyward as such trustee, for a part of the purchase money. The bond and mortgage was afterwards assigned by Richard F. Reynolds to the complainant, J. E. Mathews, executor of William Mathews.

It appears, from the pleadings, that Reynolds sold and conveyed the premises to T. S. Heyward, as trustee, and took the cash portion of the purchase money from him, knowing that he was receiving trust funds, and accepted the bond and mortgage for the balance executed by T. S. Heyward, as trustee.

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Mr. Reynolds appears *to have been fully aware of the danger of dealing thus with a trustee, for he required Mr. Heyward then, as appears by the testimony reported by the Referee, a man in large business, and

supposed, at that time, to have been a person of considerable means, to guarantee the bond in his individual capacity. By the report of the Referee, it appears that, of the purchase money of the said lot, the sum of four thousand six hundred and twenty-nine 10-100 dollars was received by T. Savage Heyward, as trustee, under the will of Harriet Ann Ashe. The pleadings and the report set forth the terms of the will in detail.

From the records of the Court it appeared that three of the defendants in this case, to wit: Annie C. Heyward, Thomas Savage Heyward, the younger, and William N. Heyward, adult children of Mrs. Georgiana Heyward, on the 29th August, 1866, filed a bill in this Court, in which, after stating the purchase of the premises with the trust funds as above mentioned, and family reasons rendering it beneficial that the same should be sold, they go on to say that besides there was due on the purchase money about \$2,500, secured by a mortgage given by the trustee, and that this amount was required to be paid by the present holder of the mortgage, who had only forborne to await the issue of that application out of which he expected to be paid, and prayed that the property might be sold, the mortgage debt paid, and the balance divided among the cestuis que trust, under Miss Ashe's will. T. S. Heyward, trustee, and the other children of Mrs. Georgiana Heyward, all of whom were minors, answered, the latter by their guardian ad litem.

Under these proceedings, Chancellor Lesesne, on the 19th February, 1867, made an order, by consent of counsel, directing the sale of the premises at such time, and on such terms as might be designated in writing by a majority of the adult parties to the proceedings, provided the consent of the mortgage creditor be first had and obtained; and that from the proceeds the master should first pay the mortgage debt and the costs, and that from the balance he should pay the adults the shares to which they were respectively entitled, and hold the shares due the infants subject to the further order of the Court.

The bill, in the present case, was filed on the 17th August, 1867.

After hearing the arguments in this case, it appeared to me that the trustee, T. Savage Heyward, having invested the funds of the trust estate of his wife and children in

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the real estate described in the pleadings, had no power to mortgage the trust property to secure the balance of the purchase money to the vendor, Richard F. Reynolds, who had full knowledge that the purchase was made with such trust funds, and who, by his deed, conveyed the property to the trustee as part of the trust estate, and in that deed admitted and declared that the purchase money was derived from such trust funds. The com-

plainant is the assignee of the mortgagee, Richard F. Reynolds, and, of course, can claim no greater rights than the assignor. I am, therefore, clearly of opinion that the defendants, who were infants at the time of the filing of the bill of partition in the case of Heyward v. Heyward, to which I will presently refer, are entitled to have their several shares of the trust funds invested in the mortgaged property, first paid out of the proceeds of sale of that property, before the complainant can take anything.

But in the case of Heyward v. Heyward, the adult cestuis que trust certainly recognized the purchase, and their proceedings were instituted with a view to pay off the mortgage debt. I am, therefore, of opinion that the adult cestuis que trust have signified such acquiescence as estops them from now disputing the act of the trustee.

It is ordered that from the cash portion of the proceeds of the sale of the mortgaged premises, and from so much of the bond of the purchaser as may be necessary for that purpose, the Sheriff do first put aside and retain in his hands, subject to the further order of this Court, the relative proportions of the said trust funds to which the defendants, who were minors at the time of the filing of the bill in Heyward v. Heyward, may be entitled, to wit: Five ninths and five-ninths of one-ninth of the amount of four thousand six hundred and twenty-nine 10-100 dollars, the amount derived as trust funds under the will of Miss Harriet Ann Ashe, and that the balance of cash and bonds he do pay over and assign to the complainant in this case.

The plaintiff appealed on the grounds:

1. That the mortgage, being given for the purchase money, was a primary lien upon the mortgaged property, and the purchase money is entitled to priority of payment out of the proceeds of sale.

2. That the breach of trust by the trustee, if any there was, could not, in proceedings for a foreclosure of the mortgage given to secure the purchase money, affect the rights of the vendor to be paid such purchase money.

3. That the filing of a bill in equity, in

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1866, by certain of the cestuis que trust, with a view to the sale of the mortgaged premises for the payment of the mortgage debt, and a partition of the residue of the proceeds of sale, was an adoption of the act of the trustee, even if the original purchase by him had been voidable, and was an adoption and assumption of the mortgage debt; and that all the cestuis que trust being properly before the Court, under such proceedings, are bound by the order made under such proceedings.

The defendants also appealed, on the grounds:

1. That His Honor Judge Carpenter erred

in holding that the defendants, who were adults at the time of the order of Chancellor Lesesne, made in the case of Heyward v. Heyward, on the 19th February, 1867, have, by the proceedings in that cause, signified such acquiescence in the mortgage given by their trustee to Richard F. Reynolds, as now estops them from disputing that act, or resisting the claims of the complainant under that mortgage.

2. Because the proceedings in the said case of Heyward v. Heyward form no part of the pleadings in this case, nor were referred to therein, and were not in evidence.

3. That His Honor Judge Carpenter erred in excluding such adult defendants from all the benefits of the decree in this case.

W. G. DeSaussure, for plaintiff.

McCrary, Hanckel, for defendants.

Jan. 16, 1871. The opinion of the Court was delivered by

MOSES, C. J. If the party insisting here for a priority of payment out of the proceeds of the sale of the mortgaged premises, by reason of the investment of the moneys received by the said T. Savage Heyward, under the will of Miss Ashe, had been his wife, Georgiana, it might have been difficult to withstand the justice and equity of her demand.

The testimony shows that at the time of the purchase "he was a Director of a bank, was regarded as a man of means, and engaged in a large brokerage business on his own account." His children were then all infants, and it was his bounden duty to procure a residence for his family at his own expense. The wife died in about one year after the conveyance to him. The interest of the children in the trust fund then became immediate, after which he continued to occupy the premises, with the *cestuis que trust*, for a long period, but the precise time does not appear.

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*The children are to be here regarded as the parties complaining of the breach of trust, by reason of the investment made as stated in the pleadings, and it might be enough to say that it was a devotion of their funds to a purchase of real estate, which did not even yield them annual income in the way of rent. The benefit which accrued was entirely for his own interest and advantage. The possession of the residence which he acquired through their means was a profit which enured only to him, and was obtained by the investment of their whole capital in a manner which necessarily subjected it to the chances of a total loss through the lien of the mortgage for the credit portion of the purchase money.

If the conveyance had conferred on him a perfect and unincumbered title for the benefit of the *cestuis que trust*, before he could

be excused from a breach of duty by the conversion of their money into real estate, he would at least be required to shew that no loss therefrom followed to beneficiaries, whose interest had been confided to his charge.

Mr. Hill, in his *Treatise on Trustees*, p. 377, says: "So it is unquestionably clear that trustees have no power permanently to convert the nature of the trust property, by laying out money in the purchase of real estate, unless a special authority for so doing is conferred upon them by the trust instrument."

In the case of *Morton v. Adams*, 1 Strob. Eq. 76, Dunkin, Ch., held that a trustee had no authority to purchase land for, or by such purchase to bind the trust estate; that "it was not necessary, and experience has proved it to be inexpedient."

The power to convert the money into land, unless authorized by the terms of the instrument creating the trust, or permitted by the authority of the Court, is not within the competency of a trustee.

If any doubt existed as to the propriety or soundness of the general principle involved in the rule, what must be said in a Court of Equity of the application by a trustee of the money in his hands to a purchase of real estate, by advancing, of the fund, the sum of \$3,666.66 as the cash payment, executing a mortgage for \$7,333.40, and applying the remaining portion of the trust fund, \$962.44, to the payment of the first installment due upon it, leaving it encumbered for the whole balance of principal and interest?

The bond and mortgage purported to have been executed by the trustee in his representative capacity, and, in his individual character, he guaranteed the payment of the bond. If he even had the right to change the nature of the trust fund, to what power

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will he *refer his authority to mortgage the land for the unpaid portion of the consideration money?

Even where a specific direction is given to invest in real securities, the trustee will only be protected by lending the money, on mortgage, to the extent of two-thirds of their value.—Hill, 368. An advance to that extent will, however, be improper, upon the security of houses or buildings which, necessarily, are of a perishable nature.—*Ibid*. Here, the manifest inducement to the purchase was a residence for the trustee himself, or for his infant children, which, at his own cost, he was bound to provide, and the whole trust fund was endangered by the amount remaining due on the mortgage being so largely in excess of the trust money advanced by him as the cash payment.

It is not pretended, on the part of the plaintiff, (Mathews,) that he did not have notice of all the circumstances attending the transaction, between T. Savage Heyward and Reynolds, in regard to the sale.

His bill alleges "that from the portion of the residuary estate which, under the said will, came to the said Georgiana, inter alia, the described lot of land was purchased; and the said T. Savage Heyward, husband of the said Georgiana, and instituted under the said will her trustee, took the conveyance thereof, in his name, as trustee as aforesaid, and, to secure the credit part of the purchase money, executed the aforesaid bond or obligation, and the aforesaid deed of mortgage and sale." In fact, the trust under and for which the purchase was made was expressed on the bond, mortgage and conveyance, and gave full information to Mathews, who, by the assignment, occupied the place of Reynolds, through whom he claimed. Whatever trusts, therefore, which attached on the instruments in the hands of Reynolds, were so impressed upon them, when this plaintiff substituted himself in his place with all his rights, that it constituted actual notice, thereby binding him to all the obligations and liabilities to which his assignor was subjected by the force and effect of the original transaction.

"It may be laid down as a general rule that a purchaser from a trustee with notice, though for valuable consideration, and a fortiori a volunteer taking with notice, is in equity bound by the trust to the same extent, and in the same manner, as the person from whom he purchased."—Hill, 165; Adams' Eq., 142; Simons v. South Western Railroad Bank, 5 Rich. Eq., 270.

The plaintiff submits, in his first ground

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of appeal, "that the mortgage being given for the purchase money, was a primary lien upon the mortgaged property, and the purchase money is entitled to priority of payment out of the proceeds of sale." The proposition thus assumed is not denied or contradicted by anything contained in the decree. It may well be conceded; and yet the claim of the parties interested in the trust remains unaffected. The contest is as to the right of the plaintiff to the "primary lien," as between himself and the cestuis que trust. If their money, as they contend, paid all the cash portion of the purchase, and was also applied in part to the extinguishment of the first installment due on the bond, they claim that they are entitled to be first reimbursed through the lien which the plaintiff holds by the mortgage. In other words, to that extent the plaintiff is to be regarded as their trustee, with a lien on certain real estate, which must primarily respond to them.

"Where a trust fund is traced into land, and the fund constituted a part only of the money laid out in the purchase, the Court has usually given a lien merely on the land for the trust money and interest; but where the entire land is clearly the fruit of the trust fund, the cestuis que trust must, upon prin-

ciple, have a right to take the land itself, whether the purchase be or not of a description authorized by the trust."—Lewin on Trusts and Trustees, 762; the same principle is recognized in Adams' Equity, 142.

In McNeil v. Morrow, Rich. Eq. Cases, 175, the Court says: "It may be stated, as a general rule, that so long as property held in trust, or a trust fund can be traced and distinguished, it will enure to the benefit of the cestui que trust."

It remains to consider the grounds of appeal presented on the part of the defendants.

The bill, in Heyward v. Heyward, therein referred to, was filed long after the expiration of the interest of the life tenant in the trust.

The right of those in remainder to the possession of the fund had accrued, and it was competent to such of them as were sui juris to excuse or waive the breach of trust on the part of their father, by direct and express agreement, or by such act as would amount to acquiescence.

"A purchase made by a trustee is not void, but voidable at the election of the cestui que trust within a reasonable time. But if, after notice of the transaction, the latter confirms, or unequivocally acquiesces in the sale, this will be a ratification, both in law and equity."—Hilliard on Vendors, 398.

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"A cestui que trust who, being sui juris, consents to, or acquiesces in, an investment by a trustee, cannot afterwards question its propriety."—Hill, 382.

Lord Eldon, in Walker v. Symonds, 3 Swanston, 64, says: "It is established by all the cases that, if the cestui que trust joins with the trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the Court must enquire into the circumstances which induced concurrence or acquiescence, recollecting, in the conduct of that enquiry, how important it is, on the one hand, to secure the property of the cestui que trust, and, on the other, not to deter men from undertaking trusts from the performance of which they seldom obtain either satisfaction or gratitude."

The decree in Heyward v. Heyward might not, of itself, constitute a bar to the claim of the adults to their proportion of the trust money invested in the purchase of the land. They are not considered as restrained from asserting their original right by the force and effect of proceedings resulting in a decree operative and binding upon them; but their bill, signed by them individually, amounts to a declaration that, with full notice of the breach of trust by their trustee, they assent that, as to the mortgagee, their claim shall

be subsidiary to the payment, through the land, of the amount due him on his debt.

Their bill, to which the trustee was a party plaintiff, sets forth the origin of the trust, the purchase of the premises with the fund in which they had an interest, and recognizing the property as their own, they claim partition of it by sale, and an appropriation of the proceeds, first, to pay the mortgagee his debt, and the balance to be divided among the children entitled. There is here a clear recognition of the purchase for them, and on their account, with a full knowledge and recital of the circumstances under which their trustee obtained the legal title, to their use, of the estate so sought to be subjected to sale, that, after the satisfaction of the mortgage therefrom, each might enjoy his several share in the balance. The effect of it is not only a recognition of the act of the trustee, but operates as an agreement by which they discharged him from all liability for the conversion of their trust money. When, on the death of the life tenant, the cestuis que trust

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became entitled, the *fund was free from all conditions and limitations. It was their own; they could deal with it at their pleasure, and were at perfect liberty (such of them as were of age) to confirm the act of the trustee. Their declaration in his favor enures to the benefit of the mortgagee, and having full knowledge, as is manifest from their bill, they cannot discharge themselves from the consequences which their act entailed to their own prejudice.

It is asking too much of the Court to assume that they were under "mistake of law," and in "ignorance of their rights." The presumption is the other way; and he who claims relief, upon the ground either of mistake of law or fact, must prove the existence of it, to entitle him to any relief from its consequences.

The introduction in evidence of the proceedings in Heyward v. Heyward, at the time they were offered, was a matter entirely in the discretion of the Circuit Court. The conduct of a case there, so far as relates to the time of the introduction of testimony on the one side or the other, must be regulated by the particular circumstances then existing, of which the presiding Judge can properly alone decide. So far have our Courts gone in this regard that, in *Browning v. Huff*, 2 Bail., 175, and *Poole v. Mitchell*, 1 Hill, 404, it was held that it was altogether in the discretion of the Court to permit testimony to be offered by the plaintiff after he had closed his case, and a motion for non-suit had been made and refused.

If the said proceedings had been offered in evidence by the plaintiff in this case to estop the defendants by the effect of the decretal order therein made, their competency to that end might be questioned. They were, how-

ever, competent to establish the fact, that the adult defendants here, who were then the plaintiffs, had by their bill waived the breach of trust by the trustee, and confirmed his appropriation of their funds to the purchase of the said real estate. Nor is it to be forgotten, that the said proceedings were brought to the notice and attention of the special Referee, as appears by his report.

If the decree in *Heyward v. Heyward* operated through itself to preclude the adult defendants here from any benefit in the fund so misapplied by the trustee, it might have the same effect as to the parties in the cause who were infants at the time it was made. We do not, however, hold that it is valid, as a bar, even against the adult defendants, but, as we have before said, they have deprived themselves of the relief they now claim, by

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their confirmation of, *or acquiescence in, the breach of their trustee, declared and expressed in their bill.

The Circuit decree is affirmed, and the motion dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 248

THOMAS R. LANGSTON v. THE SOUTH CAROLINA RAILROAD COMPANY.

(Columbia. April Term, 1870.)

[Bonds ⇌ 77.]

Coupon bonds issued by an incorporated railroad company, payable to bearer, are negotiable.

[Ed. Note.—Cited in *Walker v. State*, 12 S. C. 272; *Hand v. Savannah & C. R. Co.*, 17 S. C. 255.

For other cases, see Bonds, Cent. Dig. § 80; Dec. Dig. ⇌ 77.]

[Interest ⇌ 46.]

A coupon bond issued by an incorporated railroad company, redeemable on a day certain, and at a bank named, on the surrender of the bond, bears interest from its maturity, although no demand of payment, or offer to surrender the bond, be made at the bank or elsewhere.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 98; Dec. Dig. ⇌ 46.]

[Bonds ⇌ 117.]

An action may be maintained on a bond payable on a day certain, at a place named, without allegation or proof of demand of payment at the time and place mentioned.

[Ed. Note.—Cited in *McNair v. Moore*, 55 S. C. 439, 33 S. E. 491, 74 Am. St. Rep. 760.


For other cases, see Bonds, Cent. Dig. § 136; Dec. Dig. ⇌ 117.]

[Interest ⇌ 46.]

Coupons, payable at a certain time and place, bear interest from the time they fall due without demand of payment.


[Ed. Note.—Cited in *Rice v. Shealey*, 71 S. C. 169, 50 S. E. 868.

For other cases, see Interest, Cent. Dig. § 98; Dec. Dig. ⇌ 46.]

[Interest  37.]

Where a bond is payable at a future fixed time, with interest in the meantime, at six per cent. per annum, and the contract is silent as to the rate of interest to be paid, if default of payment shall be made, the debt will bear interest, from the time it falls due, at 7 per cent. per annum, the legal rate of interest.

[Ed. Note.—Cited in *Briggs v. Winsmith*, 10 S. C. 134, 30 Am. Rep. 46; *Sharpe v. Lee*, 14 S. C. 341, 342; *Mobley v. Davega*, 16 S. C. 75, 42 Am. Rep. 632; *Maner v. Wilson*, 16 S. C. 476; *Piester v. Piester*, 22 S. C. 140, 53 Am. Rep. 711.

For other cases, see Interest, Cent. Dig. § 77; Dec. Dig.  37.]

[This case is also cited and approved in *Mobley v. Davega*, 16 S. C. 73, 42 Am. Rep. 632.]

Before Carpenter, J., at Charleston, May Term, 1870.

This was an action on three coupon bonds. The first was in words and figures, as follows:

United States of America.

No. 28. \$500.

The State of South Carolina.

The South Carolina Railroad Company promises to pay to bearer five hundred dollars, redeemable on the first day of April, one thousand eight hundred and sixty-three, and not before without the consent of the holder of this certificate, with interest thereon, at the rate of six per cent. per annum, from the date hereof. The said interest to be paid quarterly, on the first days of January, April, July and October of each year, on presenting the proper coupons, at the South-western

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Railroad Bank, in Charleston, where *the principal also will be redeemed, on the surrender of this certificate.

In witness whereof the said company has caused its corporate seal to be hereunto affixed, at Charleston, this first day of April, 1853.

[L. S.] H. W. Conner, President.

J. R. Emery, Secretary.

The second bond was identical with the first, except as to its number, and the third was as follows:

United States of America.

No. 262. \$500.

The State of South Carolina.

Liquidated Debt of South Carolina Railroad Company to the State.

The South Carolina Railroad Company promise to pay to bearer five hundred dollars, redeemable on the first day of October, one thousand eight hundred and sixty-eight, and not before without the consent of the holder of this certificate, with interest thereon, at the rate of six per cent. per annum, from the first day of October, one thousand eight hundred and forty-eight. The said interest to be paid annually on presenting proper coupons at the South-western Railroad Bank, in Charleston, where the principal also will be redeemed on the surrender of this certifi-

cate, (the said interest being divided, by agreement of the said company, in four quarterly payments, by coupons, payable in January, April, July and October, which are attached to this bond, and numbered so as to correspond with the same.)

In witness whereof the said company has caused its corporate seal to be hereunto affixed, at Charleston, this tenth day of March, 1849.

[L. S.] James Gadsden, President.

Wm. H. Bartless, Secretary.

The case was submitted for decision to His Honor the presiding Judge, who made a statement of the case as follows:

"This case was referred to me by consent, in writing, of the attorneys representing the plaintiff and defendants.

"The action is in debt on three (3) coupon bonds, copies of which are attached to the paper hereto annexed and marked 'A.' To

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*two of the bonds there was a coupon attached, for the sum of seven 50-100 dollars, payable 1st April, 1863. The execution of the bonds was admitted by the attorneys, in writing, and it was also admitted, in writing, that at the maturity of the bonds, respectively, and from the dates of their maturity to the commencement of the suit, on the ninth day of March, eighteen hundred and sixty-nine, the South-western Railroad Bank had neither gold coin or United States Treasury notes to pay the bonds, but that the defendants, the South Carolina Railroad Company, were, from the close of the war to the present time, in possession of a large amount of United States Treasury notes.

"The plaintiff claimed to recover the principal of the said bonds and the coupons there-to attached, with interest at the rate of seven per cent. per annum, from the first day of April, eighteen hundred and sixty-three, and the first day of April, eighteen hundred and sixty-eight, when they respectively matured, and were redeemable in gold coin of the United States.

"The defendants claimed that interest could only be recovered from the date of the commencement of the suit, as there was no proof that the certificates were ever surrendered, as required by the bonds, or any offer to surrender the said certificates was ever made, or that any demand was ever made prior to suit brought.

"The said defendants also claimed that under the decision of the Supreme Court of this State, in the case of *O'Neil v. McKewn*, et al., (1 S. C., 147,) the said bonds could be paid and satisfied in United States Treasury notes.

"The plaintiff, in reply, claimed that interest was recoverable on the bonds from the dates on which they were respectively redeemable as the claims were liquidated, and, according to law, the said bonds being nego-

tible instruments, interest was recoverable on them, unless the defendants could prove that they had at the South-western Railroad Bank, where they were redeemable, an amount of gold coin or Treasury notes to satisfy the same, if they had been presented.

"The plaintiff also claimed that under the decision of the Supreme Court of the United States, in the case of *Hepburn v. Griswold* [8 Wall. 603, 19 L. Ed. 513], he was entitled to payment in gold coin, inasmuch as the bonds sued on were executed before the twenty-fifth day of February, eighteen hundred and sixty-two.

"I held that the said plaintiff was not entitled to recover interest except from the date of the commencement of the suit, inas-

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much *as, by the terms of the bonds sued on, the interest was payable on coupons attached to the bond, and the principal payable on the surrender of the certificate. The bond was therefore payable only on demand and offer of surrender, and, until demand made, interest did not commence to run, but that he was entitled to recover the amount due him in gold coin of the United States.

"I accordingly gave judgment for the plaintiff against the defendants for one thousand five hundred and fifteen (\$1,515) dollars, with interest thereon from the ninth day of March, eighteen hundred and sixty-nine, in gold coin of the United States.

"Before the said judgment was pronounced, the plaintiff excepted to my conclusion of law as to the right of the plaintiff to recover interest, on the ground that the plaintiff was entitled to interest on the bonds from the first day of April, eighteen hundred and sixty-three, and the first day of April, eighteen hundred and sixty-eight, the dates at which they were respectively redeemable, and that he was not restricted to the recovery of interest from the date of the commencement of the suit."

The plaintiff appealed, and the appeal was now heard upon the above statement.

Buist & Buist, for appellant.

Porter & Conner, contra.

Jan. 20, 1871. The opinion of the Court was delivered by

MOSES, C. J. It is not questioned that the instruments sued on are at this day, by "the usage of trade and commerce," recognized as bonds, though payable to bearer, and intended to pass from hand to hand, with the same facility as promissory notes, transferrable by delivery. Though at common law they would want the characteristics which are indispensable to bonds, still the Courts, in more recent times, probably influenced by the consideration of their extensive issue and circulation, affecting in no small degree the course of trade, and the monetary transactions of the country, have conceded to

them the negotiable qualities impressed upon their face. Nearly every English and American Court has recognized them as bonds, although passing by mere "manual delivery," and the Supreme Court of the United States, in the case of *Mercer County v. Hackett*, 1 Wallace, 95 [17 L. Ed. 548], not only accepted, but enforced such construction.

It is submitted by the defendant that there

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is no contract, express *or implied, to pay interest after the maturity of the bonds, and that it cannot be claimed by way of compensation for the detention of the debt, because a demand of payment, at the S. W. R. R. Bank, by the terms of the obligation, was imposed on the plaintiff, and this not having been made, constitutes such default as precludes him from all damages.

If it were clear, in point of fact, that the bonds were not payable on a specified day, but were payable on demand, at the pleasure of the holder, then the liability for interest before such demand could not arise through the force of the contract, nor would any damages for the detention of the debt be allowed, because the condition on which the payment was to be made had not been performed.

The case of *Sanderson v. Bowes*, 14 East, 508, so much relied on in the argument, goes to no further extent. There the note was payable on demand at a particular place, and no default of payment, on the part of the maker, could properly be averred, until there was a compliance by the holder with the precedent condition on which the right to exact payment depended.

It cannot be said that the time of payment was not fixed in the bonds here sued on. The promise, by the defendant, in two of them, was to pay on the 1st of April, 1863, and in the third, on the 1st of October, 1868, with interest from their respective dates, "quarterly, on the 1st day of January, April, July and October in each year, on presenting the proper coupons at the South-western Railroad Bank, in Charleston, where the principal, also, will be redeemed on the surrender of this certificate"—the coupons attached running to the respective periods fixed for the redemption of the principal. The promise was to pay at a prescribed time. The presentment at the place named was not an essential part of the contract. The value of the bond consisted in the obligation it imposed on the defendant to pay the money when, by its terms, the money became due. The surrender of the certificate imposed no duty on the plaintiff to which he would not have been subjected without its recital in the bond, for the debtor, on the payment of his note or other instrument to the creditor, could rightfully demand that the written evidence of his debt, on its satisfaction, should be "surrendered."

If the bonds are to be considered, as the

defendants contend, only payable on demand at a particular place, a non-compliance with this precedent condition would not preclude the plaintiff from interest, after maturity, until such demand at the designated place,

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*but would operate to bar the action, because it would then have been commenced before its right accrued; and yet the defendant concedes a liability to interest from the commencement of the suit, in the absence of all demand at the South-western Railroad Bank.

The bonds are to be held as payable on a specified day, and whether interest is to follow their non-payment from the time they fell due, as a part of the contract, by the recognized rule appertaining to the breach of a written promise to pay a named sum at a fixed period, or as compensation, in the way of damages, for the detention of the debt, the principle has been too long established to be the subject of doubt at this day.—*Ryan v. Baldrick*, 3 McC., 498; *Wistar Siter & Price v. Robinson*, 2 Ball., 274.

It is now proper to consider whether, before a recovery can be had of the principal, and the interest on these bonds from maturity, (regarding them as payable at a fixed time,) it was necessary for the holder to aver and prove a demand on the defendant at the South-western Railroad Bank?

The difference which for so long a period prevailed between the King's Bench and the Common Pleas on this question has never affected the American Courts. They have been almost of one mind in holding that "in actions on promissory notes against the maker, or on bills of exchange, where the suit is against the maker in the one case, and the acceptor in the other, and the note or bill is made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain the action. But if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defense, to be pleaded and proved on his part. This, if the place of payment is a bank, and the money be there deposited to meet the note or bill, will exonerate him from all costs and damages; and, if such place be other than a bank, an offer to pay the money at the time and place would protect him from interest and costs on bringing the money into Court."—*Wallace v. McConnell*, 13 Pet., 136 [10 L. Ed. 95]; *Story on Bills*, Sec. 288, and note.

In this State the same principle was held in *Smith v. Burrell*, manuscript, Charleston, Nov. Term, 1827, and in *Clarke v. Gordon*, 3 Rich., 313 [45 Am. Dec. 768].

The plaintiff claimed, in the Circuit Court, his right to interest on the bonds from the time they severally became due, at the rate

of seven per cent. per annum. We hold that he is so entitled.

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*If the debt bears a fixed rate of interest on its face higher or lower than that prescribed by law as the legal one, where the parties do not contract that it shall be the rate after the debt becomes due, the interest fixed by law attaches on it for the detention of the principal sum.

Decisions in the Courts of some of the States may be found maintaining a different rule, but the weight of authority is against them.

In this State, in the case of *Gaillard, Ex'r.*, ads. *Ball*, 1 *Nott & McCord*, 69, it was held, "that where a person entered into a bond, conditioned for the payment of four per cent. interest on legacies till the legatees come of age, and, as each legatee comes of age, to pay him his proportion of the principal, the legatees are entitled to seven per cent. interest (i. e., the legal interest of the State,) from the time the bond becomes due."

In *Brewster v. Wakefield*, 22 How., 118 [16 L. Ed. 301], in which the opinion was delivered by Chief Justice Taney, the Court held, as to the mode of computing interest where the note did not, by the contract, carry the interest expressed until its full satisfaction, that, when it fell due, the statute must interpose and regulate it.

Our judgment in reference to the interest due and payable on the bonds is to be held applicable to the two coupons embraced in the action.

It is ordered and adjudged that the case be remanded to the Circuit Court for Charleston County for a new trial.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. *255

*P. J. COOGAN, Plaintiff in Error, v. B. J. PARKER and Wife, Defendants in Error.

(Columbia. April Term, 1870.)

[*Landlord and Tenant* ⚭186.]

Covenant on a lease for seven years from 1st July, 1859. The rent which had accrued up to the 1st April 1862, had been paid, and the action was against the lessee, to recover so much of the rent as had accrued from that day until the end of the term. The defence was that the defendant had been deprived of the beneficial use and enjoyment of the premises, according to the intent of the lease, from and after the 1st April, 1862, by the casualties of war, but it was no part of the defence that the defendant had surrendered, or offered to surrender, the lease, or otherwise to rescind the contract, and it was in evidence that he used and occupied the premises, after the close of the war, in 1865, until the end of the term: *Held*, That the defence set up was insufficient to relieve the defendant from the plaintiff's claim.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 759; Dec. Dig. ⚭186.]

[*Landlord and Tenant* ⚭192.]

The authorities reviewed, and the true doctrine applicable to the defence held to be, that where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder, shall be discharged from the payment of rent.

[Ed. Note.—Cited in *Huguenin v. Courtenay*, 21 S. C. 412; *Ludden & Bates Southern Music House v. Dusenbury*, 27 S. C. 469, 4 S. E. 60.

For other cases, see *Landlord and Tenant*, Cent. Dig. § 777; Dec. Dig. ⚭192.]

[*Landlord and Tenant* ⚭192.]

If the tenant be deprived of the beneficial enjoyment of the leased premises, according to the intent of the lease, that is a destruction of the subject-matter of the lease, within the meaning of those terms as herein used, whether there be a physical destruction of the premises or not.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 777, 781, 784-786; Dec. Dig. ⚭192.]

[*Landlord and Tenant* ⚭186.]

To complete the defence the tenant must show that he rescinded the contract by a surrender, or offer to surrender, of all benefit therein which remained to him.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 759; Dec. Dig. ⚭186.]

Before Carpenter, J., at Charleston, June Term, 1869.

Writ of error by the defendant below to the Circuit Court. The action was covenant on a lease brought by Benjamin J. Parker and Elizabeth A., his wife, executrix of William Greer, deceased, plaintiffs below, against Patrick J. Coogan, defendant below. The following is a copy of the lease:

State of South Carolina, Charleston District.
This indenture made between William Greer, of the first part, and P. J. Coogan, of the second part, sheweth that I, William Greer, of the first part, do hereby lease unto the said P. J. Coogan, of the second part, his heirs, executors or assigns, for the term of seven years, to take date from the first day of July, eighteen hundred and fifty-nine, the premises known as the French Coffee House, No. — East Bay, for the sum of twelve hundred and fifty dollars a year, payable quarterly. The said P. J. Coogan, his heirs, executors or assigns, of the second part, agree to put and keep the premises in good order, and to keep the pumps, privies, roof, gutter, drains, cistern, etc., in good order always. And, furthermore, that if any improvements

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of any kind are made, *that they are to remain on the premises; and that the said P. J. Coogan does bind himself, his heirs, executors or assigns, to the above and that the premises are to be known and used as a coffee house, or restaurant: and it is understood and agreed that if, at any time, one quarter's rent shall be in arrears or unpaid, or the said lessee transfer this lease without the written consent of lessor, the said William Greer may be at liberty to determine this lease, and repossess the said premises.

And, furthermore, the said P. J. Coogan, his heirs, executors or assigns, do bind themselves to carry out faithfully the written lease.

William Greer. [Seal.]

P. J. Coogan. [Seal.]

Signed, sealed and delivered in the presence of (this first day of July, eighteen hundred and fifty-nine):

R. S. Parker,

Alex. Owens.

The plaintiffs, by their declaration and bill of particulars, claimed the rent due from 1st April, 1862, to first July, 1866, at \$312.50 per quarter, and interest.

The defendant pleaded several pleas. The third was as follows:

That the said plaintiffs ought not to have or maintain their aforesaid action thereof against the said defendant, because, he says, that, before the commencement of this suit, and before the commission of said breaches in the plaintiff's declaration mentioned, to wit, on the 15th day of February, A. D. 1862, at Charleston aforesaid, in the State aforesaid, flagrant war existed, and that portion of Charleston aforesaid in which said leased premises in the plaintiffs' declaration mentioned lie was in the possession and under the control of one of the contending armies, and by virtue of the orders of the military power then and there present and acting, and in consequence of the casualties of war, (for which the said defendant was in no way responsible, and which he could neither resist or control,) said defendant was compelled to vacate and abandon said leased premises, and was then, and ever thereafter has been, deprived of the peaceable enjoyment thereof.

Issues were joined on all the pleas, and the jury found for the plaintiffs below the full amount of their claim.

The following bill of exceptions shows the points of law submitted to this Court:

At the trial of the cause, the plaintiff, to

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maintain and prove the *issue on his part, gave in evidence the lease executed on the first day of July, 1859, between said William Greer, deceased, and the said defendant, Patrick J. Coogan, and that the rent of the premises in said case mentioned had not been paid, as in said lease stipulated, since the first day of April, A. D. 1862, and that the sum of six thousand and fifty-six 37-100 dollars, with interest thereon, was due thereon and unpaid, and evidence tending to prove that the defendant has never surrendered, or intended to surrender said premises; but held the same during and after the termination of the war and up to the end of his lease.

And the defendant, to maintain and prove the issue on his part, offered evidence tending to prove that insurrection and rebellion existed in South Carolina, and that the Governor and Executive Council of the State of

South Carolina, about the 10th day of February, A. D. 1862, promulgated the following order, to wit:

"State of South Carolina,
"Executive Council Chamber, February 7, 1862.

"The following resolution, by the Governor and Council, adopted at a meeting held this day, have been ordered to be published:

[Extract.]

"Resolved, That the Commanding General of the Charleston Department is hereby authorized, in conjunction with the Mayor of the city, to close all grog-shops and prohibit the sale of all intoxicating drinks in the vicinity of the lines of fortifications now being erected in and about the city of Charleston, during the time that negroes are employed upon the same; and the said General and Mayor are further authorized to establish such regulations for effecting these purposes as may be deemed necessary by them.

"Extracts from the minutes.

"By order of the Governor and Council.

"F. J. Moses, Jr., Secretary."

That, pursuant to said order, the Commanding General of the Charleston Department of the State, in connection with the Mayor of the city of Charleston, about the middle of February, 1862, closed up and prohibited all business of the defendant at the said French Coffee House.

That, from that time forward, by virtue of said orders, and by the casualties of war, the defendant, without his default and against his will, was deprived of the possession of said premises.

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*That, after August, A. D. 1863, until the close of the war, in April, 1865, said premises were within range, and actually repeatedly hit and greatly injured by the bombardment of Charleston by the United States forces on Morris' Island.

That, at the close of active military operations, and the surrender of Charleston, in February, 1865, said premises were in a very dilapidated condition, so much so as to be uninhabitable.

That in June, 1865, the defendant petitioned Colonel Woodford, United States Military Commander of the post of Charleston, who then had the custody and control of said premises, for permission to occupy them.

That the petition was granted, and the defendant authorized to occupy the premises, free of rent, of the United States for the time, on the express condition that said defendant would put said premises in repair.

That, pursuant to said arrangement with said military commander, the defendant entered upon and repaired said premises, expending thereon about one thousand dollars, made the premises habitable, and thenceforward occupied them till June, 1866, when defendant surrendered the premises to the plaintiff.

Defendant further offered to prove that, on July 1, 1862, he paid \$312.50 rent, in full to April 1, 1862, for said premises, to William Greer, deceased, and that on that occasion said Greer and himself had a conversation as to the rent of said coffee house, when said Greer informed defendant that "while the then state of things continued, he, Greer, could hardly expect him, defendant, to pay rent."

That from that time forward till some time in 1866, rent for said premises was never demanded by said Greer or any other person.

The Court refused to admit the evidence, and instructed the jury:

That if the defendant leased the premises in 1859, as indicated by the lease of William Greer to him, for seven years, and pursuant to the lease the defendant was put in possession of the premises, then he must be held to the payment of all the rent, as stipulated, which has not been paid, with interest thereon from the time it became due.

To which refusal to admit said evidence on behalf of the defendant, and to the said instructions to the jury, the defendant then and there, and before the jury had withdrawn from the bar, did except.

Corbin, for plaintiff in error.

Duryea, Cohen, contra.

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*March 22, 1871. The opinion of the Court was delivered by

WILLARD, A. J. It is important, before considering the question peculiar to the present case, to ascertain the state of the law of South Carolina as to the liability of a tenant for years to pay rent after the destruction of the subject-matter of the lease, from causes beyond his control. This question will be looked at apart from the effect of the covenants usually found in such leases, other than the covenant to pay rent.

It has been considered that Bayly v. Lawrence, (1 Bay, 499,) and Ripley v. Wightman, (4 McC., 447,) have introduced into this State a doctrine at variance with the common law, as expounded by the adjudicated cases in England, and the leading States of this country, following the common law. So strong has this impression of the state of our local law been abroad, that it has been said that, in this respect, South Carolina follows the doctrines of the civil law. When it is considered that, both by custom and statute law, the rules and principles of the common law have been made the foundation of our judicial system, it will be apparent that strong necessity should exist before we ascribe to the Courts that decided those cases, an intention to introduce into this State principles and rules foreign to our usages and system of laws. It is apprehended that a clear idea of the effect of these decisions, and a review of the state of the common

law, on this subject, will make it apparent that no such necessity exists.

The doctrine acted upon by the Courts of this State may be stated as follows: that where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder shall be discharged from the payment of rent.

Bayly v. Lawrence, (1 Bay, 499,) is the first reported case in which this principle was applied. The report of that case is exceedingly brief, and it appears, by the Reporter's note, that it was omitted in the publication of the cases of 1792. Why this omission occurred, whether as the result of accident, or because the report did not sufficiently present the ground of the judgment of the Court, is not explained. That was an action of covenant for rent, in arrear, brought on a lease of a shipyard, at Hilton Head, for ten years, dated the 6th day of June, 1774. The defence was, that the defendant was driven off by the casualties of war and deprived of the enjoyment. It was resolved, *per Curiam*,

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"that the defendant ought to pay for the time he peaceably enjoyed the premises, but not for the time he was prevented by the casualties of war." This is all that is given to us of the facts of the case, or of the conclusions of the Court. It does not appear whether the immediate cause of the defendant's being "driven off" and "deprived of the enjoyment" of the shipyard was force or fear acting upon him personally, or the destruction of the property that constituted the main value of the shipyard, as such. Nor does it appear whether or not the defendant resumed possession of the premises after the end of the hostile occupation, which must have ceased before the end of the term. We are left to inference in deducing these important facts, vital to the understanding of the authority of the case. It is reasonable to infer that the principal value of the shipyard consisted in the buildings, ways, and other conveniences for building, repairing and launching vessels. Lands convenient for such a purpose are not likely to be valuable for agricultural, nor, when remote from populous communities, for other general purposes. Nor is it to be assumed that the site, occupied by this shipyard, possessed any extraordinary or peculiar value, as compared with other lands similarly related to the waters of that extensive harbor, so as to have formed an important element of the consideration upon which the rent reserved was agreed to be paid. As a hostile force would, naturally, seek to destroy the means by which an enemy could build and repair vessels, it is to be presumed that the conveniences and appliances that constituted the principal value of the shipyard were destroyed. If

these conclusions are correctly drawn, the case is distinguished from Pollard v. Shaffer, (1 Dallas, 210 [1 L. Ed. 104],) where it was held that the occupation of leased premises by an alien enemy was no ground for a reduction of the rent agreed on. Under this view of Bayly v. Lawrence, its doctrine will be found fairly embraced within the statement, already made, of the ground assumed by the Courts of this State. It would be an instance of relief granted, in the nature of rescission, on the ground of the substantial destruction of the subject-matter of the lease.

This doctrine was very fully drawn out in Ripley v. Wightman, (4 McC., 447.) Colcock, J., says: "If a man lease a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied." He places this upon the ground that "the title to the rent is founded on the presumption that the tenant enjoys the thing during the contract." The application of

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this privilege to the facts of that case involved the idea that in a lease of a dwelling-house, for the purpose of a residence, when the land that supports and adjoins the house is designed to be occupied only as accessory to such residence, the use of the house for that purpose is to be regarded as the proper subject-matter of the lease, and all other matters as incidental thereto; and also that the destruction of the house, to the extent of rendering it useless as a residence, is a substantial destruction of the subject-matter of the lease. We have here the distinction upon which the determinations of the Courts of our State rest, which have been charged with carrying the law in a direction divergent from the proper course of the common law. It is involved in the question whether the actual physical destruction of the property, the usufruct of which was contemplated by the lease, is essential as ground for rescinding the lease, or whether the destruction of the possibility, of an usufruct, such as was in the contemplation of the parties to the lease, is sufficient ground for such rescission. It is very clear that the latter view has been judicially settled in this State, and acquiesced in by both Legislature and people for too many years to be disturbed at this time. It must be assumed that the relations of landlord and tenant, as they exist at this day throughout the State have been constructed upon the idea of the law thus promulgated by the highest judicial authority of the State. It remains to be seen whether this view of the law has not a higher sanction of authority and reason than the opposite doctrine.

The next case to be noticed was Bacot v. Parnell, (2 Bail., 424,) which was decided on the authority of Ripley v. Wightman. O'Neill, J., says of Ripley v. Wightman: "In that case, the act of God was held a

rescission of the contract." He applied the same rule in the case before the Court, holding that a contract for the hiring of a slave was ended by the death of the slave, that being the act of God. This same doctrine was again sanctioned in *Corley v. Cleckley*, (Dud., 35,) and in *Wilder v. Richardson*, (Ib., 323.)

Before examining the merits of the position assumed by the Courts of this State upon precedent and authority, it is important to ascertain whether this is in fact an open question under the English and American decisions.

As the doctrine above stated is applicable only to the case of a destruction of the premises by the act of God and the public enemies, it will be unnecessary to look in-

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to the great mass of cases, *English and American, where the injury complained of arose from fire, either originating on the premises or adjoining them. Among the cases thus shut out of view are the following: *Belfour v. Weston*, (1 T. R., 310;) *Monk v. Cooper*, (1 Ld. Raym., 1477, and 2 Strange, 763;) *Baker v. Holtzapffel*, (4 Taunt., 45 and 18 Ves., 115;) *Walton v. Waterhouse*, (3 Saund., 420;) *Bullock v. Domitt*, (6 T. R. 650;) *Ld. Chesterfield v. Bolton*, (Com. Rep., 627;) *Leeds v. Cheatham*, (1 Sim., 146;) *Izou v. Gorton*, (35 Eng. C. L., 198;) *Loft v. Dennis*, (102 Eng. C. L., 484;) *Willard v. Tillman*, (19 Wen., 358;) *Hallett v. Wylie*, (3 Johns., 44;) *Graves v. Berdan*, (29 Barb., S. C., 100; s. c., 26 N. Y., 498;) *Magaw v. Lambert*, (3 Penn., 444;) *Fowler v. Bott*, (6 Mass., 63,) and *Phillips v. Stevens*, (16 Mass., 238.)

In all these cases it has been held that the destruction of leased premises by fire, occurring through accident or negligence, does not afford ground for relieving the tenant from the payment of rent. It is worthy of remark that in all these cases there is not one in which, so far as appears by the reports, the tenant put himself upon the distinctive ground of a right to rescind by an act of surrender. On the other hand, *Baker v. Holtzapffel* was decided on the ground that there had been no steps taken by the tenant in order to make a rescission effectual. These cases are strong authority for holding that, during the continuance of the lease, no abatement of rent can be claimed by reason of injury to the leased premises by fire. It has been generally assumed, however, and perhaps not without reason, that their effect is to deny the right of the tenant to relief in any form in such cases.

It will not be necessary to enquire whether cases of the destruction of the subject-matter of the lease by negligent or accidental fire are distinguishable from, or stand as exceptions to, the rule that the destruction of the subject-matter of the lease by the act of God or the public enemies, works a dissolution of the lease at the election of

the lessee. If it can only be regarded as an arbitrary exception, still strong reasons have been urged why relief should not be extended to such cases. Loss by fire is an ordinary risk that may fairly have been considered within the contemplation of the parties. The exercise of prudence and care, on the part of the tenant, who has control of the premises during the lease, may avert the danger, or at least diminish its injurious consequences. To throw the consequences of the loss wholly on the lessor, diminishes unduly the interest prompting the tenant to

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the exercise of that care due in his *relation to his landlord, while an unscrupulous tenant, with a hard bargain, would find himself tempted to destroy the premises secretly, in order to escape the payment of rent. These considerations are unanswerable, when the fire originates upon the premises in the possession of the tenant.

To undertake, in such cases, to draw a line between accidental and negligent fires, would be impracticable, from the nature of the cause of inquiry.

We may, also, exclude from consideration, in the present connection, a class of cases in which the relation of landlord and tenant has been modified by covenants to maintain, support and repair, and to surrender possession of the premises at the end of the term in an agreed condition. Of these, 1 *Dyer*, 23, is an instance. In that case one bound by his covenant to sustain and repair the banks of a water-course was held liable on his covenant for damage occurring through an extraordinary flood. In this case, although the defendant was a lessee, no question was made as to any diminished value of the leased premises; nor was any demand for rent involved.

Canal Nav. v. Pritchard, (6 T. R., 750,) *Bullock v. Domitt*, (6 Ib., 650,) *Lord Chesterfield v. Bolton*, (Com. R., 627,) *Arden v. Pullen*, (10 M. & W., 321,) *Leeds v. Cheatham*, (1 Sim., 146,) and *Phillips v. Stevens*, (16 Mass., 238,) are all cases of this class. In all these cases the rights of the parties depended upon the force and effect of covenants to repair, and, accordingly they have no bearing on the question under immediate consideration.

Paradine v. Jane, (Alley, 26; Sty, 47,) and *Pollard v. Shaffer*, (1 Dallas, 210 [1 L. Ed. 104]), involve a somewhat similar principle, but do not touch the present question. In both of these cases the complaint was that the defendant had been deprived of the possession of the leased premises by an alien enemy, and not that the subject-matter of the lease had been destroyed. The thing leased remained in existence still, although the lessee had incurred the personal misfortune of losing the advantage he had anticipated from it.

Hart v. Windsor, (12 M. & W., 66,) *Sutton*

v. Temple, (12 Ib., 52,) and *Smith v. Marrable*, (11 M. & W., 5,) are cases in the Exchequer at variance with themselves upon the question whether there is incident to a lease an implied covenant that the premises are fit for the purpose for which they were hired. In *Hart v. Windsor*, and *Sutton v. Temple*, the existence of such an implied covenant was denied, while in *Smith v. Marrable* the tenant was relieved on the ground of a breach of such implied covenant. It

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*is true that *Hart v. Windsor* professes to overrule *Smith v. Marrable*. Parke, B., who delivered the opinion of the Court in both of these cases, says that the decision in *Smith v. Marrable* rested on *Edwards v. Etherington*, (Ry. & M., 268, and 7 D. & R., 117,) *Collins v. Barrow*, (1 M. & Rob., 112,) and *Salisbury v. Marshall*, (4 Car. & P., 65,) and that these cases were not law. Whether this sweeping overthrow met the approval of the King's Bench, whose decisions were involved, does not appear from any case brought to notice. In *Sutton v. Temple*, a different account is given by the same Court of *Smith v. Marrable*. It is there said that the case in hand was distinguished from *Smith v. Marrable* on the ground that in the latter case the contract was a mixed one of land and chattels, (a furnished house,) and that, while there is such an implied contract in regard to chattels, there is none in the case of land. The report of the case (in 11 M. & W., 5,) gives no such character to *Smith v. Marrable*. The lease, in the latter case, is set forth, making no mention of chattels of any description, and the question came before the Court upon the charge of the Chief Baron to the jury to the effect "that, in point of law, every house must be taken to be let upon the implied condition that there was nothing about it so noxious as to render it uninhabitable." Standing by themselves, these cases in the Court of Exchequer are of unsettled authority; but their weight will be still more diminished when we come to look at *Edwards v. Etherington* and *Cowie v. Goodwin*, (35 Eng. C. L., 162.) Whatever may be the merits of the controversy as to the implication of covenants of fitness, we are not required, at the present time, to hold the balances in its settlement—for the principle involved in these cases is clearly distinguishable from that which forms the ground of the doctrine that the destruction of the subject-matter of the lease by the act of God or the public enemies works a dissolution of the lease at the election of the tenant.

Edwards v. Etherington, and *Cowie v. Goodwin*, approach nearer to the question in hand. *Edwards v. Etherington* (24 Eng. C. L., 437,) also reported under the name of *Edwards v. Hethrington*, in 16 Eng. C. L., 271, was a case where the premises became uninhabitable during the term, as a conse-

quence of natural decay. The tenant elected to rescind, and returned the key to the lessor. The Court held that he was entitled to be relieved, as he had lost the beneficial use of the premises without fault on his part. —*Cowie v. Goodwin* (38 Eng. C. L., 162, 9 Car. & P., 378,) involved the same principle and received the same solution.

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*It is apparent that if these cases possess authority, it tends to enlarge the doctrine stated above, and places a destruction of the habitable quality of a house by natural decay, without the fault of the tenant, on the same footing as if the cause of such injury was the act of God, or of the public enemies. *Arden v. Pullen*, (10 M. & W., 321,) was, also, a case of decay, though alleged to have resulted from bad original construction; but the tenant had covenanted to repair, and that created a clear distinction from *Edwards v. Etherington*, and *Cowie v. Goodwin*.

Graves v. Berdan, (26 N. Y., 498, s. c., 29 Barb. S. C., 100,) directly affirms the doctrine under immediate consideration. That was an action for rent of apartments in a building afterwards destroyed by fire. *Emott, J.*, whose opinion, delivered in the Supreme Court, received the direct sanction of the Court of Appeals, takes ground that where the estate is gone, and the thing demised no longer exists, no rent can any longer be recovered. He applies this to the case in hand, holding that the destruction of the apartments was the total destruction of the thing leased, and concluded that the tenant ought to be discharged from the payment of rent. This conclusion was sustained on appeal. The opinion in the Court of Appeals states: "That at common law, where the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned." This was the ground on which the judgment in the case rested. It is true the opinion branched out into collateral matter, tending to narrow down the practical value of the rule; but, so far as the case settled the law of New York, it carries it beyond the doctrine of the Courts of this State, as stated above, by extending it beyond the act of God and the public enemies to one of accidental fire.

Cass v. Rudale (2 Ves., 280,) was not a case of landlord and tenant, but was a bill for a specific performance of a contract for the purchase of houses, where it appeared that, after suit brought, the houses were destroyed by an earthquake. The Court decreed a specific performance. As the present question arises out of the peculiar contract that exists between landlord and tenant, *Cass v. Rudale* can throw no light upon it.

Taverner's case (1 Dyer, 56,) applied the principle in question, allowing the rent to be apportioned where there was a lease of land and sheep, and the sheep died during the term.

From the foregoing review of the author-

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ities on which those rely *who have affirmed that Bayly v. Lawrence and Ripley v. Wightman, run counter to the course of the common law. It will be seen that, so far as it regards adjudicated cases, there is no conflict with the principle of these cases. It is true that, in some of these cases, expressions are employed inconsistent with the application of the principle that has been made in our Courts; but the consideration of these judicial views and opinions belongs to that part of our discussion which will take into account the state of authority.

Regarding, then, the question as an open one upon the adjudicated cases in England and this country, we will proceed to consider its merits more closely.

The question is two-fold:

1st. Where there is a substantial destruction of the subject-matter out of which rent is reserved by a lease for years, by an act of God, or of the public enemies, may the tenant elect to rescind the lease, and, on surrendering all benefit thereunder, may he be discharged from the payment of rent?

2d. Whether the actual physical destruction of the property, the usufruct of which was contemplated by the lease, is essential to form a ground for rescinding the lease, or whether the destruction of the possibility of an usufruct, such as was contemplated by the parties to the lease, is sufficient ground for such rescission.

We believe it will be found that the better reason and the weight of authority lies on the side supporting the proposition advanced in the 1st question, just stated, as well as in the latter category of the 2d question, that the idea of mere physical destruction has never been prominent, and that the possibility of a beneficial enjoyment, according to the clear intent of the lease, has been made the test of the integrity of the lease. Rent is defined to be a certain yearly profit in money, provisions, chattels, or labor arising out of lands and tenements, in retribution for the use.—3 Kent's Com., 460.

This definition, with very little difference in the form of statement, and none in its import and effect, is generally agreed upon. The existence of rent, therefore, presupposes land, and a possible usufruct, for there can be no just demand for retribution or compensation for that which does not exist. An agreement to pay rent, whether a simple contract, or a covenant in form, is controlled by the nature of rent. If the conditions under which rent accrues do not exist, there is nothing for either an agreement or a covenant to pay rent to rest upon. A correspond-

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ing definition of a lease was *given by Judge Thompson in the United States v. Gratiot, (14 Pet., 538 [10 L. Ed. 573].) He says "the legal understanding of a lease for years is

a contract for the possession and profits of land for a determinate period, with the recompense of rent." But the possession of land derives value only from its profits, immediate or prospective. The lessee for a short term ought to be regarded as contemplating immediate profits—the owner of the reversion as looking to prospective profits. The definition of rent, as we have seen, is based upon the idea of "yearly" or present profits. Where parties contract together in terms that import the relations expressed by the foregoing definitions, it is obvious that their contract ought to receive such a construction as to preserve the rights and equities lying at the foundation of such definitions. The equity of a contract is its life, springing out of the idea of a reciprocity of benefits and obligations. Hence, a contract, without a consideration, being wanting in the element of equity, is void at law. When the equity of a contract is in harmony with its terms, it is enforced at law. A contract is the law of the parties—its equity is the reason of that law, and it is not a mere figure of speech to say, that where the reason ceases the law ceases also.

On the other hand, the ordinary contract for the payment of money at a fixed time, or on a fixed contingency, must be defined in terms expressing quite a different intention. The consideration of a contract to pay money must be either a right or thing acquired, or an obligation capable, in intentment of law and by the process of law, of being turned into value. The consideration of a lease is not the possession alone of land, but possession with its profits. The lessor assumes no obligation that there shall be profits, nor can any process of law produce such profits. The basis of the consideration is, then, an expectation of profits; all that the lessee gets being a right to produce and take them if they exist. It may well be that the lessee takes all ordinary risks of loss. The real consideration is, therefore, in the nature of a power of limited control over the premises, and to take to his own use the profits. This power, to answer the ends of the lease, must be upheld during the term. It may be destroyed either by the act of the lessor or of one claiming under him or against him, by title paramount, or by the destruction of the subject-matter of the lease through some agency not embraced in the risk taken by the lessee.

In the first case, all are agreed that the tenant is entitled to relief. In the second case, the words "demise," or "let," or equiva-

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*lent words, import a covenant of quiet enjoyment, under which the tenant may have relief.—Hart v. Windsor, 12 M. & W., 66. Why is this covenant of quiet enjoyment implied by the law from the mere fact that the contract is one of letting? Clearly because the equity demands that the power of the

lessee should be upheld when he has not taken the risk of its destruction. Unless, therefore, it can be shown that the lessee has taken, subject to the risk of destruction by the act of God and the public enemies, this principle should give him relief. It is claimed that where one covenants to perform an act, it is no ground of relief that the act became impossible through the act of God or the public enemies.—*Walton v. Waterhouse*, 3 Saund., 422, note a. If, while the covenant to pay rent continues in force, this might be an answer to the claim that performance was prevented by an act of God or the public enemy, still the covenant is subsidiary to the lease, and if the lease falls, must fall with it, for the right to rent must precede the right to enforce the covenant. The present question can, therefore, receive no solution from this principle applicable to covenants. The question, then recurs, can the lessee, in the absence of a clear expression of such intent, be regarded as having assumed the risk of the destruction of the leased premises by the act of God or the public enemies? That such an event is to be regarded as extraordinary, and not generally to be considered as within the contemplation of parties in their ordinary dealings, must be admitted. On this question we are of opinion that the weight of authority, supported by many adjudicated cases, sustains the doctrine we have presented, and that no adjudicated case denies it, while the habits and customs of the people embrace it as one of the fixed ideas upon which their daily dealings are based.

According to Rolle's Abrid., 939, possession of the leased premises by the King's enemies does not suspend the rent, and the reason assigned is, that by express agreement the lessee is bound to pay under all risks. The case here put does not imply a destruction of the subject-matter of the lease, but a mere interruption of the lessee's enjoyment of it. Again, it is said, that if part of the leased land is overflowed by fresh water, the rent does not cease, but if overflowed by the sea, the right to rent to such part is gone. The overflowing by fresh water is not regarded as inconsistent with a several enjoyment of the land, though changed in the character and value of its profits; but the sea makes all that it covers common; hence, in this case there is an actual destruction not physi-

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cal—for the land still remains under the sea—but legal and beneficial.—*Ib.* 236. This is a distinct affirmance of the principle in question. *Taverner's case*, (1 Dyer, 56.) is an instance of the application of the principle in question to a lease of land and sheep, when the sheep died. The arguments against the judgment which apportioned the rent were addressed against the doctrine under consideration, nor was any distinction attempted to be drawn between leases of land

alone, and mixed leases of land and chattels, as was afterward done in *Sutton v. Temple*.

It must, therefore, be regarded that the principle contended for met the approbation of the Court. We have already seen that this principle was applied in *Edwards v. Etherington*, and *Cowie v. Goodwin*, and in these cases carried beyond the limits contended for.

The note of a decision of Lord Mansfield, referred to by Buller, J., in the case of *Belfour v. Weston*, (1 T. R., 312,) has relation to a case of burning by fire, in which case he says the landlord is not obliged to rebuild, but the tenant is obliged to pay rent during the whole term, has no bearing on the present question, as we have already seen. In *Baker v. Holtzapffel*, (4 Taunt., 44.) which was an action for use and occupation of premises destroyed by fire, Lord Mansfield put the decision upon the distinct ground that the defendant had made no offer to deliver up the premises. This case would lead to the conclusion that at that time it was not fully settled that a loss by fire conferred no right on the tenant to rescind. When the same parties came before Lord Eldon for equitable relief, (18 Ves., 115.) he disposed of the case on the ground that there was no relief in equity in such a case beyond what the law afforded. Lord Northampton, in *Brown v. Quiller*, (Ambler, 619.) says: "The justice of the case is so clear that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am surprised it should be looked upon as so clear a thing that there should be no defence to such an action at law." This was said of the burning of leased premises by fire, and although it may have been inapplicable to the case in hand, is no mean support to the more general position contended for.

It is said in the note, at page 422 of 3 Saunders' R., (*Walton v. Waterhouse*.) that if there is an express covenant to pay rent, tenant is bound to pay, though the premises be burnt or blown down. It is also said, in the same note, "and as it appears from

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the before-mentioned case of *Paradine v. Jane*, (Alleyne, 26.) that it is no plea, in such case, to an action of covenant for nonpayment of rent, to say that the house was destroyed by the King's enemies, or that the defendant was evicted and turned out of possession by them, so it is equally no reason to say that the house was burnt down, and, therefore, he is not bound to pay rent.

The doctrine contended for does not assume that the plea here stated to have been made in *Paradine v. Jane* would be good. It is not the destruction of the buildings on leased land, whether by the act of God or the public enemy, that in itself constitutes the right to relief against the covenant to

pay rent; but it is such a destruction as reaches to the subject-matter of the lease, or the thing that must be regarded as the consideration of the agreement to pay rent, that authorizes the tenant to elect to rescind, and it is only when this doctrine is made effectual, by the appropriate act of the tenant, that a bar to the action of covenant is complete, which goes to the existence of the covenant. It is undoubtedly correct to say that blowing down, when caused by a tempest, stands on the same footing as destruction by public enemies; but the consequences of this admission are not necessarily such as were drawn by the learned Reporter, whose language is here given.

It will be useful to notice the remarks made by Tindal, J. in *Izou v. Gorton*, (5 Bing., N. C., 501.) that "the cases referred to in the argument, in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself." This was said in a case of destruction by fire of leased apartments subsequently repaired by the landlord, who brought his action for rent, and was allowed to recover. Tindal cites *Baker v. Holtzapffel*, as decisive of the question, which decision, as has been already stated, rested on the fact that the tenant had not offered to surrender the lease. This citation is followed by the language quoted above, which goes beyond the necessities of the case, to intimate that there was no ground for a surrender in the case in hand. That the cases referred to by Tindal are not those that have been regarded as the leading cases on this subject, is evident, from the fact that none of them answers the description given by him. By confining this remark of Tindal to cases of destruction by

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fire, the case then in hand, it will escape the criticism of inaccuracy to which, upon any other construction, it would be subject.

In *Taverner's* case there appears to have been a struggle between the inclinations of the common lawyers to dispose of such cases by an arbitrary rule, recommended by its simplicity and convenience of application, on the one hand, and the force of the inherent equity and justice of the claim of apportionment on the other hand, in which the latter prevailed. This is one of the cases to which Tindal ought not to be regarded as having referred, in the language quoted above.

The enlightened spirit in which the jurists, both of the common and civil law, have dealt with this question, is set forth by Chan. Walworth in *Gates v. Green*, (4 Paige, 355.) He lays it down as a principle of natural law, "that a tenant, who rents a house or other

tenement for a short period, and with a view to no other benefit except that which may be derived from its actual use, should not be compelled to pay rent any longer than the tenement is capable of being used." He cites to the proposition the law of Scotland, the Code Napoleon, the law of Louisiana and New Foundland. He also cites the authority of Puffendorf as supporting that view. He makes this judicious comment on Rutherford's Institutes, 127: "Rutherford, in his lectures on natural law, makes a very sensible distinction between a casualty which destroys the value of the use of the property, which loss naturally falls on the lessee, and one which destroys the property itself; in which latter case he holds that the lessee is excused from the payment of further rent." If, instead of reading "property," we read "subject-matter of the lease," we will not change the sense of the terms employed. It would be an unwarrantable use of the word "property" to confine the idea conveyed by it to the land on which a building stands when the building communicates to the lease almost the entire value and interest covered by the word property. After referring to the efforts of some of the Chancellors of England "to introduce this principle of natural law into the administration of justice in their Courts," Ch. Walworth adds: "A contrary principle, however, finally prevailed in the Equity Courts of England, as well as in the Courts of common law, and it must now be considered as settled, both in England and in this State, (New York,) that a lessee of premises, which are burned, has no relief against an express covenant to pay rent, either at law or in equity, unless he has protected himself by a stipulation in the lease,

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or the landlord has covenanted *to rebuild." It is obvious that the learned Chancellor had in view the case of destruction by fire alone, as the case before him was of that class, and his statement of the point decided is in terms confined to destruction from that cause. The strength of his conviction, as to the inherent justice of this proposition advanced by him, is an assurance that, if called upon to do so, he would have restricted the decisions referred to to the exact point decided, and, in doing so, would have left unaffected the principle of natural law in its application to cases of destruction from the act of God and the public enemies.

It was this view that Judge Colcock took in deciding *Ripley v. Wightman*, and to which he cites the support of 6 Bacon, 50.

A more critical notice of the New York decisions is rendered important by the fact that the authority of Chancellor Kent is cited against the doctrine here contended for. That learned Chancellor says (3 Kent's Com., 466): "It is well settled that upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence,

will not exempt the party from his obligation to pay rent." If by the loss of the premises is meant only that which Rutherford describes as the "loss of the value of the use of the property" to the lessee, then this authority is reconcilable with all that has here been said on this subject. If, on the other hand, we read the passage from Kent as saying that the destruction of the subject-matter of the lease is not, under any circumstances, ground for rescission, then we involve the learned commentator in the inaccuracy of not being supported by the authorities on which he relies. The judicious character of his mind must convince us that he employed these words in the exact sense in which they stand; in which case he would be read as saying that it is no ground of relief for the tenant that he has lost the benefit that he contemplated in leasing the premises. Nor would the addition of the words "by fire, inundation or external violence," compel an alteration of this reading; for it is possible for a tenant to lose the benefit of leased premises from either of these causes without there being such a destruction of the subject-matter of the lease as to warrant a rescission.

In *Hallett v. Wylie*, (3 John., 44.) a case of injury by fire, Judge Van Ness states, "that there is no case in the books where the destruction of the premises by fire has been held to excuse the tenant from the payment of the rent in an express covenant." He goes on to state that every reservation of rent in

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a lease is to be regarded as *having the effect of a covenant. It was on the ground peculiar to cases of loss by fire that this case was decided. We have already referred to *Willard v. Tillman*, (19 Wen., 35S.) a case of fire also, in which the decision of the Court is put on still narrower grounds, namely, that the lease embraced a strip of land capable of beneficial use, independently of the building burned, and that the tenant, from all that appeared, might still be in possession and use of that land. The plea in that case was held bad, as it went against the whole demand for rent. This case shows at least a disinclination to re-affirm broadly the doctrine put forth in *Hallett v. Wylie*. *Gates v. Green* we have already alluded to as having elicited the views of Ch. Walworth. In *Graves v. Berdan*, (26 N. Y., 49S.) also alluded to above, is an authority that where the lease is of apartments alone, their destruction by fire is ground of rescission. In the opinion of Judge Emott, in the Supreme Court, (29 Barb. S. C., 100.) it is said that if there is an express covenant to pay rent in a lease of lands, neither the destruction of buildings by fire, nor the inundation of the property by water, nor its occupation by the enemy, will exempt the party from his obligation. This is evidently an incorrect rendering of the passage above quoted from Kent,

and is not supported, as broadly stated, by the authorities cited in its behalf. This inexactness did not escape the attention of the Court of Appeals, for the opinion in the latter Court, after sanctioning the conclusions of Judge Emott, is careful to say that "it may be added, that at common law, when the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned." The ground upon which this case was decided was, that the lessee of apartments in a building occupied in part by others takes no interest in the soil, and consequently the destruction of the building would be the total destruction of the thing leased. It is said that it would be otherwise if the tenant had leased the entire building; for in that case the land would be left, and, in respect of that, he would have to pay rent. It will not be necessary to consider whether the reasons given for this decision are the best that could be given. It would, at all events, reduce apartments in a house, as the subject of letting, to a condition expressed accurately neither by the term real nor chattel. It would be something less than an easement, although it was assumed that the easement of going upon the land to and fro in the use of the apartments would accompany it as an incident. It would also involve the

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idea *that a lessee of the whole building would have rights and liabilities of a class different from that of the aggregate of all the tenants of its separate apartments under several leases. (See *Kerr v. Merchants' Exchange*, 2 Edwards Ch., 315, and *Izon v. Gorton*, 35 E. C. L., 198.) The real difficulty in *Graves v. Berdan* was in reconciling the right of a tenant of apartments destroyed by fire to escape the payment of rent, while the rule was upheld by the Courts of England and New York, that a tenant living in an entire building was not relievable in case of loss from the same cause.

With the settlement of this question we have nothing to do at the present time, while the general course of the case, and the pointed concessions of the Court of Appeals, sustains the general doctrine we are attempting to elucidate.

In *Fowler v. Bott*, (6 Mass., 63) Judge Sewall says that a lease for years is a sale of the premises for the term. That, unless there is an express stipulation, lessor does not insure the premises against "inevitable accident, or any other deterioration." He also says: "The rent is, in effect, the price or purchase money to be paid for ownership of the premises during the term, and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser." Again, he says that, independent of some covenant, the destruction

or injury of the premises by fire, "or any other casualty," is the misfortune of the lessee, and he is not excused from paying his rent. The attempt here made to assimilate a case of sale and one of hiring, as to all their incidents and consequences, seems not only unnecessary, but liable to be carried out into consequences calculated to destroy the common law idea of the relation of landlord and tenant. Judge Evans, in *Corley v. Cleckley*, (Dud., 35,) made, it is conceived, a more judicious use of the points of similarity between these two transactions, when he traced the same consequences to both, as it regarded the question of what condition of unsoundness, at the time of the contract, would warrant its rescission. This is as far as it appears safe to run the parallel. The statement placing "any other casualty" on the same footing with fire, while not essential to Judge Sewall's argument, needs to be subjected to a more careful limitation, in order to bring it within the decided cases of England, as we have already seen.

Unless something of importance has been overlooked in the foregoing citations, it cannot be doubted that, in case of substantial

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*destruction of the subject-matter of the lease, the tenant is entitled to rescind.

What, then, should be regarded as a substantial destruction? It is said, in *Doe ex dem. Freeland v. Burt*, (1 T. R., 701,) by Ashurst, J., that "the construction of all deeds must be made with reference to the subject-matter, and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country." In that case, a lease of a yard to a tenant of apartments was held not to carry with it vaults underneath the yard, notwithstanding the principle of the common law, that the ownership of the soil carried all above and below it. The ground of this decision was, that, construing the lease by its subject-matter, it was obvious that the parties intended otherwise.

This principle is directly applicable. If parties contract with reference to the occupation of a dwelling house, the destruction of that dwelling house is clearly the destruction of that which they had in view, and was the basis and consideration of their contract. To say that the few feet of barren land on which it stood, incapable of any production worthy of consideration, is sufficient to answer the intention of the parties, to satisfy the justice and equity of the contract, as well as its terms, is to say what no jurist has yet ventured broadly to affirm. The only difference between leases in compactly built cities and in the country is, that, in the one case, the principle is more clear and evident in its application than in the other. The ground of distinction must be the fact that the structure bears such relation, in point of fitness and value for the use contemplated by the

lease, as to give rise to the conclusion that the buildings were the main element of the consideration on which the agreement to pay rent was based. Such a conclusion is in accord with the sense of justice by which the mass of the people are influenced; and one reason why questions of this character are, after all, so few in number among the reported cases, is, that the sense of justice has influenced the public mind to such an extent as to bring them to a reasonable solution without an appeal to the Courts.

It has long been felt that the application of the common law ought to yield results more in accordance with the habits and ideas of the people, in this respect, and it is apprehended that, if approached in a constructive as well as a critical spirit, its doctrines and principles will be found, in all respects, compatible with the growth and tendencies of the civilization which has been fostered by it.

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*The present action is for rent upon a lease, for seven years, of premises consisting of a building in the lower part of the city of Charleston, to be used as a restaurant, the lease containing a covenant to repair. The defendant, upon the trial, offered to prove that he was prevented, by the casualties of war, from using the premises for the purposes contemplated by the lease: also, that the building was so injured, by the same cause, as to be rendered uninhabitable: and, also, that the military forces of the United States took possession of the premises. This evidence was excluded by the Circuit Judge, and a verdict rendered for the plaintiff. It, however, appeared that the defendant regained possession by an arrangement with the commandant of the military force, and retained possession after the cessation of hostilities until the termination of the lease.

It is not necessary to inquire whether sufficient ground existed for a rescission, for it does not appear that the defendant took any measures to rescind the lease. It is said, in behalf of the defendant, that the possession of the premises, subsequent to the military occupation, ought to be ascribed to the consent of the military authority, and not to be considered as a holding under the lease. If, under any circumstances, a hostile military occupancy could operate to extinguish the lease, still it would be necessary for the defendant to make it to appear that such occupation was in invitum. For aught that appears, the defendant may have abandoned the premises, without sufficient cause, to the military force.

It is sufficient for the purposes of the present case to hold that the defendant, not having established a rescission of the lease, has shown no sufficient bar to the plaintiffs' demand.

The motion for a new trial must be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*WM. L. REILLY and AMELIA L., His Wife,
v. JAMES WHIPPLE.

(Columbia. April Term, 1870.)

[Partition ⇐74.]

On a bill by A. against B., for partition of land, held under a deed of trust, the Circuit Court held, upon the construction of the deed, that the parties were entitled to a joint estate in the land during their joint lives at least; and, without deciding to whom the land would go on the termination of that estate, ordered a writ of partition to issue: *Held*, That the failure of the Circuit Court to decide to whom the land would go at the termination of the joint estate for life was not error; and that the question as to the limitations would come up if, upon the return to the writ, a sale should be ordered; in which event, provision should be made to protect those limitations.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 209; Dec. Dig. ⇐74.]

[Trusts ⇐13.]

A purchaser of land may direct the seller to insert in the conveyance trusts for the benefit of another; and, if he does so, intending it as a gift, and the trusts are inserted, he is bound by them.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 11; Dec. Dig. ⇐13.]

Before Lesesne, Ch., at Charleston, December, 1868.

Appeal from the Circuit decree, which contains everything necessary to a full understanding of the case, and is as follows:

Lesesne, Ch. In the year 1856, a conveyance of a house was executed by Harriet S. English and others to the defendant, James Whipple, in trust, for the joint use of himself and his wife, Mary Ann Whipple, during their joint lives, and after her death, in the case of her dying first, for the joint use of him and of her daughter, Amelia L. Yates, now Amelia L. Reilly, the plaintiff, during their joint lives, with other limitations and provisions, which it may be necessary to notice hereafter. Mary Ann Whipple died some time after, and this bill was filed in January, 1867, and asks for an account and payment to the plaintiff of one-half of the rents and profits accrued since her mother's death, and for partition of the property between her and the defendant.

The defendant denies that Mary Ann Whipple, the mother of the plaintiff, was his wife; and affirms that the property was purchased with his money, and for himself; that, being an illiterate man, unable to write or read, he entrusted the purchase money, \$3,000, to the said Mary Ann, and directed her to pay the same, and have the papers drawn in his name, which she afterwards told him had been done. That the said Mary Ann, a short time before her death, told him that the paper had been left with Mr. DeSaussure, from whom he got it; and that he was not aware of its contents until he had it read to him, after the war, when the plaintiff applied to him for money. De-

fendant asks that the deed be set aside as null and void. The deed was prepared by Wilmot G. DeSaussure, Esq., who testifies that Whipple gave instructions for the same at the office of DeSaussure & Son, and that

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Mrs. Whipple *was present. That Whipple represented that the money to be used for the purchase of the house had been earned partly by her, and that she had also received some money from a friend at the North. That, after discussion, it was arranged that the title should be taken in the manner indicated above; and, before the same was executed, it was read over by him, and explained to Whipple. Mrs. Reilly, the plaintiff, testifies, too, that, after her mother's death, she read the deed to Whipple, who remarked that it was all right; also, that some of the money which was used to pay for the house was her mother's.

Several witnesses were examined, on behalf of the defendant, to prove that Mrs. Whipple had no money, and that Whipple had given her the money, and directed her to have the title made in his name.

But Mr. DeSaussure testifies that Whipple was present when the instructions were received, and stated that some of the money was earned by her. His testimony, moreover, leaves no doubt on my mind that Whipple understood and approved the scope of the deed. And it is adjudged, accordingly, that the same is a subsisting and valid deed.

The testimony was taken by the Master, and will accompany this decree. It remains to consider whether it entitles the plaintiff to the right which she claims. The trusts are in these words, to wit: "In trust, nevertheless, to and for the joint and equal use, benefit and occupation of the said James Whipple and Mary Ann Whipple, for and during their joint lives, without being subject, in any manner whatsoever, to his debts, contracts or engagements, or his ejectment of her; and from and immediately after the determination of that joint estate, in case the said Mary Ann Whipple should die before the said James Whipple, then in trust for the joint and equal use, benefit and occupation of the said James Whipple and of Amelia Yates, daughter of the said Mary Ann Whipple, for and during their joint lives. And upon the determination of that, or the preceding estate, by the death of the said James Whipple, during the lifetime of the said Amelia Yates, or of the said Mary Ann Whipple, the said James Whipple shall have the right to dispose, by his last will and testament, in writing, previously made and executed, of one-half of the said premises, to such person or persons, and for such estate or estates, as he pleases, not inconsistent with the legal rights and interest of the said Mary Ann Whipple, or Amelia Yates, (mother and daughter,) herein vested in them;

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*and, in default of such will, the said half part of the said premises shall vest in the said Mary Ann Whipple, if then living, her heirs and assigns forever. But if she be then dead, the same shall vest in the said Amelia Yates, her heirs and assigns forever. But if the said Mary Ann Whipple should survive the said James Whipple, then one-half of the said premises shall vest in the said Mary Ann Whipple. And if the said James Whipple should make no disposition, by will, of his half part thereof, then, and in that case, the whole of the said premises shall enure to the said Mary Ann Whipple, her heirs and assigns forever, with the power to dispose thereof by will, duly executed; and, in default of such will, then her half part of the said premises, or the whole thereof, as the case may be, shall vest in the said Amelia Yates, her heirs and assigns forever; or, if she be then dead, without leaving issue, to her brother, John Yates, his heirs and assigns forever."

Upon the death of Mary Ann Whipple, the plaintiff, her daughter became entitled to one undivided half of the property for life, certainly, if not in fee, with a contingent right to the other half, in case Whipple do not exercise the power of appointment reserved to him by the deed. She is, therefore, entitled to have the property partitioned. As to an account of the rent and profits from the defendant, I do not think, under the circumstances, it should extend back beyond the date of demand, and as that is not fixed by the testimony, the filing of the bill will be taken as the time.

It is ordered and decreed, that a writ of partition issue, according to the rules and practice of this Court, to make equal partition of the premises described in the bill, between the plaintiff, Amelia Yates, and the defendant, James Whipple, and that an account be taken, with all proper allowances of the value of the rents and profits of the same, since the date of the filing of the bill, and that the parties, or either of them, shall be at liberty to apply at the foot of this decree for further orders in the cause.

The defendant appealed, and now moved this Court to reverse the decree, upon the following grounds:

1. Because it is established by the testimony, that the whole purchase money in said deed mentioned was paid by the defendant, through Mary Ann Yates, and was his own earnings. He was, therefore, entitled to receive an absolute deed in fee of the entire property.

2. Because, even admitting the entire tes-

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timony of complainant *all the circumstances, taken together, shew that the deed in question, making provision for Mary Ann Yates, by the name of Mary Ann Whipple, and as the wife of James Whipple, of a joint

estate for life, and, after her decease, for her daughter, was in the nature of a voluntary conveyance, obtained under the dictation, and by the undue influence of a shrewd, intelligent and unscrupulous woman, over a man of ignorance and weak intellect, and by the abuse of his confidence whilst acting as his agent in the management of this business, and, therefore, void, on the ground of public policy and equity.

3. Because, even admitting that the defendant was present at the time the instructions were given concerning the deed, which he positively denies in his answer, his total ignorance of the nature and scope of the deed prevented him from understanding or approving its purport. And being without learning, and unable to read or write, or understand words or letters, he could not have been aware that, under the deed, he took only a life estate in one undivided half of the property, with power to dispose thereof by will; and that Mary Ann Yates, in her lifetime, or the complainant, her daughter, after her mother's decease, could, at any moment, compel partition and sale of the property which he had intended for himself as a permanent home. The deed, therefore, should have been set aside and declared void, as the estate thereby conveyed was not such an one as he had contracted for, or had a right to expect.

4. Because the deed should have been declared void, as obtained by fraud in the confidential agent of defendant, who gave her final instructions, at the very time the purchase was to be completed and rendered effective and binding, by the payment of the money, to have the deed drawn in his name; and, admitting that he gave different instructions previous to that time, he was not concluded by them, but had the right to alter or modify them at any time before payment of the purchase money.

5. Because the testimony of General De-Saussure, upon which the Chancellor's decree is based, besides being inconclusive, and resting on memory, after the lapse of a number of years, stands almost entirely, if not wholly, unsupported. And in equity there can be no decree upon the testimony of a single witness against the answer, unless supported by special circumstances, which do not exist in this case.

6. Because the decree of the Chancellor does not determine what estate the complainant takes or is entitled to, but declares as

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follows: "Upon the death of Mary Ann Whipple, her daughter became entitled to one undivided half of the property for life, certainly, if not in fee, with a contingent right to the other half, in case Whipple does not exercise the power of appointment reserved to him by the deed. She is, therefore, entitled to have the property partitioned." Enforcing this decree, therefore, would result

in the offer of the property for sale, with an undefined and imperfect title, which would greatly depreciate its market value, to the detriment of this defendant, and deprive him of his just right to a sale, with an ascertained and definite title or estate in the complainant.

7. Because if the deed in question be partly voluntary and partly for consideration, as to the estate of Mary Ann Yates, or the complainant, it should not be enforced without knowing how much is voluntary and how much for consideration.

King, for appellant.

DeSaussure, contra.

The opinion of the Court was delivered by

WRIGHT, A. J. The grounds of appeal, from 1 to 5, inclusive, present a single question of fact. In those grounds, the appellant demands that the deed from the representative of English to the appellant be set aside for fraud; but, if such a decree as that were made, the effect would be to revive the title in the heirs of English. That would hardly answer the purpose of the appellant. His purpose, we suppose, could only be effected by a judgment, setting aside, not the deed itself, but the trusts thereof, so as to leave the title in him, as the sole beneficial owner.

This would be to reform the deed, not to set it aside; but that could only be done upon the clearest proof that the trusts in favor of Mary Ann Whipple and her daughter were fraudulently inserted. The Chancellor held that there was no fraud, and we are unable to perceive that, in that respect, he miscarried in his judgment.

The sixth ground complains, in effect, that the Chancellor failed to decide that the appellee takes under the deed more than a life estate. His decision is, that she takes a life estate at least in one-half of the property, and he directs a commission to issue, to divide the property between her and the appellant.

The complaint is, that he ought to have gone further, and decided what will become of her half at her death. But such a decision would have been premature.

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*If the commissioners should make actual partition, it will stand good only so long as the appellee lives. If they should recommend a sale (and we cannot know beforehand that such will be their recommendation,) it will be time enough then to decide the questions that will come up on the return, one of which may be the point attempted to be raised by the 6th ground of appeal.

We cannot anticipate what the Circuit Court will do. If it should order a sale of

the property, out and out, it would seem eminently proper that it should enquire whether there are future interests which require protection, and, if there are, to make such a decree for the preservation of the corpus as will protect those interests; the parties, no doubt, believe that there must be a sale, but the Court cannot know this until the information reaches them through the proper channel; and an opinion in anticipation of such information would be extra judicial.

Nor do we think there is anything in the 7th ground of appeal. It may be true that all the money paid for the property belonged to the appellant; still, if there was no fraud, if the trusts of the deed were inserted by his authority, direction, or consent, he is bound by them: the money being his, he might have taken the deed in his own name, and then, by a separate instrument, declared that he held the property in trust; and if he had done so, he would have been bound by the declaration.

Surely, then, it was competent for him to direct the grantor to declare the trusts. The mere fact that no consideration, except that of kindness and benevolence, moved him to make the declaration, or direct it to be made, does not invalidate it. As long ago as *Villers v. Beaumont*, (1 Vern., 100,) it was determined, that if one make a gift of which he afterwards repents, the Court has no right to free him from the fetters with which he has voluntarily bound himself, but he must lie down in his own folly; and the doctrine of that case is law to this day—*Francis v. Lehre*, (1 Rich. Eq., 271,)—and always will be, as long as law is founded upon reason and good sense.

The decretal order will, therefore, be modified, so that the writ directed by it to be issued will provide for the equal partition of the said premises between the plaintiff, Amelia Yates, and the defendant, James Whipple, during their joint lives. On the return to the writ the Circuit Court, in case of a sale of the premises being directed, will provide for the payment of the interest of the purchase money in equal shares to each

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of the said parties, during their *joint lives, and for the preservation of the principal, to await such proceedings as, on the death of either of them, may be instituted for the same, by those who may regard themselves as thereto entitled. The account ordered by the decree of the rents and profits will be taken in conformity with the directions therein contained.

MOSES, C. J., and WILLARD, A. J., concurred.

2 S. C. 283

CALHOUN v. CALHOUN.

(Columbia, April Term, 1870.)

[Slaves ⇨7.]

In May, 1854, A and B sold and conveyed to C, with warranty of title, a plantation, fifty slaves and some chattels, and C, at the same time, gave to them his bond for the purchase money, amounting to \$49,000, payable in installments, with interest; and to secure the payment of the bond, gave to them two mortgages—one of the plantation, and the other of the slaves. The slaves remained in the possession of C and his administrator, until 1865, when they were emancipated. On bill, filed in 1866, to foreclose the mortgage of the plantation: *Held*, that the administrator of C, was entitled to no abatement, because of the emancipation of the slaves, and decree of foreclosure for the full amount of the debt was entered for plaintiffs.

[Ed. Note.—Cited in *Roberts v. Adams*, 2 S. C. 343; *Blease & Baxter v. Pratt*, 3 S. C. 514; *McElwee v. Jeffreys*, 7 S. C. 233; *Trimmier v. Thomson*, 10 S. C. 184; *Darby v. Stribling*, 22 S. C. 246; *Sloan v. Hunter*, 56 S. C. 388, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

For other cases, see *Slaves*, Cent. Dig. §§ 20-29; Dec. Dig. ⇨7.]

[States ⇨17.]

When the Constitution of this State of 1868 was adopted and ratified, South Carolina was not a territory but a State within the Union, and bound, as such, by all the obligations which the Constitution of the United States imposes upon the States.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 21; Dec. Dig. ⇨17.]

[States ⇨17.]

The acceptance by Congress of a State Constitution, as republican in form, does not give the force of law to provisions therein which the Constitution of the United States inhibits.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 21; Dec. Dig. ⇨17.]

[Constitutional Law ⇨155.]

Section 34 of Article IV of the Constitution of this State of 1868, declaring all contracts, the consideration of which was the purchase of slaves, to be void, and providing that no suit shall be commenced, or prosecuted for the enforcement of such contracts, and the Ordinance of January 30, 1868, containing the same declaration and provision, are State laws impairing the obligation of contracts, and, being inhibited by the Constitution of the United States, are void.

[Ed. Note.—Cited in *Gibbes v. Greenville & C. R. Co.*, 13 S. C. 242.

For other cases, see *Constitutional Law*, Cent. Dig. § 291; Dec. Dig. ⇨155.]

[Courts ⇨5.]

Notwithstanding said declarations and provisions, and the provision in the Act of August 20, 1868, "to organize the Circuit Courts," which excludes from transfer to the Circuit Courts of "all causes not cognizable therein under the Constitution," said Courts and the Supreme Court have jurisdiction to hear and determine suits to enforce contracts for the purchase money of slaves.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 11, 12; Dec. Dig. ⇨5.]

[Slaves ⇨7.]

It is no breach of a warranty of title, contained in a bill of sale of slaves, that they were afterwards liberated by the Government, nor, to an action on a bond for the purchase money of the slaves, can such liberation be set up as

a defense on the ground of failure of consideration.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 25, 26; Dec. Dig. ⇨7.]

[Slaves ⇨7.]

A contract made in 1854, for the sale of slaves, being in conformity to public policy then existing, and legal and binding, was not invalidated by the subsequent emancipation of the slaves, and a change of public policy in reference to slavery.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 25; Dec. Dig. ⇨7.]

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[Slaves ⇨7.]

*One who purchased slaves and mortgaged them to secure the payment of the purchase money is not entitled to credit on the mortgage debt for the slaves lost by emancipation when in his possession.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 20-29; Dec. Dig. ⇨7.]

[Dower ⇨15.]

Where a purchaser of land gives to the vendor, at the time of the purchase, and as part of the same transaction, a mortgage of the land, his widow is not entitled to dower therein until the whole mortgage debt be paid; and it makes no difference that only part of the debt was incurred for the purchase money of the land.

[Ed. Note.—Cited in *Groce v. Ponder*, 63 S. C. 167, 41 S. E. 83.

For other cases, see *Dower*, Cent. Dig. §§ 18, 57-60, 132; Dec. Dig. ⇨15.]

[Homestead ⇨96.]

A homestead exemption cannot be claimed against a creditor whose debt was contracted for the purchase money of the land.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 147; Dec. Dig. 96.]

Before Johnson, Ch., at Pickens, July, 1866.

Appeal by defendants from the Circuit decree. The evidence was nearly all in writing, and the facts of the case, which were few and simple, are fully stated in the decree, which is as follows:

Johnson, Ch. On the 13th day of May, 1854, Floride Calhoun and her daughter, Cornelia M. Calhoun, sold and conveyed to Andrew P. Calhoun the Fort Hill plantation, in Pickens District, containing eleven hundred and ten acres, fifty negro slaves, and all the personal property on the plantation, with certain specified exceptions, for the sum of forty-nine thousand dollars. And, in payment of the same, they took the individual bond of Andrew P. Calhoun, to be paid as follows, that is to say: Forty thousand two hundred dollars to Floride Calhoun, and the remaining eight thousand eight hundred dollars to Cornelia M. Calhoun; the whole amount to be paid in fifteen years, from the first day of April, 1854, the payments to commence in ten years from the last date, and to be fully completed in five equal annual installments thereafter, with interest on the whole amount for the first ten years, at the rate of five and one-half per cent. per annum, "and, for the remaining five years, at the rate of three per cent. per

annum upon the installments as they fall due; and for the purpose of securing the payment of the bond, and as a part of the same transaction, as is evidenced by the fact that all the papers bear the same date, and by a written agreement, entered into at the same time, by all the parties, Andrew P. Calhoun executed two separate mortgages, one for the Fort Hill plantation, and the other for the fifty negro slaves, each, by its terms, to secure the payment of the whole amount of the bond to Floride Calhoun and Cornelia M. Calhoun. The mortgage of the negro slaves is in the usual form, with a proviso in the words following, to wit: "That, if default shall happen to be made of, or in, any payments of the said debt, or sum of money aforesaid, according to the true intent

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and meaning of the said bond *and condition thereof, that then, and in that case, it shall and may be lawful to and for the said Floride Calhoun and Cornelia M. Calhoun, their executors, administrators, attorneys, or agents, from time to time, and at all times thereafter, peaceably and quietly to enter into any or all the mesuages, lands or tenements of the said Andrew P. Calhoun, and to take the said slaves into their custody and possession, and the same to hold and detain to their own use and behoof, as their own goods and chattels, from thenceforth and forever, or the same to sell and dispose of at will and pleasure, returning the overplus, if any there should happen to be, after paying the said debt or sum of money, with interest accruing, unto Floride Calhoun and Cornelia M. Calhoun."

There was some conflict of evidence upon the subject, but, upon the whole, I am satisfied that, in the trade, the plantation was estimated at fifteen thousand dollars, the fifty negro slaves at twenty-nine thousand dollars, and the other personal property at five thousand dollars, making, in the aggregate, forty-nine thousand dollars.

In 1856, Cornelia M. Calhoun died intestate, and, in February, 1866, Thomas G. Clemson took out letters of administration upon her estate. And, in March, 1865, Andrew P. Calhoun died intestate, leaving, as his heirs-at-law, his widow, Margarite M. Calhoun, and seven children, to wit: Duff Green Calhoun, John C. Calhoun, Margarite Calhoun, Andrew P. Calhoun, James E. Calhoun, Patrick Calhoun and Mary Lucretia Calhoun, an infant, who has since died. And his son, John C. Calhoun, administered upon his estate, which, like that of many others, was almost entirely swept away by the results of the late war; and the only property remaining for the payment of the bond, which is wholly unpaid, except the interest up to the first day of April, 1865, and of other debts, which, from an exhibit of the same, filed with the answer of the administrator, amount to as much, or more, than the mort-

gage debt, is the Fort Hill plantation, and about ten thousand dollars' worth of personal property. The bond is the only specialty debt due by the estate of the intestate, so far as is yet known.

The bill was filed on the 12th of March, 1866, for the purpose of foreclosing the mortgage on the Fort Hill plantation, for the payment of the whole amount of the bond. To this the defendant, Margarite M. Calhoun, objects, insisting that she is entitled to dower in the plantation, subject to the payment of the purchase money of the same, and not of the whole mortgage debt, and that the assets

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*in the hands of the administrator are first to be applied, in the regular course of administration, to the extinguishment of the mortgage; and that the Fort Hill plantation shall only be subjected to the payment of any deficiency of the amount of the bond, after the proceeds of the personal estate are applied, and after deducting that portion of the same which was given for the purchase money of the fifty slaves, which, for reasons hereinafter assigned, it is insisted, should not be paid. The cases of *Wilson v. McConnell*, 9 Rich. Eq., 500, and *Henagan v. Harlee*, 10 Rich. Eq., 285, sustain the position that the personal estate is first to be applied to the payment of the mortgage debt, and that the land is only liable for the balance due. But the first proposition is not sustained by the authorities. A widow can only take dower in land, mortgaged by the husband at the time of the purchase, and as a part of the same transaction, subject to the payment of the entire mortgage debt, whether the same was in whole, or in part only, for the purchase money of the land, provided the same is recoverable at law.

But it is insisted by the defendants that the largest portion of the mortgage debt was incurred by the purchase of the fifty negro slaves, who have since been emancipated, and that the consideration of the bond, to that extent, has wholly failed. For more than ten years after the purchase, there was no complaint of any failure of consideration, and it is not now alleged that there was any intrinsic defect in the title when the bond was given. At the time, property in slaves, as in everything else, was subject to be destroyed by revolution; and it has been so destroyed. But did not the intestate buy them with the contingency distinctly before him that the institution of slavery might in a short time be abolished, either by a revolution in the Government or by constitutional amendment? It is well known that the value of slaves, at different times, was greatly affected by the political aspect of the country. And I think it may be safely taken for granted that, when the intestate made the purchase, he took the chances of emancipation into consideration, and paid such a price as he supposed the intrinsic value of the slaves,

lessened by such chances, would justify him in doing.

From all the consideration which I have been able to give the subject, I can find nothing in the law which will justify me in disregarding the decisions in analogous cases, arising from the death or destruction of property, after it is sold, and before it is paid for, so far as to decide that the consideration of the bond, to the extent the same was given for the purchase money of the

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negro slaves, *has failed, and that the purchaser is not responsible for the same. In adhering to such decision as the rule, it may be that very great hardships will follow in many cases, but I am by no means certain that they would be fewer or less grievous if the contrary rule were adopted as the right one. But it is insisted that the institution of slavery was not abolished until it was done by our State authorities. If the State did the act freely, and not in compliance with the demands of an authority which she was forced to obey, then the owners of slaves might be justified in presenting claims against the State for their value, but not in refusing to pay the parties from whom they had purchased them the amount they had agreed to pay for them before their emancipation; and, if it were otherwise, it is strange that there has been no decision in any case arising out of the emancipation of slavery in the West India Islands, or in the Northern States, sustaining the position contended for; and, if such a rule were adopted in relation to executory contracts for slaves, it would be very difficult for Courts of Equity to stay their hands in executed contracts for them when the equities for relief would be precisely the same—except, perhaps, that the more grasping creditor had compelled payment by sacrificing the property of his debtor, when the more indulgent one had given time, as a special favor to the purchaser.

It is further insisted that, if the defense of a failure of consideration to the extent of the purchase money of the negro slaves be not sustained, the estate of the intestate is not now liable for the same, because the condition of the mortgage was broken before their emancipation, and, upon that being done, the legal estate in the slaves vested in the mortgagee, and that, legally, the loss by their emancipation fell upon them, and not upon the mortgagor. It is true that, upon the condition of the mortgage being broken, the legal title to the slaves vested in the mortgagees, and they might, without any condition to that effect, have seized and sold them, and applied the proceeds to the payment of the debt, or they might have filed their bill to foreclose their mortgages, both on the land and the negro slaves, or they might have instituted suits at law upon the bond for the whole amount of the same.—2 Washb. on Real Prop., 592; 4 Kent, 183, and

note 1. In the case of *Bryan v. Robert*, 1 Strob. Eq. Rep., 342, the well established doctrine of this Court is stated by Chancellor Harper to be this, to wit: "In this Court, the mortgagee, though having the legal title, is not considered, in any manner, as the own-

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er of the slaves, as, in a *Court of Equity in England, the mortgagee of land is not considered the legal owner. He is regarded as having taken a pledge or security for his debt, with no view to the possession of the property itself. His object is merely the recovery of his money." And, by the provisions of the Act of 1712, the mortgagee must be in the actual possession of personal property for the space of two years after the breach of the proviso in the bill of sale, or other paper operating as a mortgage, before the absolute ownership of the property vests in him. And it has been decided, in the case of *Jackson v. Willard*, 4 John. Rep., 41, that "the interest of a mortgagee before foreclosure is not the subject of sale or execution at law, notwithstanding the debt is due, and the estate has become absolute at law; and in the case of *Corell v. Dolloff*, 31 Maine Rep., 104, that if the property in the possession of the mortgagor is destroyed, without any fault of his, he cannot be held to account for it. Upon condition broken, the legal title to personal property is permitted to vest in the mortgagee, for the purpose of enabling him the more readily to enforce his lien, and not for the purpose of compelling him to do so or lose his debt, in case the property may be destroyed. And the Court, in this case, cannot hold that the loss resulting from the emancipation of the slaves shall fall upon the mortgagees merely because they failed to enforce with haste one of their remedies for the payment of their bond, when the mortgagor might, at any time after his purchase, have sold the property, and paid the mortgage debt.

It is ordered and decreed that, unless the installments now due on the said bond, and all the interest that is due, (being computed according to the terms of the bond,) be paid on or before the first day of February next, that the said defendants do stand absolutely debarred and foreclosed of and from all equity of redemption of and in the said mortgaged premises, and that the Commissioner do sell the Fort Hill plantation, on the first Monday in March next, or such other time as may be agreed upon by the parties, at Pickens Court House, after giving at least twenty-one days' public notice of the sale, to the highest bidder, on a credit till the first day of November next, the purchaser to give bond and two or more good sureties—the title deed to be signed, but not delivered till the payment of the purchase money—and, if the money be not paid at the time it becomes due, then that the said plantation be resold, on saleday in December next, after the usual

notice, to the highest bidder, for cash, at the risk of the former purchaser.

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*It is also ordered and decreed, that the creditors of the estate of Andrew P. Calhoun be enjoined from instituting suits at law, upon their claims against the same, and that they be required to come in before the Commissioner, and prove their demands against the said estate, on or before the first day of April next, and that the Commissioner will give two months' public notice to creditors, that they will be required to do the same.

And it is also ordered and decreed, that the question of emblements, and all other questions made in the pleadings, and not decided in this decree, be reserved until the coming in of the Commissioner's report; and that he do report the amounts due by the estate of the intestate, with leave to report any special matter.

The defendants appealed, and moved this Court to modify the decree in the particulars indicated in the following grounds:

1. It is respectfully submitted that the Chancellor erred in decreeing for the plaintiffs so much of the bond, \$29,000, as was given for the slaves, which were afterwards emancipated, both by the Government of the United States, and the State of South Carolina.

2. Because the consideration of the bond, to the extent of the value of the slaves included in it, having failed, the title to said slaves having been destroyed, and the warranty of complainants broken by the legal interference of the Government, which has not only destroyed the title to the slaves sold, but declared such contracts, if made now, illegal and criminal, the judiciary of that Government should sustain the defence at least to the extent of refusing aid to enforce it, whilst executory.

3. It is respectfully submitted that the mortgage of the fifty slaves was a re-conveyance of them to the complainants, which, upon condition broken, became unconditional, and they were, at the time of emancipation, the absolute property of the mortgagees, both by law and the terms of the agreement. Their loss was the misfortune of the complainants, the owners, and, as a consequence, their value should have been credited as a payment and discharge, to that extent, of the bond for the purchase money.

4. Because the mortgagees were in default in not taking possession of the slaves mortgaged, after condition broken, and the representatives of the mortgagor were forcibly prevented by emancipation—the legal act of the mortgagees, through their Government—from delivering the slaves, in discharge of so much of said bond.

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*5. Because the widow, Mrs. M. M. Cal-

houn, has a legal right to dower in "Fort Hill," subject only to the payment of the purchase money of said premises, which purchase money, being secured by mortgage, should have been directed to be first paid, in the order prescribed for the payment of debts.

6. Because, it is respectfully submitted that the decree is not only regardless of the history of the times, and the hardships involved, but contrary to the law, justice and equity of the case, and the public policy of the State.

Harrison & Whitner, for appellants.

Noble, for appellees:

1. Does Sec. 34, Art. 1, State Constitution, annul validity of contracts for the purchase of slaves? "No State shall pass any law impairing the obligation of contracts."—U. S. Const., Sec. 10, Art. 1. Contract perfect when made—danger of emancipation foreseen and dreaded—it was a danger incident to slavery—the buyer took the risk. Property in slaves recognized by U. S. Const., Sec. 9, Art. I. Repeal of the law prohibited, Art. V. Recognized by Congress in fugitive slave law, and, in 1862, freeing slaves in D. C., and compensating owners, under 5th Amend. U. S. Const.—2 Brightly's Digest, 129, § 102.

2. Slavery, in one form or another, always existed. "Personal servitude appears to have been the lot of the greatest portion of mankind."—Hallam's Mid. Ages, Part 2, p. 89; 2 Kent Com., 246; Williams, adm'r, v. Johnson, adm'x, Am. Law Times for Oct., 1869, p. 149. Recognized as a legitimate institution by Paganism, Judaism, by the followers of Christ, and of the Prophet.

3. Slavery in the insurgent States abolished by President's proclamation, Jan., 1863. The Government of the United States omnipotent during war. "The public safety" called for emancipation—right of eminent domain annexed to sovereign power, and by its exercise private property can be disposed of without compensation.—Vattel, 112. The sovereign takes by prerogative, and not by title paramount.—Black Com., Book 2, p. 239.

4. Government interference in the execution of contracts does not impair their validity or obligation.—Atkinson v. Ritchie, 10 East., 530; Sjoerds v. Luscomb, 16 East., 201; Bright v. Page, 2 Bos. & Pull., 295; Hardy v. Clark, 8 Term, 259; Caradine v. Jane, Ibid; Boyles v. Fettyplace, 8 Mass.,

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330; Tontong v. Hubbard, 3 Bos. & Pull., 291; Rose v. McLeod, 2 Bay., 108; Stent v. Bailis, 2 P. W., 217; Loss produced by vis major falls on vendee or lessee.—Story Eq. Jurisp., § 101, et seq.; Bullock v. Dormit, 6 Term, 650; White v. Nutt, 1 P. W., 61; Mortimer v. Copper, Bro. Rep., 156; Paine v. Miller, 6 Ves., Jr., 349; Rugg v. Minott, 11

East., 210; Story Eq. Jurisp., §§ 104, 1307; Sugden on Vendors, 174; 2 Powell on Contracts, 61, 70. These cases afford analogies.

5. The State Convention of 1868 acted on the belief South Carolina was not a "State of the Union." Congress did not indubitably speak out.—McPherson's Hand-Book of Politics for 1868, pp. 191, 337, where Reconstruction Acts collected. The point settled 1869, in the case of The State of Texas v. White and others.—Am. Law Rep., Lead. Cases, 2 V., p. 84. The highest law tribunal in America held, notwithstanding the rebellion, Texas was at all times a "State of the Union." "No State shall pass any law impairing the obligation of contracts."—10 Sec., Art. 1, Const. U. S., and Art. 6; Rutland v. Copes, 15 Rich. Law, 116; Bank of Dubuque v. State of Iowa, 12 How., 1. Even doubtful, if Congress can.—Hepburn v. Griswold, Am. Law Times, U. S. Court Rep., Feb. 1870, p. 29.

In 1862, Congress emancipated in D. C., under 5th Amend. of U. S. Const., and gave compensation for slaves as private property. 2 Brightly's Digest, 129, § 101.

In 1863, the Government of U. S. emancipated in insurgent States, under war powers, and for "the public safety."—Vattel, 112.

In 1865, the 13th Amendment U. S. Const. emancipated in Mo., Ky., and Md. But contracts for the purchase of slaves entered into while slavery was lawful, were left untouched, to be enforced by the Courts according to the common and statute laws of the country.

The opinion of the Court was delivered by

MOSES, C. J. The case before us is of interest to the community, from the large amount of debt which will be affected by its decision. We are impressed with its consequence, not only because our judgment will act upon pecuniary obligations of a great magnitude, but because important constitutional issues are necessarily involved in it.

No more delicate duty can be imposed upon a judicial tribunal than that which requires it to discuss questions in which the

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action *of those from whom it derives its own authority is to be reviewed, particularly where the enquiry into that action is to ascertain if it is in conflict with the Constitution of the United States. The Constitution of the State, acting directly upon the people, by whose delegates it was framed, and designed to guard and regulate their relations with their own internal government, will be sustained by the Court, unless the infraction of the Constitution of the United States is plain and manifest. If there is doubt, it should be resolved in favor of the State Government, because "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States, respectively, or to the people." (Art. 10 of Amendments.) Where, however, the Constitution of the State, or an Act of the Legislature, plainly contravenes the Constitution of the United States, a Court would be false to every sentiment of duty and of principle, if it failed so to pronounce. The greater the interests at issue, the greater the necessity of interposing the shield of the judiciary to save the "supreme law of the land" from the blows which assail it. With these preliminary remarks, not, we hope, uncalled for, we will proceed to the case before us.

The Circuit decree sets forth the facts on which it rests, and these are not contradicted. It therefrom appears that the bond, the deeds and the mortgage constituted one transaction, and were contemporaneously delivered. The consideration of the bond was negro slaves then sold, and the mortgage of the same slaves was given to secure it. The important question, therefore, first made, is, whether, under the Constitution and laws of South Carolina, a debt contracted in 1854, the consideration of which was slaves, is recoverable in her Courts?

The jurisdiction of the Court is objected to, and the ground of objection rests: First. On the Ordinance of the State Convention of 30th January, 1868, which ordains, "That all contracts, whether under seal or not, the consideration of which was the purchase of slaves, are hereby declared null and void, and of no effect; and no suit, either at law or in equity, shall be commenced or prosecuted for the enforcement of such contracts.

"Sec. 2. That all proceedings to enforce satisfaction or payment of judgments or decrees rendered, recorded, enrolled or entered upon such contracts, in any Court of this State, are hereby prohibited.

"Sec. 3. That all orders heretofore made

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in any Court in this *State in relation to such contracts, whereby property is held subject to decision as to the validity of such contracts, are also hereby declared null, void, and of no effect."

Secondly. On the 34th Section of Article 4 of the Constitution, framed by the same Convention, and afterwards ratified by the people, which is in the following words: "All contracts, whether under seal or not, the consideration of which were for the purchase of slaves, are hereby declared null and void, and of no effect; and no suit, either at law or equity, shall be commenced or prosecuted for the enforcement of such contracts; and all proceedings to enforce satisfaction or payment on judgments or decrees rendered, recorded, enrolled, or entered up on such contracts, in any Court of this State, are hereby prohibited; and all orders heretofore made in this State in relation to such contracts, whereby property is held subject to decision as to the validity of such contracts,

are also hereby declared null and void, and of no effect."

Thirdly, On the Act "to organize the Circuit Courts," passed on the 20th of August, 1868, which, providing for the transfer to the said Courts of all causes pending in the Courts of Common Pleas and Sessions of the provisional Government, and of all suits depending in the Courts of Chancery, excludes from such transfer causes which are "not cognizable therein under the Constitution."

If, by these several prohibitions, it was intended to impose limitations upon the general jurisdiction both of the Supreme and Circuit Court, as conferred by the State Constitution, they must be respected and obeyed, unless in conflict with that of the United States. It is further insisted, on the part of the appellants, that, even if the Court concludes that it has jurisdiction, the decree must be reversed, because slavery having been abolished both by the action of South Carolina, in her Convention of September, 1865, and by the Thirteenth Amendment of the Constitution of the United States, there was no consideration to support the contract now sought to be enforced, the warranty of the vendor having failed. Although the defense is presented in various forms and propositions, we think we have fully stated its substance and essence in the language we have employed.

The preliminary question and the general defense were submitted upon the same line of argument, and we shall, therefore, consider them together.

So far as it seeks to give supreme effect to the Section of the State Constitution declaring null and void all contracts the con-

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sid*eration of which was for the purchase of slaves, etc., it rests on the supposed fact that South Carolina "had thrown herself out of the Federal Union," that she was, therefore, no longer subject to the Constitution of the United States, and never did become again so subject until she was re-admitted into the Union by the force of the Reconstruction Acts. That, after she was reduced by the power of the war until her re-admission, she stood in relation to the Government of the United States as a mere Territory, and when admitted under her Constitution of 1868, by the force of the Reconstruction Acts of Congress, "that Constitution, so established, is binding on the Judiciary of the country as the organic law of the State."

It is not to be denied that, under the fourth Section of the fourth Article of the Constitution of the United States, "it rests with Congress to decide what Government is the established one in a State," (*Luther v. Borden*, 7 Howard, 2 [12 L. Ed. 581].) and whether such Government is republican. These are political, and not judicial questions. So,

too, are those relating to the admission of Senators and Representatives.

No one would contend that, if Congress refused to admit the Senators and Representatives duly elected from this State, a mandamus from any Court could compel it. Their political powers, even, cannot be exercised if in contravention of the Constitution. The idea, however, that, because Congress has the exclusive right to determine whether a State Government is republican, the admission of members into Congress, under a Constitution previously submitted to it, no matter with what elements in such Constitution conflicting with that of the United States, so validates and confirms the instrument as to give supremacy over the Constitution of the United States, is not sustained by any authority, and we fail to discover the argument or reason which would recommend such a proposition to the approving judgment of any Court.

To admit that the State had lost by secession all its constitutional relations to the United States would be to affirm that the act of secession had dissolved the Union, and that the States composing the Southern Confederacy, by their attempted voluntary withdrawal, had, by a power reserved to them as States, thrown off the allegiance which they owed to the General Government. This has not been the view in which the secession of the States has been regarded by the Executive, Judicial, or Legislative Department of the United States.

President Johnson, in his special message

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(of December 4, 1865.) *to Congress, which was then holding its first session after the cessation of hostilities, says: "Besides, the policy of military rule over a conquered territory would have implied that the States, whose inhabitants may have taken part in the rebellion, had, by the act of those inhabitants ceased to exist. But the true theory is, that all pretended acts of secession were from the beginning null and void. The States attempting to secede placed themselves in a condition where their vitality was impaired, but not extinguished; their functions suspended, but not destroyed."

In *Texas v. White et al.*, (7 Wallace, 726 [19 L. Ed. 227].) Chief Justice Chase (delivering the opinion of the Court) says: "Considered as transactions under the Constitution, the ordinance of secession adopted by the Convention, and ratified by a majority of the citizens of Texas, and all the Acts of the Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly follows, that the State did not cease to be a State, nor her citizens to be citizens of the Union.

If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation."

The decision in this case further affirmed propositions which are conclusive against the views of the appellants here. These, as it is said, are deduced from the duty imposed on the United States, after "suppressing the rebellion," "to re-establish the broken relations of the State with the Union," "the authority for the performance of which is derived from the obligation of the United States, to guarantee to every State in the Union a republican form of government." So far was Texas from being considered, after she had laid down her arms, and before her full restoration to the Union, as a territory, subject to all laws which Congress might impose, she was held to be a State with a State Government, competent to sue in the Supreme Court of the United States, under the 2d Section of the 3d Article of the Constitution.

It is a mistake to suppose, as was averred in the argument, that the case of *Hepburn v. Ellzey et al.*, (2 Cranch, 446 [2 L. Ed. 332],) held "that the admission of Senators and Representatives in Congress has been the test and criterion by which States have been admitted." All that the Court there

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decided was, that the word "State" is *used in the Constitution as designating a member of the Union, and excluded from the term the signification attached to it by writers on the law of nations."

If the reconstruction of the States could only be effected by Congress in the exercise of its political power, it may be useful to consider in what light Congress did regard them, on the termination of hostilities. It was never urged, by any department of the Government, that the war was waged for the subjugation of the States which had confederated, that they might be reduced to the position of territories, or inferior dependencies, or denied that it was carried on for the purpose of restoring them to the Union, with guarantees and assurances that the attempt would not be repeated by either of them to dissolve a Union which it was proposed should be perpetual. As was said by Chief Justice Chase, in the opinion of the Court pronounced (during the war,) in the case of "The Venice," (2 Wallace, 258 [17 L. Ed. 866],) referring to the proclamation of the President of the 16th August, 1862, and the general conduct of the war: "It was a manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their National relations, under better forms and firmer guarantees, without any view of subjugation by conquest."

It is not easy to perceive, from the course of the Government of the United States, how a conclusion can be reached that the action of either of its departments, in relation to the State, before its full restoration, was intended to reduce it to a mere territorial existence.

The 13th Amendment to the Constitution of the United States was submitted to the Legislature of South Carolina for adoption as early as November, 1865, and was adopted by it during the same month. (House Journal of November, 1865, p. 93; Senate Journal, p. 74.) The certificate of its passage was signed and promulgated by Mr. Seward, Secretary of State, on the 18th day of December, 1865. (McPherson's Manual, for 1865, 1866, p. 6.) It is of interest to note the fact, that the Union was then composed of thirty-six States; the proposed amendment was ratified by exactly twenty-seven, the three-fourths required; West Virginia, Virginia, Arkansas, South Carolina, Alabama, North Carolina and Georgia, being of the number. The Amendment was recognized as ratified by every department of the Government.

In June, 1866, by Joint Resolution of both

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Houses, Congress *proposed the 14th Amendment. It was submitted to the State of South Carolina, and rejected by it on December 20, 1866. It failed to receive the vote of three-fourths of the States, all the States called "insurrectionary" having rejected it. (McPherson's Manual, for 1867, p. 194.) It is of consequence and significance, that the Congress of the United States did regard the said States in the Union at the time, for the most important act that a State, under the Constitution, could perform, the expression of its voice on a proposed amendment of that instrument. It is probable that this refusal on the part of the said States led to the Reconstruction Act of March, 1867, which made the acceptance of the said amendment one of the conditions on which "the rebel States" were to be declared entitled to representation in Congress.

If we follow the various clauses of the Reconstruction Acts, we will not find any expression on the part of Congress, in regard to the "rebel States," which places them in relation to the general Government as conquered provinces or territories. Indeed, such an assumption by Congress would have falsified the oft repeated declaration, that the war was not intended for subjugation any further than it was necessary "to re-establish the national authority, and the ultimate restoration of States and citizens to their national relations, under better forms and firmer guarantees."

The 4th Section of the 4th Article of the Constitution requires "that the United States shall guarantee to every State in this Union a republican form of Government." It may

be that in the exercise of this power Congress exceeded the limit of the authority that the framers of the Constitution intended to confer. The design of Congress, as expressed in the preamble, was "to enforce peace and good order in said States until loyal and republican State Governments can be legally established." Throughout the Act, as well as in the preamble, they are referred to as States. So far from any indication on the part of Congress to assume unlimited power in regard to the character of the Constitutions which they should enact, it required that such Constitutions should be "in conformity with the Constitution of the United States in all respects;" and when the provisions of the said Acts were fully complied with, what was to be the consequence? Was South Carolina to be admitted as a State in the Union? or never, in the contemplation of Congress, having been, by her act of secession, out of the Union, though in armed hostility to it, she was, by the Act, "to be declared entitled to representation in Congress," and her voice

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was again to be heard *in the family of the States by her representatives assembled in the halls of the National Legislature.

In this connection it may be of interest to refer to the case of *The State v. Carew*, [13 Rich. 498, 91 Am. Dec. 245], decided in May, 1866, by the Court of Errors of this State. The weight of its authority against the proposition of the appellants will be estimated when it is remembered that the result of it was to declare null and void Acts of the Legislature, passed in December, 1861, and December, 1865, because they were in conflict with the Constitution of the United States. This Court the highest of authority then in the State, held that an Act passed by the Legislature while South Carolina, as one of the Confederate States, was in hostile array to the United States, was void, because violative of that very provision of the Constitution of the United States which we are now endeavoring to enforce and sustain.

The argument on the proposition of the appellants as to the unlimited power of Congress over the Constitution of 1868, presented and accepted under the Reconstruction Acts, goes, without disguise, to this extent, "that when the Constitution adopted by the State becomes the Constitution which is recognized by Congress, and when Senators and Representatives are admitted under that Constitution, the matter is complete, and the Constitution so established is binding on the Judiciary as the organic law of the State."

It is probably not a matter of wonder or surprise that the consequences of the war, which has wrought so many changes, should have worked so material an alteration in the political sentiments of the South, which once denied to the General Government any powers except those expressly ceded to it in the Constitution, and pressed the doctrine of

State rights to the extent of insisting that the citizens of a State owed no allegiance to the United States save that which it owed through the State. A power is now claimed for Congress by the argument so omnipotent that it would virtually destroy all the safeguards which protect the Constitution from total annihilation at the hands of Congress. Let the argument be illustrated by the suggestion of an example: Suppose the Constitution adopted by the State, and accepted by Congress, had provided "that the State should have the power to impair the obligation of contracts," "or that the State should coin money," would it, for a moment, be contended that the Judiciary would be estopped from declaring either of them obnoxious to the Constitution of the United States, and, therefore, of no force or effect?

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*Even conceding, as was held in *Evans v. Eaton*, (Pet. C. C. R., 337 [Fed. Cas. No. 4,559]) that "there is nothing in the Constitution of the United States which forbids Congress to pass laws violating the obligation of contracts," can Congress empower a State to pass such laws? If it can, then all the prohibitions of the Constitution of the United States in regard to the powers of a State are worth nothing, if that which is not permitted to the States under the Constitution can thus be done by the license or consent of Congress, although Congress, even, has no right to amend it, (Const. U. S., Art. V,) and can only, by a two-thirds vote of both Houses, propose amendments to be ratified by the Legislatures or Conventions of three-fourths of the several States, or on the application of the Legislatures of two-thirds of the several States, call a Convention for proposing amendments to be ratified in the same way. Without, then, any power on its own part to amend, the authority is claimed for it to change, vary or destroy an Article of the Constitution, provided it can find the opportunity to second and confirm the unlawful Act of a State when it is called upon to pass on its Constitution.

If the right is to be referred to the guarantee power, that was intended for the safety and protection of the State, that a Republican form of Government, the only one recognized by the Constitution itself, should be secured, and which form each State has the right to demand shall be insured to it.

The whole argument proceeds upon the ground that Congress can authorize a State to violate the Constitution of the United States, provided that it does so by passing on a State Constitution and accepting it, though it contains provisions in direct antagonism to such Constitution.

If it can, what becomes of that clause in the said Constitution which declares (Const. U. S., Art. III,) "that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the au-

thority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding?" And what becomes of the twentieth Section of that very State Constitution claimed to have been impressed with infallibility by the hands of Congress, which requires "all officers, before they enter on the duties of their respective offices, and all members of the Bar, before they enter on the execution of their duties,

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to solemnly swear (or affirm) that *they recognize the supremacy of the Constitution and laws of the United States over the Constitution and laws of any State?"

The 34th Section of the 4th Article of the Constitution of 1868, without declaring the contracts illegal or immoral, proscribes them as null and void, and of no effect; prohibits suits for their enforcement, and proceeds to the extent of prohibiting proceedings for the payment of judgments already rendered. Its contemplated purpose appears to have been two-fold—first, to affect all existing contracts where the consideration was the purchase of slaves, even if the agreement had been merged in, and consummated by, a judgment; and, secondly, to deprive the party in whose favor such a contract had been entered into, of all remedy in the Courts of South Carolina to enforce it.

Mr. Cooley, in his valuable Treatise, well expresses "the power of the people to amend or revise their Constitutions," (Cooley on Const. Lim., p. 33,) by saying "that it is limited by the Constitution of the United States in the following particulars: First. It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand direct intervention on the part of the Government of the United States. Second, It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attain persons of crime, or provide, *ex post facto*, for the punishment of acts by the Courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For, while such provisions would not call for the direct and forcible intervention of the Government of the Union, it would be the duty of the Courts, both State and National, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people, in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes through the delegated powers of their Legislatures."

The 10th Section of the 1st Article of the Constitution of the United States declares "that no State shall pass any law impairing the obligation of contracts." The prohibition

is not confined to acts or resolutions of the legislative bodies of a State, but is against the exercise of the forbidden power by a State. It is the State, no matter by what body represented, which is subjected to the restraint.

It was, therefore, held in *Cohens v. Virginia*, (6 Wheat., 414 [5 L. Ed. 257],) in

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*which the opinion was pronounced by Chief Justice Marshall, "that the Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void." (See, also, *Doddy v. Woolsey*, 18 How., 331 [15 L. Ed. 401].) It was upon the same principle that the Supreme Court of the United States proceeded in the more recent case of *Cummings v. The State of Missouri*, (4 Wal., 277 [18 L. Ed. 356],) which held that certain clauses of the Constitution of Missouri adopted in 1865, were null and void, because repugnant to the Constitution of the United States.

Are the Ordinance of the Convention and the said Section of the Constitution, together with the clauses of the Act of 1868, already referred to, obnoxious to the tenth Section of 1st Article of the Constitution?

When the contract was entered into, it had the binding efficacy which the law accords to a contract, not wanting any of the incidents to make it a perfect and complete agreement. The contract vested "certain definite, fixed, private rights of property," (*Butler v. Pennsylvania*, 10 How., 416 [13 L. Ed. 472],) and was of the character of those within the meaning of the Constitution.

To impair the contract the action of the State must be upon and in regard to it.—*Charles Riv. Br. v. Warren Br.*, 11 Pet., 581 [9 L. Ed. 773]. The purpose of the Convention in this Article of the State Constitution admits of no doubt. The contract itself was the immediate subject of action, and whether "it was executed or executory," was protected by the said provision of the Constitution of the United States.—*Green v. Biddle*, 8 Wheat., 92 [5 L. Ed. 547].

In the many interesting cases which are to be found in the Reports, in which this important provision of the Constitution of the United States is brought into discussion, we have not found, in our investigation, a single one where the question arose upon the entire destruction of the contract, so declared in express terms by State authority. Where it is attempted to expunge the whole contract, to make it "null and void," it would be a waste of words to enquire if the obligation is impaired. The cases almost exclusively relate to the effect on the obligation of the contract, through the remedy by which it is to be enforced. As the said Section of the State Constitution also forbids the prosecution of any suit for the enforcement of such contracts, or for satisfaction of judgments founded on them, it may be proper to enquire into

the force of this prohibition as impairing the obligation of its action or effect on the remedy. This branch of the subject has been

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so fully examined by the late *Court of Appeals, that it would be but a repetition of what has been so well expressed in its opinion in the case of the State v. Carew, (13 Rich., 498 [91 Am. Dec. 245].) and but a reference to the same authorities which led to the conclusion to which it arrived.

The Constitution of 1868, by the 15th Section of the 4th Article, gives "exclusive original jurisdiction to the Circuit Courts in all civil cases which shall not be cognizable before Justices of the Peace." This general grant covers the right of action on a bond for the payment of money. The Supreme Court, by the 4th Section of the same Article, "has appellate jurisdiction only in cases of Chancery, and is constituted a Court for the correction of errors at law."

The whole judicial machinery through which justice was to be administered was fully furnished by the Constitution, so that the provision of the 15th Section of the Bill of Rights, securing "to every person a remedy by due course of law for any injury he may receive in his lands, goods, person or reputation," should not be a mere delusion. These provisions cannot be deprived of their full force and power, either by the Ordinance, the 34th Section of the 4th Article of the Constitution, or the provisions of the Act of 1868, because they so affect the remedy as to render worthless the obligation which can alone be enforced through it.

Our judgment being, that there is nothing in the Constitution or laws of South Carolina which forbids the Circuit Courts, or this Court, from entertaining cases of the character of the one before us, it becomes necessary to consider the other grounds presented by the defence.

Is there such a breach of warranty on the part of the vendors as will discharge the defendant from the payment of the bond?

The covenant of warranty must be construed according to the intent of the parties, to be collected from its terms.—Woodhouse v. Jenkins, 9 Bing., 701; Browning v. Wight, 2 B. & B., 14. It extends to and covers nothing but what is expressed in it. Stanard v. Forbes, 6 A. & E., 572.

What is the covenant here: "against ourselves, our heirs, and against every person whomsoever lawfully claiming, or to claim the same, or any part thereof."

The persons sold were slaves at the time, and the title was in the vendors when they conveyed to the purchaser. The covenant extended to the title and soundness. It was no more than a warranty that they should never be lawfully claimed, and taken from

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the possession of the vendee as slaves by a better title than that held and conveyed by

the vendors, in analogy to the principles which apply to eviction from real estate by paramount title. Has that condition been broken? Has a better title deprived the defendant of the possession of the slaves?

In the case of Watkeys v. DeLancey, (2 Doug., 354.) where the words of the covenant were "lawfully seized in his own right of a good estate in law, in fee simple, in the premises," Lord Mansfield said, "the defendant covenants that he is seized in fee of the land in question by all the laws in being."

In Noble v. Kind and Smith, (1 Hy. Bl., 34; see also Ex'ors. of Greencliffe v. W., 1 Dyer, 42.) on a covenant "against any person whatsoever," it was held that a breach must be shown by a title in esse prior to the covenant.

The emancipation of slaves by governmental authority was a possible contingency which must be assumed, from the peculiar character of the property, to have been understood by the parties treating for their sale and purchase. A warrantor of title is an insurer of it against all lawfully claiming by a better one. Emancipation, whether the act of the United States or the State, does not change the title by vesting it in another, but, in effect, declares that those on whom it operated shall not be the subject of property.

A covenant for quiet enjoyment of real estate is not broken by any action of the supreme authority of the State. The doctrine of eminent domain is usually restricted to real estate, or corporeal franchises, but the principle upon which it is based may be well applied by analogy to any species of property. Indeed, Vattel says, "everything in the political society ought to tend to the good of the country; and, if even the citizen's person is subject to this rule, their fortunes cannot be excepted.—1 Bk., ch. 20, p. 171. If the State can exercise dominion over the land, why not over every species of property held by the individual? If the right is inherent in the Government, how is it to be limited to a particular kind of property, excluding every other?"

McKinley, J., in Pollard's Lessee v. Hagan, (3 How., 233 [11 L. Ed. 565].) says: "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain."

Mr. Justice Daniel, in the West River Bridge Co. v. Dix, et al., (6 How., 532 [12 L. Ed. 535].) says: "Under every established

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Government, the tenure of property is derived, mediately or immediately, from the sovereign power of the political body, organized in such mode, or exerted in such way, as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It

is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now, it is undeniable that the investment of property in the citizen by Government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the Government, acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But in all contracts, whether made between the State and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, and of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made subservient to them, and must yield to their control as conditions inherent and paramount whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain."

To whatever immediate cause emancipation is to be referred, it is not to be denied that it was effected by a power to which the citizen was bound to yield obedience, and which he could not resist.

As early as the summer of 1865, almost every County in the State was garrisoned by troops of the United States, and, wherever they went, they gave practical effect to the proclamation of President Lincoln. The amnesty proclamation of President Johnson, in May, 1865, required of the citizen an oath recognizing and promising support to the laws and proclamations which "have been made during the existing rebellion with reference to the emancipation of slaves." The State Convention of September, 1865, was composed of members who had subscribed the said oath; and so impressed were they with the fact that the institution of slavery had passed away by the "action of the United States authorities," (Constitution of September, 1865, Sec. 11, Art. III,) that, in the

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*Constitution which they framed, a clause was included prohibiting the re-establishment of slavery, and referring its abolition to the said authorities.

The Court of Errors, in the case of *Pickett v. Wilkins et al.*, 13 Rich. Eq., 366 (December, 1867,) held "that slaves in this State did not become either de jure or de facto free until 1865, when they were emancipated by the action of the United States authorities."

The ratification by the State of the 13th

Amendment of the Constitution of the United States, was only repeating in a different form what it had done in the most solemn manner through the Constitution of 1865.

It was contended, by the defendants, that every act of the Government is to be regarded as the act of every citizen, and that the plaintiffs here contributed to the loss of the property by emancipation. What, on the other hand, is to be said of the participation of the purchaser who, by his aid, contributed to deprive the warrantor of the power to perform his covenant? This doctrine, however, has not been recognized in this country, (2 Hall's Am. L. J., 230; 5 John., 318,) it being considered by our Courts as too refined and fanciful to be safely applied to the common transactions between man and man.

The defence of subsequent failure of consideration cannot avail the defendant. If the covenant of warranty was not broken, it is difficult to perceive how the appellants will be entitled to an abatement of the bond by reason of an alleged failure of consideration. Conceding, however, that it may be submitted as a defence independent of that of covenant broken, if the event which induced the failure was contingent from the nature of the article sold, and to which the agreement was subject, there cannot be said to be such a failure of the consideration as to cast the loss on the vendor. If there was no such failure at the time of the contract, how can he be responsible for any loss which accrued by after occurring circumstances, against which his covenant cannot be held to extend?

The argument against the legality of the contract cannot prevail. If it was illegal when entered into, no Court will give it effect. If the cause of action grows out of a transgression of a positive law, it would not be enforced, because the very claim which would be preferred for the favor and protection of the Court would be in contravention of the law itself. It is not pretended that this contract was illegal when it was

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made. On the contrary, *the whole defence rests on the force of subsequent events, through which it is attempted to impair what, at the time, was a legitimate and lawful transaction, sanctioned and sustained by the laws and usages of the State for centuries.

Nor can the recovery be resisted on the ground that the agreement was against public policy. This, says Mr. Story, in his work on Contracts, (Sec. 546,) "is, in its nature, so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the Courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that whenever any contract conflicts with the morals of the time, and con-

travenes any established interest of society, it is void, as being against public policy."

If what constitutes the "public policy" of a State is to be ascertained by the general sentiment which pervades its constitution and laws, indicating the opinion of the people which prescribed them, as the rule by which they were to be governed in their relations to the Government and to each other, then the contract before us is consistent with the public opinion which prevailed in South Carolina when it was entered into.

Considerations of public policy cannot affect the judgment of a Court, unless expressed in a shape which will be binding upon it. If they are carried out by the legislative will in the form of law, they will be received as mandatory. The condition of any people would fail in that security which gives value to property and contracts, if the decisions of its Courts were to be regulated by the vague and undefined notion of those who administer justice, in regard to what, from time to time, may constitute the "public policy" of the State.

To excuse or defeat the performance of a contract, lawful when it is entered into, it is not only necessary that a change in the public policy of a State should intervene, but it must prevent the performance of the contract, and this was the ruling in *Touteng v. Hubbard*, (3 B. and P., 291,) so insisted and enlarged on in the argument. The same principle is reflected in *Gordon v. Blackman*, (1 Rich. Eq., 61,) and in *Finley v. Hunter*, (2 Strob. Eq., 214,) referred to by the counsel.

For upwards of two centuries slavery existed in South Carolina, owing its origin to no statutory provisions, but regulated from

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*time to time by local laws regarded necessary and proper for its government.

It existed as a common law institution, for the title by which it was held could neither be definitely or distinctly traced to time or person. Although it was not recognized by the common law of England, still it lawfully prevailed in her American colonies. When the Union was established, it was recognized as a distinct institution, and continued to prevail in many of the States which composed it, and it was alone dissolved as a result and consequence of the late war. Slaves, in South Carolina, when this contract was made, were the legitimate subjects of sale and purchase.

To impeach such a transaction now as illegal, or against public policy, is not only to ignore the history of the State in regard to the institution, but to view the events of the past by the reflected light of the present day.

It is further contended by the appellants "that the mortgage of slaves was a re-conveyance of them to the plaintiffs, which, on condition broken, became unconditional, and that at the time of emancipation they were

the absolute property of the mortgagees, both by law and the terms of the agreement; that their loss was the misfortune of the plaintiffs, the owners; and, as a consequence, their value should have been credited as a payment and discharge to that extent on the bond for the purchase money."

Throughout the argument for the appellants, it has been assumed that the contract, taken as a whole, growing out of all the transactions "make one res gesta"—"one contract"—which is executory. So far as relates to the sale of the slaves, the title to which vested in the purchaser by the deed, the contract was executed, as was the consideration given, by the vendor for the bond of the said purchaser, and nothing in the whole matter remained executory but the payment of the bond.

The legal title to personal property conveyed by mortgage vests in the mortgagee, but the breach of the condition does not confer so absolute a right as to give a perfect and independent claim to the chattel, as one holds property subject alone to his own control and dominion. Even if he has possession of the article, his title is divested on the payment of the debt, and transferred to the mortgagor. His possession, if he has it, is a qualified one, and though he may be clothed with a mere legal title, he is a trustee for the mortgagor, who still continues to hold the equity of redemption, and who has the real and beneficial interest.

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*Ch. Johnston, in *Black v. Hair & Black*, (2 Hill Eq., 624 [30 Am. Dec. 389].) says: "A creditor holding a mortgage security is a trustee, to sell not only for the benefit of the mortgagor, but for his own use."

"The interest which attaches to property held by one in absolute right, is not of that character which belongs to a mortgagee when in possession before foreclosure. One thus holding, would be accountable for the actual receipt of rents and profits."—4 Kent, 166.

In *Bryan v. Robert*, (1 Strob. Eq., 342,) Chancellor Harper thus states the established doctrine: "In this Court the mortgagee, though having the legal title, is not considered in any manner as the owner of the slaves, as in a Court of Equity in England the mortgagee of land is not considered the legal owner. He is regarded as having taken a pledge or security for his debt with no view to the possession of the property itself. His object is merely the recovery of his money."

It would be a contradiction of the purpose of the whole transaction here to say that the vendor actually disposing of the slaves had "a view to their absolute possession," except as a security for his debt. If his right is absolute because he has the legal title, how could the mortgagor compel redemption after condition broken—and this, within a reasonable time, he may do—or why, if the mort-

gagage sells, does he hold the proceeds beyond the amount necessary for the payment of his debt for the benefit of the mortgagor? It is because the mortgage, in fact, is but a security for the debt. Ch. Kent, in the 4th Vol. of his Commentaries, (p. 160,) remarks, that "the Courts of law have also, by a gradual and almost insensible progress, adopted the equitable views of the subject, which are founded in justice, and accord with the true intent and inherent nature of every such transaction." The doctrine contended for in the argument would narrow and restrict the right of redemption, which, for centuries, it has been the aim of the Courts to extend and protect.

It was to this end that the Act of 1712 (2 Stat. at Large, 587,) provided that where possession of the chattels, subject to the right of redemption upon performance of the proviso contained in the mortgage, continues in the mortgagee for two years after breach of the proviso, without redemption, the said chattels vested in the mortgagee as his own proper goods forever. In the face of this statute, can it be declared that where the possession, after condition broken, continues

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with the mortgagor, that an unqualified *legal title, conferring the absolute beneficiary interest, is in the mortgagee?

In relation to the question of dower, this Court concurs with the Circuit Chancellor.

The claim under the Homestead Law is expressly excluded by the language of the Constitution, which declares "that no property shall be exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of the said homestead, or the erection of improvements thereon."—Art. II, Sec. 32.

The decree of the Chancellor is affirmed, and the motion is dismissed.

It is ordered and adjudged that the case be remanded to the Circuit Court of Pickens County, that the time of sale for foreclosure, under the order of the Chancellor, may be prescribed, as also the terms thereof, and for such orders as may be necessary to give effect to the judgment now pronounced. Any questions made in the pleadings, and not decided by the decree, to be passed upon by the said Circuit Court.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 309.

Ex parte LOUISA STROBEL.

(Columbia. April Term, 1870.)

[Homestead \hookrightarrow 135.]

A widow is entitled to a homestead in the real estate of her deceased husband, though he

died before the adoption of the Constitution of 1868, giving the right.

[Ed. Note.—Cited in Moore v. Parker, 13 S. C. 490.]

For other cases, see Homestead, Cent. Dig. § 246; Dec. Dig. \hookrightarrow 135.]

[Homestead \hookrightarrow 150.]

Under a petition to the Judge of Probate, by the administrator of an intestate estate, for sale of the real estate for payment of debts, a decree, pro confesso, was entered against the widow of the intestate, who was a party to the petition, and a decree for sale made: *Held*, That the decree was no bar to an application afterwards made by the widow to the Judge of Probate to have a homestead set off to her in the lands ordered to be sold.

[Ed. Note.—Cited in Norton v. Bradham, 21 S. C. 375, 384; Ex parte Carraway, 28 S. C. 236, 5 S. E. 597; McMaster v. Arthur, 33 S. C. 515, 12 S. E. 308.]

For other cases, see Homestead, Cent. Dig. § 294; Dec. Dig. \hookrightarrow 150.]

[This case is also cited and overruled in Haddon v. Lenhardt, 54 S. C. 90, 31 S. E. 883.]

Before Platt, J., at Barnwell, March Term, 1870.

John G. Strobel died intestate in January, 1868, and on the 13th February, 1868, Jacob H. Kalb administered on his estate. On the 22d March, 1869, Jacob H. Kalb filed his petition in the Probate Court, praying that the assets of the estate of his intestate be marshalled, and the land sold, in aid of the

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personalty, for payment *of debts. Louisa Strobel, the widow of the intestate, was made a party to the petition, a decree, pro confesso, was entered against her, and a decree for sale of the land made by the Probate Judge.

On the 23d June, 1869, the petition in this case was filed in the Court of Probate by Louisa Strobel. The petition prayed that a homestead be assigned to the petitioner out of the real estate of her late husband. The Probate Judge dismissed the petition on two grounds: (1) That the decree for sale of the land was a bar to the application; (2) That the petitioner was not entitled to a homestead, her husband having died before the adoption of the Constitution of 1868.

An appeal was taken by the petitioner, Louisa Strobel, to the Circuit Court, and His Honor Judge Platt reversed the decree of the Probate Judge.

The administrator, Jacob H. Kalb, then appealed to this Court.

Robert Aldrich, for appellant.

Verdier, contra.

April 25, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The respondent, Louisa Strobel, petitioned the Probate Judge of Barnwell County for the allowance of a homestead out of lands of her deceased husband, ordered to be sold by the Judge of Probate for the payment of the debts of the

deceased. Her petition was dismissed, on the ground that the petitioner, being a party to the application for the sale of the lands in question previously made by the administrator, and not having interposed her claim to a homestead on such application, is bound by such order; and on the further ground that the death of her husband having occurred prior to the adoption of the Constitution, (1868,) no homestead exemption could be claimed in her behalf.

On appeal to the Circuit Court, this decision was reversed, and a homestead was allowed. From this determination the present appeal is taken.

The grounds of appeal will be noticed in their order:

1. It is claimed that the death of the husband before the adoption of the Constitution deprives the respondent of her right of homestead exemption. We have already held the contrary in *Ex parte Kennedy and Howze v. Howze*, (ante, pp. 216, 229.)

2. It is also claimed that the petitioner being a party to the application to the Judge of Probate to marshal the assets, and sell

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*the real estate of the deceased, and having been served with process in such application, and having allowed the order of sale to go by default, she cannot now set up a claim to a homestead. If the respondent was bound to interpose such claim upon the application to sell her husband's real estate, then there is ground for the claim made by the appellant.

We are of opinion that she was not so bound.

The provisions of Section 32, Article I, of the Constitution of 1868, operate in terms against the enforcement of process to sell such premises for the payment of debts. The Constitution thus operates upon and limits the effect of the judgment or order for

the sale of such lands. To hold the proposition contended for by the appellant would be equivalent to interpolating in the text of the Constitution a condition to the effect that such right of homestead should not be allowed, if the applicant had had an opportunity of setting forth her claim to the same in the proceeding in which such judgment or order was allowed. Such a proviso would materially affect the sense of the Constitution, and cannot be made out by any fair rule of construction put upon the terms of that instrument.

Had the petitioner chosen to bring forward her claim on the application for the sale of the land, and had a decision gone against her, on the merits, a very different question from the present would have been presented.

As the petition is not brought before us by the appellant, we must assume in her favor all that is not embraced in the appellant's grounds of appeal, and, among other things, that she is the head of a family having a homestead in the premises in question. As was held in *ex parte Kennedy*, she is to be regarded, in the application, as the representative of a family, and it does not appear what persons constitute such family, whether adults or minors, nor that such persons were parties to, or in any manner personally bound by, the order of sale.

3. The third ground of appeal is general, to the effect that the order allowing the homestead was otherwise contrary to law.

Without a specification of the grounds of objection no matter of appeal not embraced in the previous grounds stated is entitled to be considered by this Court.

The order of the Circuit Court must be affirmed, and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER TERM, 1870.

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

HON. J. J. WRIGHT, ASSOCIATE JUSTICE.

2 S. C. *312

*OSMA BAILEY v. GREENVILLE AND COLUMBIA RAILROAD COMPANY.

(Columbia. Nov. Term, 1870.)

[*Slaves* ⇐S.]

One who hired from their owner, between the 1st July, 1864, and the 30th April, 1865, certain persons claimed to be slaves, and received the benefit of their services, must pay to the owner the hire agreed on; and this whether the slaves were liberated by the emancipation proclamation of 1863 or not.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. § 36; Dec. Dig. ⇐S.]

Before Melton, J., at Richland, October Term, 1870.

The only question made in this case was whether the plaintiff, the owner, could recover for the hire of slaves from the 1st July, 1864, to the 30th April, 1865, under a contract with the defendant. His Honor held that he could, and judgment was given for the plaintiff.

The defendant appealed, and contended that the persons hired were free, under the President's proclamation of 1st January, 1863.

Chamberlain, Dunbar, for appellant, cited

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the emancipation proclamation of the President, issued 1st January, 1863.—Stat. at Large for 1862 and 1863. Appen. 2, 3.

Rhett, for appellee: The persons hired continued to be slaves until April, 1865. But, if not slaves, defendant got the benefit of their services, under his contract with plaintiff, and must pay according to the terms of his contract.—West v. Hall, 64 N. C. R.;

Maxwell v. Hip, 64 N. C. R.; 9 Amer. Law Reg., 390; Morgan v. Nelson, Mudd v. McElwain; Amer. Law Times, May, 1868, p. 117; 3 Amer. Law Times, May, 1870, p. 116.

March 27, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. It appears that, some time between the 1st day of July, 1864, and the 30th of April, 1865, the plaintiff made a contract with the Greenville and Columbia Railroad Company to furnish persons to labor for said company.

The following persons were furnished, to wit: George, Carson, Moses, Jerry, Geoffrey, Marcus, Harry, Charles, Adam, Emanuel, Robert and Amos.

These persons performed the labor required by the said railroad company. This fact is admitted in the defendant's answer.

The plaintiff claims that the persons he furnished the defendants as laborers at the time were his slaves and continued such till some time in 1865, when they were emancipated; while the defendants claim that the said persons were free from January 1, 1863, by virtue of the emancipation proclamation of the President of the United States, and, therefore, they are not indebted to the plaintiff for the services which the said persons rendered the said railroad company.

It is clear that the plaintiff had control of the services of the said persons, and that the defendants so regarded him; otherwise, they would not have contracted with him for the services of the said laborers.

In this case, two questions present themselves for the consideration of this Court:

1st. The defendants having hired from the plaintiff several persons to perform service, and the persons having rendered the required service, are the defendants liable to the plaintiffs for the wages of the said persons?

2d. In what way could the emancipation proclamation of the President of the United States affect these laborers which plain-

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tiff *claims were his slaves during the time they rendered service to the defendants?

The latter question we do not consider material to the proper disposition of this case.

The defendants having made an agreement with the plaintiff for the labor of some persons, whose services the plaintiff controlled at the time, and the persons having rendered the required service to the defendants, the defendants are liable to the plaintiff for the wages of the said persons during the time they served them, whether the said laborers were or were not slaves.

This fact is too plain for discussion.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

2 S. C. 314

ROBERT Q. PINCKNEY, Plaintiff in Error,
v. WILLIAM A. DUNN, Defendant in Error.

(Columbia. Nov. Term, 1870.)

[*Factors* ⚡31.]

Where a factor receives his principal's money and retains it, without giving notice to the principal, until the currency, in which it was received, becomes worthless, he cannot relieve himself from liability for the loss by showing, merely, that he was not in default in an unreasonable detention of the money: he must, also, show that it remained in his hands as the property of the principal. If he mixes it with his own money, or uses it in his business, he is liable therefor.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. §§ 34-36; Dec. Dig. ⚡31.]

[*Factors* ⚡31.]

Where a factor received, in 1862, Confederate currency for his principal, and deposited it in bank, to his own credit, giving no notice to the principal that he had received it until some time after Confederate currency had ceased to be of any value: *Held*, That proof that he was not in default in his failure to give notice, and that he always had a balance in bank to his credit during the war, was not sufficient to relieve him from liability to his principal for the money.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 34; Dec. Dig. ⚡31.]

Writ of error to the Circuit Court for Charleston County. His Honor the Circuit Judge, before whom the action was tried, made a statement of the case for this Court, which is as follows:

"This was an action of assumpsit. The declaration contained several counts, one or more charging the defendant, as factor, for

not accounting for cotton received by him from the plaintiff for sale. There was a count upon an account stated and the money counts.

"The only evidence offered by the plaintiff was contained in letters of the defendant and accounts furnished by him. By the ac-

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*counts it appeared that there was to the credit of the plaintiff, on the defendant's books, in January, 1861, a balance of sixty-nine dollars and eighteen cents.

"The accounts furnished by the defendant, in 1868, showed that the cotton, shipped by the defendant, through G. C. Bauermeister, then a merchant in Charleston of good standing, had been sold in Liverpool by F. C. Huth & Co., for an amount, in sterling currency, which the defendant estimated as equal, in Confederate currency, to \$1,671.

"The defendant had advanced to the plaintiff on his cotton, at time of shipment, \$1,212.60, making the difference between the amount received by the plaintiff, and the price for which the cotton sold, \$458.40, in Confederate currency.

"The defendant Pinckney was absent during the war, but, in February, 1862, Mr. Clacius, agent of G. C. Bauermeister, paid over to the agent of Pinckney, in Charleston, a sum of Confederate currency, said to be the balance of sundry shipments of cotton, by Pinckney, through Bauermeister, in which Dunn's balance was included but not designated. No account of sales, showing the particulars of the sales of the several shipments, or the respective balances, accompanied the payment by Mr. Clacius.

"After the war, Pinckney endeavored to get accounts of the cotton from Bauermeister, but failed to get account sales, from which a statement of the different shipments could be made, until February, 1868.

"The jury were charged that the defendant was liable to the plaintiff in this action, not only for the balance of \$69.18 admitted to be due in 1861, but also for the difference between the amount for which the plaintiff's cotton was sold and the amount advanced by the defendant to the plaintiff; that the defendant's absence from the city, and the interruptions of the war, was no excuse for his not accounting to the plaintiff for the proceeds of sales of the plaintiff's cotton, received by him; and that he was responsible for the value, in good money, of the amount so received by him, and not accounted for, with interest. The jury found a verdict for \$527.58, the aggregate of the two amounts above stated, with interest from 12th February, 1862.

"The defendant moved for a new trial, upon the same grounds taken at the trial, and also on the ground that the jury had not made any allowance for the difference in value between Confederate currency and

lawful money. I refused to grant a new

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trial on the *first ground, but upon the second I made an order that a new trial be granted, unless the plaintiff remit the verdict by deducting from the principal sum therein stated the sum of \$88.73, so that the verdict may be for \$438.85, with interest from 12th February, 1862.

"The plaintiff elected to so remit, and enters up judgment in accordance with the order.

"In pursuance of exception taken at the trial, the defendant has called on me for a statement of the case, with a view to an appeal, on the grounds hereto annexed. It was in evidence that regular communication from Europe was cut off from Charleston, by blockade, between 1862 and 1865: that Pinckney did not receive Bauermeister's accounts of the sales of plaintiff's cotton and the other shipments until 1868, at which time he made out, from data not previously in his possession, the account which he rendered to plaintiff's solicitor, stating balance in Confederate currency of \$458.40, as of 12th February, 1862.

"It was also proven that the Confederate money received in 1862 had been deposited by Pinckney in bank, and that he had always a balance to his credit in bank during the war, until bank deposits of Confederate money became valueless."

The grounds taken for the plaintiff in error were as follows:

That the factor is not liable to account until he is in a position to render an account.

That the account sales, which furnished the data for the statement of Dunn's balance, not being received until 1868; it was impossible for him, in February, 1862, to have ascertained Dunn's balance; and before it became possible for him to state Dunn's account, and notify him of a balance of proceeds to his credit, the Confederate money received by him had become valueless.

Simonton & Barker, for appellant.

1. The factor is not liable for accounting until he is in a position to account.

The plaintiff's action is not for negligence, on the part of defendant, in the conduct of his agency, but assumptit on the implied contract of a factor to pay over proceeds after demand. To render defendant liable for the value of the Confederate currency received by him in 1862, some default must be proved against him while the currency was worth anything.

There is a distinction recognized in Clark

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v. Moody, et al., 17 *Mass., 145-153, as it is, also, in Cooley v. Betts, 24 Wend., 203, 205, 206, between the duty of a factor to render an account, and his duty to pay over money in his hands. It is his duty to render accounts at reasonable time, and, in case of

neglect or refusal to do so, he is, probably, liable to an action, without a demand, as soon as he is in default for not accounting; but where he has rendered accounts duly, and is in no default of any kind, he is not liable to an action for money received by him until a demand has been made upon him, or instructions given to remit.—*Ferris v. Paris*, 10 Johns., 285.

And this is chiefly because the money is received by him to await the instructions of his principal, and it is not his duty to remit without instructions, and partly, it is said, because when the money is to be paid, he is not to seek the principal and pay him wherever he may be, but it is due, and payable at the factor's residence.—*Hall & Chase v. Peck & Co.*, 10 Verm., 474; 1 Am. Lead'g Cases, 519.

There is no evidence that plaintiff sought his money during the war, or that defendant refused to account with him.

It is in evidence that the defendant could not state plaintiff's account until he received the accounts of Bauermeister, and that he did not receive these until 1868. He is not charged with want of diligence, or proved in default of this part of his agency. During the war he could not communicate, lawfully, in consequence of the blockade. After the war he is not charged with neglect.

If, while Confederate currency had a value, defendant could not render plaintiff an account, the loss, in value of the proceeds received, should not be charged to him, but be attributed to the war.

2. The plaintiff cannot recover, upon "account stated," the value of Confederate money in 1862, because the account was stated in 1868, *nunc pro tunc*, and showed only what balance would have been placed to plaintiff's credit, had the account of Bauermeister been received at that time, or afterwards, and before Confederate currency became worthless.

"The account stated," says Chitty, "alleges that the defendant, on a named day, month and year, accounted with the plaintiff of and concerning divers sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that, upon such accounting, the defendant was then found to be in arrear to the plaintiff in the named sum, and that, being so found in arrear and indebted, the defendant, in con-

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sideration thereof, then *promised the plaintiff to pay him the same on request."—1 Chit. Pl., 342.

If any promise to pay can be implied from the account stated by defendant in 1868, it would be to pay so much Confederate currency, which is not what the plaintiff seeks.

3. Plaintiff cannot recover under the counts for money had and received. "It must, in general, appear that the defendant has received money, and not merely money's

worth, as stock or goods."—1 Chit. Pl., 351; Morrison & Berkey, 7 S. & R., 246. "Nor for the value of foreign securities, unless it appear that the defendant converted the same into money."—McLachlan & Evans, 1 Y. & J., 380.

Lesesne and Miles, contra:

1. The action is against factor for neglect and default in doing his duty as factor. The neglect and default alleged in the declaration is in the failure to account and the failure to pay over.

The precedent and the authorities for it will be found 2 Chit. Pl., 343.

The evidence (furnished entirely by the defendant's letters) proves the sale, and the receipt of the proceeds of sale by the factor, as well as a balance due to the plaintiff on an old account, but no notice to plaintiff of the receipt of the money, and no payment.

The letter of defendant, of 21st July, 1861, in evidence, proves that defendant understood his duty as factor. He says: "Relative to the cotton shipped I have not yet heard from it; indeed, it is scarcely time. As soon as I do I will inform you."

"The term 'accounting' has a large significance; any nonpayment is a non-accounting."—2 Chit. Pl., 342, note g.

"When an agent omits to render his account of sales when reasonably required after the sales are made, he will be presumed to have received the money, and will be accountable therefor; and, in all cases of unreasonable delay, he is generally charged with interest, whether he has made interest or not."—Story on Ag., § 204.

"The responsibility of factors, or agents, for the price of goods sold by them, does not attach till it is received, unless where they have improperly sold upon credit, or where the delay of payment has been occasioned by their neglect. * * * * * If the agent admit that he has received the money, as by taking credit in account with the debtor, he is thenceforth precluded from saying, as against the claim of his principal, that the money has not been received."—Paley Pr. and Ag., Sec. 8, (1.)

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"The actual receipt of money, on account of their principal, makes them, in all cases, accountable."—Ib., Sec. 8, (3.)

"The averment in the declaration of a general request (licet superius requisit) is sufficient in assumpsit based upon a mere duty, (Com. Dig. Pleader, C., 70.) And is sustained by proof of any demand before action brought, or before trial. A special demand need not be laid where the consideration for the defendant's promise has been executed. A special demand need not be alleged or proven in an action of account.—Ib.

No demand is necessary where the agent unreasonably neglects to account, or is otherwise in default.—Tillotson v. McCrillis,

11 Vt., 477. Cited Parson's Mercantile Law, p. 157, n. 6. The cases cited by appellant, in which the factor has been held not liable, are where he has duly accounted, but has received no instructions to remit.

In this case the defendant, as factor, having received the money for plaintiff's cotton, was bound to remit without special instructions, because the correspondence shows this to have been the course of dealing between them, and the plaintiff could not give further instructions until the defendant informed him of the receipt of the money, as he had promised to do.

But the evidence in this case (furnished by defendant's letters,) is sufficient to prove special instructions, because "it is not necessary, in all cases, that the consignor should give an order in the form of a command, in order to make it the duty of the factor to obey it. The expression of a wish by the consignor may fairly be presumed to be an order; and any answer by the factor, to the effect that he had not noted the wish, would be construed to be an assent thereto."—Brown v. McGran, 13 Peters, 494. Cited in Story on Contracts, § 359.

The argument of appellant admits that it is the "duty of the factor to render accounts at reasonable time, and in case of neglect or refusal to do so, he is probably liable to an action without demand so soon as he is in default for not accounting." But he denies that defendant is in default for not accounting, because "the factor is not liable to account until he is in position to account;" and that the defendant could not state plaintiff's account until he received the accounts of Bauermeister, and that he did not receive these until 1868.

The answer to this is:

1. That the defendant's default in "not ac-

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counting" was complete when he received the sales money for plaintiff's cotton in 1862 without notifying the plaintiff of the fact, as he was bound, and had agreed to do, and allowing him the opportunity of receiving payment upon such statement as might have been agreed upon between them, even without the account sales. If the money thus received by defendant for the plaintiff was subsequently lost, the loss must be borne by the party in default, the defendant.

2. If the defendant was not "in a position to render an account" in 1862, this was a default caused by the negligence or inadvertence of the defendant, or his agents, for whom he is liable.

In the same manner in which the defendant received the proceeds of sale of the plaintiff's cotton, he might have received the account sales; and if such account sales were necessary to enable defendant "to account," (which is not admitted,) and the defendant could have obtained them by reasonable skill and diligence, the failure to procure them

cannot excuse him from the legal consequences of his default in not accounting and paying over.

The sale was made in Liverpool in 1862, and the proceeds of sale paid to defendant. The defendant furnished the account sales to the plaintiff in 1868.

"Factors are generally held liable only for a reasonable exercise of skill, and for ordinary diligence in their vocation. * * * But good faith alone is not sufficient. There must be reasonable skill, and a fixed obedience to orders; and if there is any loss occasioned by negligence, or mistake, or inadvertence, which might fairly have been guarded against by ordinary diligence, the factor is responsible."—Story on Bail, § 455; 1 Parson's on Con., 96. "A factor is responsible not only for himself, but for those he may employ under him."—Smith's Mer. Law, 151.

If the loss in this case is attributed to the loss of value of the Confederate money received by the defendant, the defendant is liable to the plaintiff, because it would not have been lost to the plaintiff but for the defendant's previous neglect in not notifying the plaintiff of its receipt, and allowing him the opportunity of receiving it while it had value.

"The mere absence of fraud or bad motive is not sufficient to justify an act detrimental to the employer's interest, and although the loss be not an immediate consequence of any fault of the agent, yet if it be such as would not have occurred but for his previous neglect, he is answerable for the consequences."—Paley on Agency, 9; Parson's Mercantile Law, 163, and cases cited.

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*The defendant having received the plaintiff's money, and, without notifying him of its receipt, having deposited it to his own account, it was at his own risk, and he is not excused from liability because the money so deposited was lost.

"If an agent place his principal's money to his own account with his general banker, without any mark by which it may be specified as belonging to the trust, and the banker fail, the agent will not be excused. And a loss occasioned by an unauthorized disposal of the principal's money is chargeable to the agent."—Paley on Agency, 47.

II. The verdict of the jury may be referred to any count of the declaration, and "the count, on an account stated, which is always inserted in a declaration in assumpsit for the recovery of a money demand," (1 Chit. Pl., 343.) is supported by the evidence, and sustains the verdict "for the value in good money of the amount received by the defendant, and not accounted for, with interest," in accordance with the instructions of the Judge.

III. If money has been received by a factor, it may be recovered under the common

money count for money had and received.—2 Chit. Pl., 343, note 1.

"Where money has been received by the defendant, which, *ex æquo et bono*, ought to be paid the plaintiff, it may be recovered by the plaintiff under the count for money had and received to his use.—1 Chit. Pl., 341.

In this case the defendant did receive money, admits that he received it, without giving notice to the plaintiff, and that he has never paid it to the plaintiff, but denies his liability to pay it now, because the money so received and retained by him became valueless in his hands.

The plaintiff is entitled to recover, in this action, not only the balance admitted by defendant to be due in 1861, but "the value in good money of the amount received by the defendant, and not accounted for, with interest," and the verdict and judgment is in accordance with this view.

Simonton & Barker, in reply, cited Paley on Ag., § 8, p. 28; Story on Ag., §§ 201, 202; Tillotson v. Enlis, 11 Verm., 477.

March 28, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The declaration in assumpsit charged the defendant, as factor, with not accounting for cotton received by him from the plaintiff for sale, and contained a count upon account stated and the money counts. Plaintiff consigned to the defendant,

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*a factor in the city of Charleston, cotton for sale. The cotton was shipped by defendant, through a mercantile house in Charleston, to Liverpool, and was there sold. In February, 1862, the defendant received in Charleston an amount in Confederate money, including the proceeds of the cotton sold in Liverpool. The amount due the plaintiff could not then be ascertained for the want of an account of the sales. In consequence of his inability to get such account sales, defendant did not render his account until 1868. The blockade of the port of Charleston, from 1862 to 1865, is assigned as, in part, the reason of the delay. The account showed a balance in plaintiff's favor. The jury, by the direction of the Circuit Judge, rendered a verdict for plaintiff for such balance, which was subsequently reduced, for the purpose of correcting the conversion of Confederate into United States values. This verdict, as amended, must be regarded as in conformity with the account rendered by the defendant. The real question in controversy arises out of the fact that, subsequent to the receipt of the proceeds of sale by the defendant, and prior to the rendition of his account, the Confederate money became valueless. The defendant claims, substantially, that the proceeds of sale, in the form of Confederate money, remained in his hands at the risk of the plaintiff. On the other hand, it is claimed that the factor was

in default for not accounting at a day that would have enabled the plaintiff to realize value from such currency.

Had the verdict depended upon the question of a due accounting on the part of the defendant, the facts should have been submitted to the jury; while, in point of fact, the verdict was rendered in obedience to the instructions of the Judge.

It appears by the case, however, that the defendant failed to establish that he had held these proceeds apart from his other funds as the property of the plaintiff, so as to cast the risk of their loss upon him. The case states that it was proven that the Confederate money received in 1862 had been deposited by defendant in bank, and that he had always a balance to his credit in bank during the war, until bank deposits of Confederate money became valueless. The inference is warranted that he used the proceeds of sale in his business, and, having taken the advantage of its use, would naturally be chargeable with the risk attending such use.

The account rendered in 1868 forms the basis of plaintiff's demand in this action. It throws the burden of a defence upon the defendant, who is bound to show that the pro-

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ceeds of sale were lost *under circumstances throwing the risk of loss exclusively upon the plaintiff. To do this he must show that the proceeds remained in his hands as the property of his principal, and that he was not in default in an unreasonable detention of such proceeds, whereby the loss was occasioned. If he fails on either point to present a state of facts that would authorize a jury to find a verdict in his favor, the Court was justified in directing a verdict for the plaintiff.

It is only necessary to consider whether the Confederate money received in 1862 was wholly or in part the property of the plaintiff, and retained that character down to the time of the loss.

Goods consigned to a factor for sale, or their proceeds, so long as they are capable of being identified, remain, in his hands, the property of the consignor, subject to any lien of the factor for advances, commissions and expenses. When the proceeds consist of notes, or money in bags, it is to be regarded as the property of the principal, (*City Council v. Duncan*, 3 Brev., 386,) and this character is not lost, though they come into the hands of the personal representatives of the factor after his decease, (*Veil v. Mitchel*, 4 Wash. C. C., 105 [Fed. Cas. No. 16,908]), or of his assignees for the benefit of creditors.—(*Thompson v. Perkins*, 3 Mason, 232 [Fed. Cas. No. 13,972].

The correlative proposition that extends the equity of this rule to the protection of the factor is, that the factor, holding and treating the property consigned, or its pro-

ceeds, in whatever form they may be, as the property of his principal, apart from his own property and funds, is not chargeable with its loss, happening without his fault. Where a factor purchased, with the proceeds of sale, a good bill for remittance to his principal, and the bill was subsequently dishonored, he was held not to be liable, although he had a *del credere* commission.—(*Muller v. Bohlens*, 2 Wash. C. C., 378 [Fed. Cas. No. 9,914]. His possession being in the nature of a trustee, his character as an agent, in dealing with the property, should appear in a clear light.—*City Council v. Duncan*, 3 Brev., 386; *Veil v. Mitchel*, 4 Wash. C. C., 105 [Fed. Cas. No. 16,908]. If, on the other hand, the factor mixes the property with his own, or uses it indiscriminately with his own property or funds, or if he should speculate with or derive undue advantage from it, the principal may either seek satisfaction out of the whole estate with which his own has become undistinguishably commingled, (*Yates v. Arden*, 5 Cranch, C. C., 526 [Fed. Cas. No. 18,126]), or may, at his election, treat his factor as a debtor for the amount thus misused.—(*Poulter v. Cornwall*, 1 Salk., 9.

So it was held when a factor took, in pay-

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ment for goods sold, a *promissory note payable to himself, and, without instructions from his principal, put the note in judgment, but, before attempting to enforce the judgment, sued his principal, that he could not recover, for the reason that, having assumed to collect the note as his own property, he was bound to enforce his judgment.—(*Hamilton v. Cunningham*, 2 Brock., 350 [Fed. Cas. No. 5,978]. The liability of the factor, in such cases, is in the nature of a breach of trust.—(*Cooley v. Betts*, 24 Wen., 203.

No objection is made, in the present case, of a want of due demand before suit brought. Nor is any question made as to the right of the factor to accept the proceeds of sale in Confederate currency. The only question is, whether the defendant held the Confederate money, which he claims to represent the proceeds of sale, apart from his other property and funds, so as to throw the risk of its loss upon the plaintiff.

In the first place, the specific notes sought to be charged to plaintiff's risk were never set apart from the aggregate sum that came into defendant's hands. In the second place, the amount was placed in bank, as a general deposit, to the credit of the defendant. The bills became the property of the bank, and the defendant received, in lieu thereof, a general bank credit, which he employed in his business.

The fact that he always had a balance in bank is of no importance. At most, it tends to show a foundation for a good credit as a merchant, strengthened by the possession of plaintiff's means. We hold that this was such a use of the property of the plaintiff

as to place the risk of loss on the defendant. As he enjoyed whatever profit there was in the use of the money in his business, he should bear the risk attending such use.

It follows, therefore, that it is unimportant to the case to inquire whether the defendant unreasonably retained in his hands the proceeds of sale; and, therefore, if error was committed by the Judge in charging that the state of war and blockade furnished no excuse for delay in accounting, it was, at least, innoxious, so far, at least, as the rights of the parties in the present case are concerned. As there was no valid defence to the plaintiff's demand, the direction to the jury, to find a verdict for the plaintiff, was free from error.

The motion for a new trial must be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*JOHN C. REISTER v. DAVID HEMPHILL.

(Columbia. Nov. Term, 1870.)

[*Clerks of Courts* ⇨7.]

At the general election held in June, 1868, C. was elected Clerk of the Court of Common Pleas for Chester, for the term of four years. He died, and in March, 1870, the Circuit Judge appointed H. as Clerk for the unexpired term of C. Under the Act approved March 1, 1870, an election was held in October, 1870, to fill the vacancy, and R. was elected: *Held*, That R. was entitled to the office for the unexpired term.

[*Ed. Note.*—Cited in *Wright v. Charles*, 4 S. C. 183; *Smith v. McConnell*, 44 S. C. 493, 22 S. E. 721.

For other cases, see *Clerks of Courts*, Cent. Dig. §§ 21-25; Dec. Dig. ⇨7.]

[*Clerks of Courts* ⇨3.]

By the Constitution of the State, no one can hold the office of Clerk of the Court of Common Pleas, unless he be elected thereto by the voters of the County.

[*Ed. Note.*—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 4-7; Dec. Dig. ⇨3.]

[*Clerks of Courts* ⇨7.]

A person appointed otherwise than as the Constitution directs to fill a vacancy in the office of Clerk of the Court of Common Pleas is not a Clerk in the constitutional sense of the term, but merely a person placed in the position of Clerk, with authority to discharge his duties.

[*Ed. Note.*—For other cases, see *Clerks of Courts*, Cent. Dig. § 23; Dec. Dig. ⇨7.]

[*Clerks of Courts* ⇨7.]

The Constitution being silent on the subject, the Legislature may provide by law for elections to fill vacancies in the offices of Clerks of the Courts of Common Pleas.

[*Ed. Note.*—Cited in *State ex rel. Huckabee v. Hough*, 87 S. E. 436.

For other cases, see *Clerks of Courts*, Cent. Dig. §§ 21-25; Dec. Dig. ⇨7.]

Case agreed upon in a controversy submitted to the Supreme Court without action.

The case agreed upon is as follows:

"John C. Reister claims to have been duly elected, according to law, to the office

of Clerk of the Court of Common Pleas, for the County of Chester, in the said State, and to be entitled to enter forthwith upon the possession and exercise of said office.

"David Hemphill resists said claim.

"The following are the facts upon which the said controversy depends:

"W. M. Chambers was elected to the office of the Clerk of the Court for said County, at the election held on the second and third days of June, 1868.

"On the fourteenth day of March, 1870, the said Chambers died.

"On the 24th day of March, 1870, upon proceedings by "information," filed by the Solicitor of the Circuit, suggesting the vacancy in the office of Clerk of the Court, David Hemphill, Esq., defendant herein, was appointed to fill the said office, by order of Hon. W. M. Thomas, Judge of the Sixth Circuit, "for the unexpired term, as Clerk, of said William M. Chambers, deceased." This appointment was based upon the provisions of Section 33 of the Code.

"David Hemphill subsequently became duly qualified, and entered upon the office aforesaid.

"At the general election, held in said State,

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on the 19th day of *October, 1870, under the proclamation of the Governor, an election took place for the office of Clerk of said County.

"John C. Reister, at said election, received a majority of all the votes cast for said office, and was declared duly elected thereto by the Board of State Canvassers.

"On the fifth day of December, 1870, the said Reister having been duly qualified for the said office, made demand upon the said Hemphill for the possession of said office, and the demand was refused by said Hemphill.

"The question submitted to the Court is as follows:

"Had the Circuit Judge authority to appoint said Hemphill for the unexpired term of said William M. Chambers?

"If the question submitted be answered in the affirmative, judgment is to be rendered in favor of the defendant; if in the negative, in favor of the plaintiff."

Chamberlain, for plaintiff:

I. The following citations embrace the provisions of law which seem to bear upon the present case:

(a) "There shall be elected in each County, by the electors thereof, one Clerk for the Court of Common Pleas, who shall hold his office for the term of four years, and until his successor shall be elected and qualified."—Const., 1868, Art. IV., Sec. 27.

(b) "There shall be a general election for the election of the various County officers (elective,) held in each County on the third Wednesday of October, Anno Domini one

thousand eight hundred and seventy; and on the same day in every second year thereafter, the officers otherwise provided for in the Constitution of the State excepted."—Acts 1869-'70, p. 338, Sec. 1.

(c) "The general elections in this State shall be held, pursuant to the Constitution thereof, on the third Wednesday in October, eighteen hundred and seventy, and forever thereafter on the same day in every second year."—Acts 1869-'70, p. 393, Sec. 1.

(d) "At each general election suitable persons shall be chosen to fill any vacancy in any elective office in any County, of which at least fifteen days' previous notice shall be given by the proclamation of the Governor."—Acts 1869-'70, p. 397, Sec. 38.

II. The following is the provision of law under which it is claimed that the Circuit Judge had authority to appoint the defendant, "for the unexpired term, as Clerk, of Chambers, deceased:"

(a) "The Clerk elected in each County un-

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der the provisions of *Section 27 of Article IV of the Constitution, shall be Clerk of the Courts of General Sessions and Common Pleas, &c.; * * * and in case no Clerk exists, the Judge shall have authority to appoint a person who shall perform the duties of Clerk; and said Deputy Clerk, or the one appointed by the Judge, shall be required to give the usual bond before entering upon the duties of the office."—Acts Sp. Sess. 1868, p. 10, Sec. 17.

(b) Section 33 of the Code, referred to in the brief as furnishing the basis of the order of the Circuit Judge, is a literal repetition of the foregoing Section of the Act of 1868.

From the citations now presented, and the facts admitted in the brief, the following conclusions arise:

1. That the full term of office for the Clerk is fixed by the Constitution at four years.

2. That William M. Chambers was duly elected in June, 1868, for a full term.

3. That in March, 1870, he died.

4. That the vacancy was filled by the appointment, by the Circuit Judge, of the defendant, according to the terms of the order, "for the unexpired term, as Clerk, of said William M. Chambers."

5. That by the Act of 1869-'70, in force at the date of the death of Chambers, an election had been ordered for the various County officers (elective), on the third Wednesday in October, 1870.

6. That subsequently, but during the same session, it was further provided, in the general election law already cited, that at the general election of October, 1870, all vacancies in elective offices in the several Counties should be filled.

7. That at the general election of October, 1870, the plaintiff was duly elected, under the provisions of law already cited, to the office of Clerk, and that he has since become

qualified for the office, and has demanded the same.

The simple question which now meets us is: Had the Circuit Judge the authority, under Section 33 of the Code, to fill this vacancy for the remainder of the term, so as to preclude the Legislature from lawfully filling the vacancy by election.

This is a new phase of a question which has often been brought before this Court. It is, essentially, the old question of the right of an officer, elected by the people, to continue to hold his office against the will and in defiance of the commands of the people who elected him.

The position taken by this defendant seems

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to be far weaker than *the position heretofore taken by those who dispute the power of the Legislature to abridge a term of office once conferred. Heretofore the claim has been limited to the party actually elected.

In the present instance the claim seems to be not merely that Chambers would have been entitled to the full four years, had he lived, but that the term survived him and remained intact, enuring to the person whom the Circuit Judge might designate as his successor. This seems to be a novel, as well as extravagant, claim; for it is pretended that Section 33 of the Code, in terms, authorizes the Circuit Judge to fill the vacancy for the unexpired term, but the claim must be, if anything, that it results, by operation of law, that the term of office of Chambers survived him, and could be disposed of by the Judge, for the full term.

It is not deemed necessary to cite authorities upon the general question herein involved. The frequent arguments heretofore addressed to this Court, and the full and elaborate decisions already rendered, are more than sufficient to govern the present case.

We understand this Court to have held distinctly, particularly in *Alexander v. McKenzie*, heard at the April Term, 1870, that an office, according to the American idea and law, is a "revocable agency," revocable at the pleasure of those who conferred the office, except in such cases as may have been specially provided for in the organic law of the State or nation; that the question, therefore, is: "Has the agency or office been revoked by a distinct act or expression of revocation by competent authority?"

It cannot be claimed that there is any doubt as to the intent or meaning of the law authorizing the election of a person to fill the vacancy in the office of Clerk for Chester County.

It is admitted that the plaintiff was, in point of fact, duly elected under the authority of the Act of the Legislature.

The agency conferred originally for four years upon Chambers, and continued, through the order of the Circuit Judge, to

Hemphill, has now been revoked expressly by two Acts of the Legislature, and has been conferred upon Reister.

What element is wanting to complete the title of Reister?

The old agency is withdrawn, by death, from Chambers, and by Act of the Legislature, from Hemphill, and a new agency has been conferred upon Reister.

In *Alexander v. McKenzie*, which may be regarded as the leading case on this question, it is said: "Political powers always enure to the beneficial use of the political

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community, as such, exclusively, and never to the exclusive use of private persons. This results from the fact that government exists for the common benefit, and its powers cannot be appropriated to the exclusive use of individuals, except by violence destructive of its principles. It, therefore, follows that political powers are revocable at the will of the government communicating them."

In support of this doctrine the Court cite *Butler v. Pennsylvania*, 10 Howard, 402; 1 *Parsons on Cont.*, 530; *Dartmouth College v. Woodward*, 4 Wheat., 518; *East Hartford v. Hartford Bridge Company*, 10 How., 511; *People v. Morris*, 12 Wend., 325; *Girard v. Pennsylvania*, 7 Wall., 1.

The Court then says: "It is clear, therefore, that the Legislature have full authority to withdraw from the defendants their powers as Mayor and Aldermen, in any mode that might seem most advisable, and it only remains to be seen whether they have, in fact, done so."

It is believed that the foregoing considerations are a sufficient argument to establish the claim herein made by the plaintiff, and that it is wholly unnecessary to burden the Court with numerous citations of authorities which might be presented if the questions involved were new or doubtful.

The question remains: Was there a vacancy in the office of Clerk at the time of the election in October, 1870?

The Acts of 1868-'70, already cited, authorize the filling of all vacancies at the October election. If no vacancy existed at that time, then the election of Reister would be nugatory, so far, at least, as this defendant is concerned.

It is submitted that Section 33 of the Code cannot be construed as conferring authority upon the Circuit Judge to do more than to temporarily fill the vacancy until it should be permanently filled by an election.

As already observed, Section 33, in terms, simply authorizes the appointment "in case no Clerk exists." It is, therefore, by inference merely that the claim, now made, that the Judge was authorized to appoint "for the unexpired term," can be maintained.

It is submitted that this is an unwarranted inference. A power so clearly and peculiarly belonging to the Legislature cannot be held

to have been surrendered by implication, especially when such implication is so far from being a necessary or irresistible implication. The grant of power to the Judge must be construed strictly upon the principle that the

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Legislature cannot be presumed, in the absence of express words, to have intended to fill an elective office by appointment, except until such time as the office could be filled by an election.

If, therefore, the authority of the Judge is limited, by a proper construction of Section 33, to the temporary appointment of a person to perform the duties of Clerk, it follows that, as regards the action of the Legislature, there was a vacancy in the office of Clerk at the date of the election in October, 1870.

The expression of the legislative will to fill such a vacancy at that election seems too clear for argument, and the fact of Reister's election to fill the vacancy, if vacancy there was, is admitted.

There are one or two cases in our State Reports which might seem, at first view, to sanction the doctrine that no vacancy existed at the time of the election of Reister; but it is submitted that a closer examination of those cases will disclose the true doctrine to be in harmony with the views presented for the plaintiff:

1. *State v. Hutson*, 1 McCord, (Law,) 241. In this case, the Constitution had made no provision as to the mode of appointing Ordinaries, but had fixed the tenure of office "during good behavior." It was held that, in this case, the tenure being constitutional, that is, fixed by the Constitution, could not be abridged by the Act of the Legislature. Hence the mode of appointment being regulated, not by the Constitution, but by the Act of 1815, the person appointed under that Act held his office, under the Constitution, "during good behavior."

2. *State v. McClintock*, 1 McCord, (Law,) 247. In this case it was held that a Sheriff appointed by the Governor to fill a vacancy "until an election should take place," is in office under the Constitution, and holds for four years—the full term.

In this case, also, the Constitution was silent as to the mode of appointment, and, therefore, it was held that an appointment once made, according to the Act of 1808, by the Governor, carried with it the right to hold, under the Constitution, for a full term.

The two cases now cited, which are the strongest in favor of the defendant in our Reports, are plainly distinguishable, in principle and fact, from the present case.

In our case the Constitution not only fixes the tenure, but also the mode of appointment, providing, in the same Section, both the tenure and the mode.

What we claim is this, that the Constitution must be respected in both particulars.

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*In other words, that any mode of appointment, other than the constitutional one, of an election by the people, must, from the nature of the case, and in deference to the constitutional mode, be regarded as merely temporary—to be continued until the office should be filled in the constitutional mode.

Under this view, which seems to be sustained, rather than controverted, by the two cases last cited, the appointment of this defendant must be held to be temporary only, and the conclusion is that a vacancy did exist at the time of Reister's election.

The case of *Alexander v. McKenzie*, already cited, is equally conclusive upon the question of the time when this plaintiff is entitled to enter upon his office. The doctrine of that case is briefly this: That in the absence of any special provision as to the time when the right to an office commences, the rule of law is that it commences whenever the party designated or elected shall become qualified and demand the office.

Reister having been qualified, and having demanded the office, is entitled to take immediate possession.

Carroll, Melton, for defendant:

I. The election of W. M. Chambers, in June, 1868, was for the constitutional term of "four years, and until his successor shall be elected and qualified."

1. The provision of the Constitution, Art. IV., § 27.

2. The election in June, 1868, was in pursuance of an Ordinance of the Convention, passed March 7, 1868, providing "for the election of all County officers required by the Constitution to be elected by the people." See Ordinance, published with the Constitution, page 32, § 7.

II. The death of the incumbent, in March, 1870, created a vacancy, which could only be filled in such way as the law provided. The appointment of the defendant to this vacancy was made in pursuance of law.

1. The Constitution makes no provision for the filling of a vacancy.

2. The Act of February 28, 1870, (14 Stat., 374,) entitled "An Act to provide for the filling of vacancies in County offices," provides for an appointment by the Governor, provided the unexpired term does not exceed one year. In this case the unexpired term exceeded two years.

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*3. Section 33 of the Code provides that, "in case no Clerk exists, the Judge shall have authority to appoint a person, who shall perform the duties of Clerk, and * * the one appointed by the Judge shall be required to give the usual bond before entering upon the duties of the office."

4. This Section of the Code is identical with § 17 of "An Act to organize the Circuit Courts," passed August 20, 1860. See Acts of 1852, p. 10. The re-enactment of this pro-

vision in the Code would indicate that it was well considered.

III. There is, by law, imposed no express limit upon the term of the appointee. It must, therefore, be referred to the "unexpired term" with reference to which it was made. The appointment by the Circuit Judge is in terms so expressed, and must so operate, unless contrary to law.

1. The constitutional term is not limited to the continuance in office of the person elected, but to a fixed term of years. The term continues, although the incumbent should die. In this connection see *People v. Green*, 2 Wendell, 272, and *Coutant v. People*, 11 Wendell, 132; same case, 11 Wendell, 512.

2. The words "in case no Clerk exists" are expressive of any vacancy which results from the non-existence of a Clerk.

3. An appointment to the vacancy in a term necessarily implies an appointment to the full unexpired term, unless it be otherwise restricted by law.

4. The requirement that the appointee should give the "usual bond," indicates that the appointment was intended to be permanent; and not that of a mere *locum tenens*.

5. The order of appointment by the Circuit Judge is "for the unexpired term, as Clerk, of W. M. Chambers." This appointment, unless it was unauthorized, must be considered to have conferred the office for the full unexpired term. There is no restriction upon the Judge's power to appoint.

IV. The election in October, 1870, for the office of Clerk of the Court, for Chester, was without warrant of law. It was not authorized by the Act of February 14, 1870, entitled "An Act to provide for a general election of County officers."

1. The only Acts which are relied upon as warranting this election are the Acts of February 14, 1870, No. 234, 14 Stat., 338, and of March 1, 1870, No. 284, § 38, 14 Stat., 397.

2. The election was not authorized by the Act of February 14, 1870. It is not within the purview of that Act to create or to fill

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*vacancies, or to supersede by election the appointment to vacancies.

3. The purpose of the Act is manifest: Certain County officers had been elected in June, 1868, for four years, and others for two years; the intention was to make the subsequent elections to occur at the time of the general elections in October. As to Clerk, see Art. IV, § 27; as to Sheriffs and Coroners, Art. IV, § 30; as to County Commissioners, Art. IV, § 19; as to School Commissioner, Art. X, § 2; as to Solicitors, Art. IV, § 29.

4. To this end, by Section 2 of the Act, all incumbents were continued in office until their successors should be elected at this general election.

5. The exception in the Act as to "officers otherwise provided for in the Constitution," imports that the Act shall not operate to

require the biennial election of those officers whose terms of office are otherwise provided for in the Constitution.

6. This construction of the Act is a reasonable one; it preserves the consistency of the Act with other contemporaneous legislation; it meets the obvious purpose of the Act, and relieves it from any conflict with the Constitution.

7. Any other construction would have operated to vacate the terms of all Clerks and other officers throughout the State who had been elected for four years, and to require their election biennially.

8. The Clerk of the Court, being an officer whose term is provided for in the Constitution otherwise than as provided for in this Act, his office was excepted from the number of those for which an election was required to be held in October, 1870.

V. The election in October, 1870, to the office of Clerk of the Court, for Chester, was not authorized by the Act of March 1, 1870.

1. This Act, § 38, provides, that "at each general election suitable persons shall be chosen to fill any vacancy in any elective office in any County, of which at least fifteen days' notice shall be given by the proclamation of the Governor."

2. This Act does not apply, for the reason that in the office of the Clerk of the Court, for Chester, there was no vacancy at the time of the general election in October, 1870; or at the time the Governor's proclamation was issued.

3. An office is not vacant when there is any one authorized to act, and who is acting.—

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Tappan v. Gray, 9 Paige, 507; People v. *Van Horne, 18 Wendell, 518; Johnson v. Wilson, 2 N. H., 202; State v. McClintock, 1 McCord, L., *246.

4. It was competent for the Legislature to have declared that every appointment to an elective office should be vacated by the election of a successor at the next ensuing general election; but the law is not so declared.

5. This Act is reasonably construed to apply only to those cases of vacancy in reference to which no power of appointment was otherwise given, or in reference to which the power of appointment had not been exercised.

6. The Act of March 1, 1870, called "The Code," under Section 33 of which the appointment of defendant was made, was contemporaneous with the Act now under consideration. These must be construed together, and the one cannot be assumed to have been intended to supersede the other.

VI. The vacancy having in this case been filled by an authorized appointment, the election in October, 1870, was unauthorized by law. If valid as an election to the succession, it cannot operate to abridge the term of the appointee; but can take effect only at the expiration of the present term.

April 18, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. In case there is a vacancy in the office of Clerk of the Court of General Sessions and Common Pleas, and the Judge of such Courts shall appoint a person to perform the duties of Clerk, is it competent for the General Assembly to terminate such appointment by providing by law for an election of a Clerk to fill such vacancy?

Section 27 of Article IV of the Constitution of 1868 is as follows: "There shall be elected in each County, by the electors thereof, one Clerk for the Court of Common Pleas, who shall hold his office for the term of four years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be Clerk of all other Courts of record held therein; but the General Assembly may provide by law for the election of a Clerk, with a like term of office, for each or any other of the Courts of record, and may authorize the Judge of the Probate Court to perform the duties of Clerk for his Court under such regulations as the General Assembly may direct. Clerks of Courts shall be removed for such causes and in such manner as shall be prescribed by law."

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*It is clear that, according to the Section of the Constitution just quoted, no person can be a Clerk of the Court of Common Pleas, (or any other Court of record not otherwise provided for in the Constitution,) unless such a person be elected by the electors.

The term of office for Clerk of Court, as fixed by the Constitution, is four years.

Where the organic law fixes the term of office it is not in the power of the Legislature, by an Act, to change that term.

The term will continue, though the office may be vacant.—The People v. Green, 2 Wendell, 270, 272; The People v. Contant, 11 Wendell, 132. But in case the organic law does not provide for filling of vacancies, the Legislature has the power to supply such vacancies in such manner as it may by law direct.

If a person be chosen to fill a vacancy in the office of Clerk of the Court otherwise than as the Constitution directs, such a person is not a Clerk of Court in the sense of the Constitution, but is simply placed in that position to perform the duties of a Clerk.

This, we believe, was the view the General Assembly took when they passed Section 17 of an Act approved the 20th day of August, 1868, which is as follows: "The Clerk elected in each County, under the provisions of Section 27 of Art. IV of the Constitution, shall be Clerk of the Courts of General Sessions and Common Pleas, and may appoint a Deputy who may perform the duties of Clerk, for whose acts such Clerk shall be responsible, and a record of whose appointment shall be made in the Clerk's office; and such appointment may be revoked at the pleasure of the

Clerk; and in case no Clerk exists, the Judge shall have authority to appoint a person who shall perform the duties of Clerk, and said Deputy Clerk, or the one appointed by the Judge, shall be required to give the usual bond before entering upon the duties of the office."

This Act gives the Clerk of the Court of General Sessions and Common Pleas the power to appoint a Deputy Clerk who may perform the duties of Clerk, and such appointment the Clerk may revoke ad libitum; but in case there be no Clerk, then the Judge, under the Act above quoted, has the power to appoint a Deputy or a person to perform the duties of Clerk; and such person, though required to give the usual bond of a Clerk, is not a Clerk, neither is he an officer under the Constitution of 1868, unless he be required to take and subscribe the oath of office as prescribed by Sec. 30, Art. II, of said Constitution, which declares that "all officers, before they enter upon the exercise of the duties of

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their *respective offices, shall take and subscribe" the oath therein designated.

Deputy Clerks are not required by law to take and subscribe the oath of office prescribed by the Constitution, and if they were, they would only be deputies, and not Clerks, as designated by the Constitution.

According to the Act of the General Assembly already referred to, Clerks of the Courts of General Sessions and Common Pleas have the power to make temporary appointments of deputies, and it is neither the letter nor the spirit of the Act to confer any greater power upon the Judges of such Courts.

It matters not, however, whether the appointment made by the Judge in this case was temporary or otherwise, as the office of the Clerk of the Court of General Sessions and Common Pleas cannot be filled by appointment.

In this case it appears that one William M. Chambers was elected Clerk of the Courts of General Sessions and Common Pleas for Chester County for a full term, and that the said Chambers died in March, 1870; that the Circuit Judge, by an order, appointed the defendant to perform the duties of Clerk for the unexpired term occasioned by the death of the said William M. Chambers; that by an Act of the General Assembly, approved March 1, 1870, all vacancies in "any elective office in any County, of which at least fifteen days' previous notice shall be given by the proclamation of the Governor," were to be filled.

The Act of the General Assembly was complied with, and John C. Reister duly elected on the 19th day of October, 1870, to fill the vacancy in the office of Clerk of the Court for said County.

The judgment of the Court, as heretofore entered, is as follows:

The above named parties having agreed

upon a case, and having submitted the same to this Court without action, whereby the following question is submitted to the Court, viz.: Had the Circuit Judge authority to appoint said Hemphill for the unexpired term of the said William M. Chambers? and it being stipulated and agreed that, if the questions so submitted be answered in the affirmative, judgment is to be rendered in favor of the defendant, and, if in the negative, in favor of the plaintiff; and after hearing the counsel for the respective parties, plaintiff and defendant, and due deliberation being had thereon, it appears to the Court that the Circuit Judge had not authority to appoint said Hemphill for the unexpired term of the said William M. Chambers.

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*Wherefore it is adjudged that the said plaintiff is entitled to the office of Clerk of the Court of General Sessions and Common Pleas for the County of Chester, and that the said defendant, David Hemphill, do forthwith deliver and surrender to the said plaintiff, John C. Reister, the said office, and all property, books and papers thereunto appertaining.

MOSES, C. J., and WILLARD, A. J., concurred.

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CYNTHIA ROBERTS, by Next Friend, v.
RACHEL C. ADAMS and Others.

(Columbia. Nov. Term, 1870.)

[*Executors and Administrators* ⚡391.]

Where an administrator, by leave of the Ordinary, sells the chattels of the estate on credit, he makes himself liable for the amount of the sales, if he neglects to take sureties on the notes for the purchase money as directed by the order for leave to sell, and he will not be relieved from liability because stay laws and military orders, afterwards passed and made, may have prevented the collection of the notes.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1588; Dec. Dig. ⚡391.]

[*Executors and Administrators* ⚡391.]

So, also, an administrator is liable if he takes as sureties, persons residing beyond the jurisdiction of the Courts of the State.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1589; Dec. Dig. ⚡391.]

[*Husband and Wife* ⚡8; *Set-Off and Counterclaim* ⚡41.]

A wife being entitled to a distributive share of an intestate estate, her husband, at a sale of the estate by the administrator on credit, made purchases and gave his note for the purchase money. On bill, by the wife, for account and settlement: *Held*, That the note of the husband could not be set off against her claim.

[Ed. Note.—Cited in *Farrow v. Farrow*, 12 S. C. 173; *Kennedy v. Badgett*, 19 S. C. 594; *Turbeville v. Flowers*, 27 S. C. 337, 3 S. E. 542.

For other cases, see *Husband and Wife*, Cent. Dig. § 26; Dec. Dig. ⚡8; *Set-Off and Counterclaim*, Cent. Dig. § 79; Dec. Dig. ⚡41.]

[*Executors and Administrators* ⚡391.]

An administrator who sold slaves of the estate in 1860 on credit, and took notes for the purchase money, which had not been collected, cannot defend himself from liability to account for the amount of the notes on the ground that notes for the purchase money of slaves had been declared void by Section 34, Article IV, of the Constitution of the State; the makers of the notes having made no such defence.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1592; Dec. Dig. ⚡391.]

Before Carroll, Ch., at Abbeville, July, 1868.

Jesse S. Adams, late of Abbeville District, died intestate in March, 1860, and James J. Adams became the administrator of his estate. In December, 1860, the administrator, by leave of the Ordinary, sold the personal estate on a credit of twelve months. James J. Adams died intestate in 1865, and the defendants, Rachel S. Adams and Wm. A. Lomax, administered on his estate. After his death, Thomas J. Roberts, the husband of the plaintiff, and one of the defendants, sued out letters of administration de bonis non on the estate of Jesse S. Adams.

The plaintiff is one of the children and

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distributees of Jesse S. *Adams, and she filed this bill against Rachel S. Adams, Wm. A. Lomax, Robert J. Roberts, the sureties on the administration bond of James J. Adams, and others, for an account of her father's estate, and for settlement of her share therein to her sole and separate use.

The accounts of the administrator, James J. Adams, were referred to the Commissioner, and he made a report thereon, to which exceptions were taken by some of the defendants. The other facts of the case, and the points made on the appeal, sufficiently appear in the Circuit decree, and the grounds of appeal therefrom. The Circuit decree is as follows:

Carroll, Ch. The personal estate of the intestate, Jesse S. Adams, was sold by the administrator, James J. Adams, in December, 1860. Of the promissory notes for the purchases at that sale a large proportion remained uncollected in the possession of J. J. Adams, at the time of his decease. In the pleadings, as also in the exceptions to the report, it is stated that, after the death of J. J. Adams, these securities were "turned over" by his administrators to the defendant, Thomas J. Roberts, who had become the administrator of the unadministered estate of the intestate, Jesse S. Adams. The promissory notes referred to, however, are understood not to have been received by Roberts in satisfaction, either wholly or partially, of what was due by J. J. Adams, at his death, to the estate of his intestate, but to have been placed merely in the custody and charge of Roberts, to be collected, and, as far as practicable, for the use and benefit of that estate.

In omitting to exact from certain of the purchasers at the sale of his intestate's personalty, notes, with adequate sureties, as required by the order authorizing such sale, the administrator, J. J. Adams, incurred, undoubtedly, a personal liability for the amounts due by these purchasers.—*Massey v. Cureton*, Chev. Eq., 184-5.

George F. Adams and John A. Adams had each purchased at that sale to an amount exceeding the estimated value of their respective shares in their father's estate. Both were then, as they now are, residents in the State of Louisiana.

It is stated that both are believed to be now solvent, and it is urged that, in accepting the note of George F. Adams, with John A. Adams as his surety, the administrator complied with the terms of sale prescribed by the order of the Ordinary. A person whose residence is without the jurisdiction

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of our Courts, and within *another and distant State, though of competent means, cannot be regarded as fulfilling the description of an approved or adequate surety to a debt contracted here, and with a creditor here resident.

There seems to have been among some of the persons entitled to distribution of the intestate's estate, some agreement or understanding that their purchases at the sale, by the administrator, to the extent of their several shares, should be treated as payments made to them upon that account. It does not appear that the plaintiff was a party to any such arrangement or understanding. Nor is it suggested that any act or conduct of her's had induced the administrator, J. J. Adams, to accept the note of her husband, without surety, for the amount of his purchases. The agreement, if it existed, was executory in its nature. It was not carried into execution before the commencement of this suit. The original note of the husband, Roberts, remained in the hands of J. J. Adams, at his decease, and, since his death, has been placed in the custody of Roberts, his successor in the administration. The plaintiff's equity to a settlement is considered, therefore, as subsisting unimpaired in respect of her entire portion in the estate of her father.—*Hill v. Hill*, 1 Strob. Eq., 1; *Wardlaw v. Gray*, 2 Hill Eq., 644.

The question which is presented by the third exception to the report is one of extraordinary interest. It elicited, however, but slight argument at the hearing. At the present juncture it may well be doubted whether any profitable result would be produced by any full or extended discussion of the subject. It is sufficient to say that the Court concurs in the conclusion of the Commissioner to which that exception is addressed, and holds, with him, that the notes executed to the administrator, J. J. Adams, in pur-

chase of the negro slaves of his intestate, are not void in law, but are upheld by a valuable and valid consideration. No copy of the Exhibit marked "O," of the defendant, Roberts' answer, has been furnished to the Court. Nor has any competent evidence been adduced as to what constituted the "assets turned over" to him by the administrator of J. J. Adams. The probability seems to be that credit upon that account, to some extent, should have been allowed to the representatives of J. J. Adams. Yet, none such appears in the statement of the accounts accompanying the report. It is true, also, as was suggested in the argument, that, by certain Acts of the General Assembly, and certain edicts of the military authority that had been set up in this State, the adminis-

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trator, J. J. *Adams, in his lifetime, and, afterwards, his administrators, were prevented from enforcing payment of the debts due for the negro slaves of his intestate that he had sold. No blame can be imputed either to J. J. Adams or his administrators, for having failed to collect these debts, and had they, or any of them, been secured by note, with proper sureties, as required by the order of sale, the administrators of J. J. Adams, upon delivering them to the defendant, Roberts, would have been held entitled to a corresponding credit upon the indebtedness of their intestate to the estate of Jesse S. Adams. But these are matters which do not seem strictly necessary to be here considered. The case is presented to the Court simply upon the report and exceptions to it, and must be determined accordingly.

It is ordered and adjudged, that the exceptions to the Commissioner's report be overruled, and that the report be confirmed, and be made the decree of the Court.

It is further ordered, that the Commissioner inquire and report whether the defendant, Thomas J. Roberts, has made any settlement on, or provision for, the plaintiff, Cynthia, his wife, and the issue of their marriage; and, if no such settlement or provision has been made, that the said Thomas J. Roberts be at liberty to lay proposals before the Commissioner for that purpose, and that the Commissioner report what provision should be made for her, and her issue, out of her share and portion of the estate of the said Jesse S. Adams, deceased; as, also, the terms and trusts of a suitable settlement of the same, with the name of some fit person to be appointed her trustee in that behalf; and, also, that he inquire and report as to the propriety of investing the same as proposed by the bill or otherwise.

It is further ordered, if desired by the defendants, the administrators of J. J. Adams, deceased, that the Commissioner inquire and report as to what were the assets turned over by them to the defendant, Roberts,

and as to what collections or other disposition of the same has been made by him, all equities being reserved.

And it is further ordered, that the parties have leave to move for such other orders as may be necessary or proper in this cause.

Let the costs of the suit be paid by the defendants, Rachel C. Adams and Wm. A. Lomax, out of the estate of their intestate, James J. Adams, deceased.

The administrators of J. J. Adams, de-

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ceased, appealed from the *decree, and now moved this Court for a modification or reversal, on the following grounds:

1. That the estate of J. J. Adams should not be held responsible, under the circumstances, for the sale notes taken without security, nor for the notes of George F. and John A. Adams, who were sureties for each other; and such should have been the decree. From December, 1861, to January, 1867, except in certain cases, collection of debts were prohibited by the civil and military authorities, and it would be manifestly unjust to hold the estate responsible for debts, the collection of which were prohibited.

2. That the purchase note of T. J. Roberts should have been considered as part of complainant's share of the estate, if the negroes are to be estimated in the accounts, as there can be no doubt that such was the original agreement to be carried into effect at the first settlement of the estate.

3. That there was error in holding that the notes given to J. J. Adams, the administrator, in purchase of the negro slaves of his intestate's estate, were not void in law, but were upheld by a valuable and valid consideration. It is respectfully submitted that the decree should have been in conformity to the existing Constitution of the State, (Article IV, Section 34,) which annuls and avoids all contracts for the purchase of slaves.

4. That the decree should have sustained the defendant's four exceptions to the Commissioner's report, and should have established and confirmed the alternative view presented by the Commissioner as the correct statement of accounts.

Noble, for appellants.

Perrin & Cothran, contra.

April 18, 1871. The opinion of the Court was delivered by

MOSES, C. J. If there are any circumstances presented by the testimony which should discharge J. J. Adams, the administrator of Jesse S. Adams, from the liability he incurred in failing to require security to all the notes taken by him at the sale of the personal property of his intestate, they have not been perceived by the Court.

The only ground of defense which is made in this regard is that the stay law, prescribed both by the civil and military authorities, prevented suit on the notes from December,

1861, to January, 1867, and being in operation up to his death, in 1865, he should not be responsible for debts, the collection of which was prohibited.

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*The default charged against him is a failure to comply with the terms fixed by the Ordinary who granted the order. The sale was in December, 1860, and it is clear that the stay law cannot operate to excuse a default made before its passage. If he had taken security, on the notes, considered good at the time, but which proved worthless by the occurrence of circumstances, while he was prevented from pursuing his legal remedy, he would have been without blame. His fault consists in not requiring security to the notes. The whole matter was in his power and control. He was not bound to deliver the property to the bidder until the terms of sale were complied with. If he did so, he stood in the position of security himself. He took the risk, and must abide by the consequences.—Peay v. Fleming, 2 Hill Ch., 98; Massey v. Cureton, Chev. Eq., 184-5.

Nor do we think that a different rule can be applied to the respective notes of George F. Adams and John Adams, on which they were mutual sureties. They were both of them then citizens of Louisiana, and so continue.

When, by an order of a Court having jurisdiction over the matter in which he acts, "competent," "adequate" or "good" personal security is prescribed as one of the conditions of a sale, the party acting alone under the authority which it confers must look to that kind of personal security which can be made available through the process of the Courts of this State. It is unreasonable to suppose that those interested in the fund should be subjected to the delay consequent upon the pursuit of the debtor in a foreign Court, whose mode of procedure may be entirely different from that which prevails in the Courts of this State, and the laws which it administers possibly less careful of the rights of creditors than those which obtain in the jurisdiction where the contract was made. It is a reliance too upon means beyond the supervision of the administrator, and even if, by the possession of property, the security was good at the time, a change and transfer might be made of it without the knowledge of the party who stands as a trustee for those really interested in the notes belonging to the estate. It is safer, both for the administrator and the distributees for whom he holds, that personal security on sales made by him should be restricted to residents of the State.

In relation to the claim of the plaintiff to a settlement to her sole and separate use of her share in the estate of her deceased father, it is not resisted by the defendants, the

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administrators of James J. Adams, *on the

ground that the marital rights of the husband had attached upon it. Such a proposition could not be maintained, and is not made.

It is claimed, however, that the note given by her husband for his purchase at the sale should be regarded as part payment of her share, according to the original agreement in respect to the notes of the other distributees.

If it had been proved that such was the agreement of the plaintiff, it could not bind her as a contract, because she was not sui juris, and was incapable of giving any legal assent. There are cases where both married women and infants will be precluded from the aid which they seek in a Court of Equity, where they have been guilty of fraud. This is not pretended against the plaintiff here. So far was she from being a party to such understanding that the Commissioner reports "there was no proof of her assent to the purchases by her husband, or to any such arrangement," and the Chancellor, in his decree, arrives at the same conclusion. How can it be said that she has barred herself of her equity to a settlement? She was compelled to resort to the Court for an account and payment of her share of the estate of her deceased father. When the amount of it is ascertained, the administrator can only be relieved from further claim by a payment in conformity to the decree of the Court.

The fund is subject to its distribution and order; and we concur with the Circuit decree in the direction which it has given as to her interest in it.

The defendants, the administrators of J. J. Adams, submit, as one of the grounds of their appeal, that the notes given to their intestate as the administrator of Jesse S. Adams, for the purchase of slaves, should not be charged in favor of the estate, because void for want of a valuable consideration.

The general question involved in the proposition has already been fully heard and decided in Calhoun v. Calhoun, (ante, p. 283.) and the principles which governed the judgment of the Court there apply with increased force to the case before us.

Here a bill is filed against the representatives of an administrator for an account of the estate of his intestate committed to his hand for administration. A portion of the property was slaves sold by him. The purchasers, who are parties to the cause, do not appeal from the Circuit decree which held them liable; but the objection is made in this Court on the appeal of the representa-

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tatives *of the vendor. It presents the singular feature of a seller claiming that his own sale should be avoided for want of consideration to make it binding on the buyer.

The whole agreement, however, as to the sale of the negroes, had been executed. The Commissioner reports "that the purchases

made by the parties were admitted to have been on account of their shares, and the notes of George and John Adams given subject to a settlement."

It is ordered and adjudged that the Circuit decree be affirmed, and the motion dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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MORRIS ISRAEL v. L. M. AYER & CO.

(Columbia. Nov. Term, 1870.)

[*Trial* ⇨252.]

In an action on a bill of exchange by the payee against the acceptor, if no evidence be given tending to prove that the acceptance was for the accommodation of the plaintiff, but only that it was for the accommodation of the drawers, it is not error to refuse to charge the jury "that the acceptor for the accommodation of the plaintiff, as well as for the drawers, is not liable to a suit by the plaintiff, the contract being nudum pactum."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. ⇨252.]

[*Bills and Notes* ⇨93.]

To an action on a bill of exchange by the payee against the acceptor, it is no defense that the acceptance was for the accommodation of the drawer, and that fact was known to the payee.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 109; Dec. Dig. ⇨93.]

[*Principal and Surety* ⇨28.]

The acceptor of a bill of exchange for the accommodation of the drawer, is not, as between the original parties to the bill, a surety for the drawer, though the fact that the acceptance was for the accommodation of the drawer was known to the payee at the time.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 21; Dec. Dig. ⇨28.]

[*Bills and Notes* ⇨93.]

Where the payee of a bill of exchange which was accepted, with his knowledge, for the accommodation of the drawer, transfers it, and at its maturity takes it up and accepts a renewal of the bill, a new consideration arises out of the transaction, amounting, as between payee and acceptor, to a valuable consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 109; Dec. Dig. ⇨93.]

[*Bills and Notes* ⇨537; *Trial* ⇨203.]

Where there is some evidence, though slight, tending to prove that the defendants, the acceptors of a bill of exchange, had been discharged by the plaintiff, the payee of the bill, the question is one of fact for the jury, and it is error in the Judge to refuse to charge them upon the point; he should do so with proper instructions as to what would constitute, in law, a discharge between the parties.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1862-1893; Dec. Dig. ⇨537; *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. ⇨203.]

[*Bankruptcy* ⇨178.]

It is error to charge a jury that a debtor who is insolvent can make no assignment by which a creditor is preferred, or to charge that a debtor, who is insolvent, is unable to make any preference to secure a creditor, because such preferences are not allowed by the Bankrupt Act—the law of the State being that a bona fide

preference of one creditor by an insolvent debtor is valid, and the Bankrupt Act not avoiding such preferences under all circumstances.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 283; Dec. Dig. ⇨178.]

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*Before Carpenter, J., at Charleston, February Term, 1870.

This was an action of assumpsit on a bill of exchange for \$4,000, drawn March 29, 1867, by Hoffman, Brabham & Co., payable, at sixty days, to the order of the plaintiff, and accepted by the defendants. A credit of \$1,000, dated October 5, 1867, was endorsed on the bill. The defendants pleaded non assumpsit, and several special pleas.

The execution of the bill was admitted, and the defendants were severally examined as witnesses for the defence. The substance of their testimony was that the bill sued on was the renewal of one previously given for the same amount; that they accepted the first bill without consideration, and for the accommodation of the drawers, and that this was known to the plaintiff at the time; that the first bill had been placed in a bank, and when the renewal was given plaintiff gave defendants a check on the bank for \$4,000 to take it up; that Hoffman, Brabham & Co., were merchants in the city of Charleston, and that, in April, 1867, shortly after the renewal was given, they were burned out; that defendants then became concerned about their acceptance, and spoke to the plaintiff about it; that plaintiff said he had received from the drawers assignments of policies of insurance on their goods to protect the bill; that he was amply protected, his assignments amounting to \$7,000. To one of the defendants he said, tell General Ayer, another defendant, "not to give himself any trouble; I am fully secured and, if I am, Ayer & Co. should be." The witness replied, "Well, if you are satisfied, we are." That defendants were anxious to secure themselves by procuring from the drawers an assignment of a certain policy of insurance on their goods, but by reason of what plaintiff said, they made no effort to secure themselves.

The plaintiff was examined as a witness in reply. He testified that the day after the store of the drawers was burned, some policies of insurance on their goods were assigned to him by one of the firm, but they were not delivered, and he never got them; he agreed to take what he could get from the policies, and nothing more; he did not receive them in discharge of the debt; he never had them, and never so stated. F. J. Pelzer, assignee of the drawers, paid him \$1,000 on the bill; the drawers of the bill were insolvent when the fire occurred.

F. J. Pelzer testified that Hoffman, Brabham & Co., made an assignment to the witness for the benefit of their creditors. The

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deed of assignment was dated 10th April, 1867. It included certain policies of insurances against fire—among them those that had been assigned to plaintiff. The policies assigned to plaintiff were all garnisheed in New York.

The policies of insurance against fire, to Hoffman, Brabham & Co., amounting in the aggregate to \$11,000, and issued by companies doing business in New York, were given in evidence. On each policy was indorsed an assignment by the insured to the plaintiff, dated April 4th, 1867. Henry Buist, subscribing witness to the assignments, testified that the assignments were made by the junior member of the firm of Hoffman, Brabham & Co.; they were never delivered to the plaintiff, nor accepted by him in discharge of the bill; they were intended to serve, in case the other members of the firm approved of them, as a protection to the plaintiff, without prejudice to his rights against the acceptors of the bill: the senior partners never approved the assignments, nor were the policies ever delivered.

Hoffman, Brabham & Co. were adjudicated bankrupts March 27, 1868. The case and exceptions, after stating the evidence, proceeded as follows:

"And the testimony on both sides being closed, the defendants prayed the Court to instruct the jury in the following particulars:

"That the acceptor for the accommodation of the plaintiff, as well as for the drawers, is not liable to a suit by the plaintiff, the contract being nudum pactum.

"That the acceptor for the accommodation of the drawer, with knowledge of the fact of the want of consideration, is entitled to all the advantages of a surety, and if the plaintiff shall extend credit to the drawer, or shall have given up securities, the acceptor is discharged.

"That if the jury shall find the facts stated in the special pleas under the issues in this cause, or if they shall find the facts under any one of them, they shall find for the defendants.

"That if they find that the plaintiff discharged the defendants, or used any declaration to defendants, from which a discharge, or the intention to discharge them, will be inferred, they will find for the defendants.

"But the Court rejected each and every of the instructions prayed for by the defendants, and, in lieu thereof, instructed the jury that if they believed that defendants, with the

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knowledge of the plaintiff, *were accommodation acceptors for Hoffman, Brabham & Co., that by reason of representations made by plaintiff to defendants, they were deterred from obtaining security from Hoffman, Brabham & Co. for the bill, and that Hoffman, Brabham & Co. could and would have secured defendants if they had applied for such security, then they should find for the de-

fendants. That if the jury believed that the firm of Hoffman, Brabham & Co. had assigned certain policies to the plaintiff, and delivered the same to him, in discharge of the bill sued on, then they should find for defendants. That in determining whether Hoffman, Brabham & Co. could have secured defendants after the fire, the jury should determine whether they were in fact insolvent; if so, they could make no assignment by which a creditor could be preferred, and so could not have secured defendants.

"To the granting of which instructions, and the refusal of those prayed for by the defendants, the defendants then and there, and before the jury had withdrawn from the bar, did except.

"And the jury having retired, and subsequently returning into Court for further instructions, asked His Honor whether, if they find Hoffman, Brabham & Co. were insolvent at the time of the fire, they can find that the said Hoffman, Brabham & Co. could make any assignment of policies to protect the plaintiff or the defendants; when his Honor instructed them, that if Hoffman, Brabham & Co. were then insolvent at the time, they would be unable to make any preference to secure any creditor, because such preferences were not allowed by the Bankrupt Act. To which said instruction the defendants then and there, and before the jury had withdrawn, did except, and still do except."

Brewster & Spratt, for appellants.

Buist & Buist, contra.

April 20, 1871. The opinion of the Court was delivered by

MOSES, C. J. The pleadings and evidence are set out at length in the brief, and will only be referred to incidentally and in effect, in the opinion which will express the judgment of the Court.

The first exception submits error, on the part of the Circuit Judge, in not instructing the jury "that the acceptor for the accommodation of the plaintiff, as well as for the drawers, is not liable to a suit by the plaintiff, the contract being nudum pactum."

"An accommodation bill is a bill to which

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the acceptor, drawer, *or indorser, as the case may be, has put his name without consideration, for the purpose of benefiting or accommodating some other party, who is to provide for the bill when due. A party who requests and procures another to lend his acceptance, thereby engages to take up the bill at maturity, and to indemnify the acceptor against the consequences of non-payment."—Byles on Bills of Exchange, 95; Story on Bills, Sections 187, 191.

There is a wide and well recognized distinction between bills and promissory notes, and all other parol contracts, as to defences which may operate to defeat their validity,

because of want of sufficient consideration. Such instruments imply a consideration in themselves, and a bona fide holder, who takes one in the usual course of trade or commercial dealing, is not required to shew that he paid value for it. One who claims by transfer or endorsement, before maturity, for value from the original holders, is not bound by any legal or equitable defenses which might prevail between them and the immediate parties to the transaction. He derives through a title, unaffected even by a fraud unknown to him, by which the paper may have got access to the commercial market.

The rule, however, for the very reason on which it is founded, cannot prevail between the original parties to the instrument. As between them, its value depends on the consideration for which it is held. If it was executed for the favor or accommodation of one of them, it wants that element so essential to a valid agreement. If no consideration passed, and the use of the name was only given to another as the mode whereby he might obtain value or credit on his own account, and for his own use, what loss has he suffered by the payment which should be compensated by him who thus loaned his credit?

"However, in general, between the original parties or a holder who has not given full value, the defendant is at liberty to show that he drew, accepted, endorsed or made the bill or note for the accommodation of the plaintiff, or of one of them, or of a person for whom he is trustee, who, either expressly or impliedly, engaged to provide for the bill, or the defendant may show that he received no consideration, or none that was, in point of law, adequate, and thus may entirely defeat the action or reduce the claim."—Chitty on Bills, 703; 3 Kent, 80; Story on Bills, Sect. 187; Byles, 92; Farrar and Hayes v. Gregg, 1 Rich., 380.

Although there was error in the refusal of the Circuit Judge to charge the jury, as thus

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claimed by the appellants, still it can not be ground for a venire de novo, because the testimony they submitted does not sustain the allegation involved in their proposition, that the acceptance of the bill, of which the one sued on is a renewal, was for the accommodation of the plaintiff as well as of the drawers; in fact, the plea avers the contrary, to wit: that it was for the accommodation of the said Hoffman, Brabham & Co., the drawers. Ayer, one of the defendants, himself testifies, "that the first acceptance was without consideration to defendants, from H., B. & Co., and merely for the accommodation of the latter." Trumbo, another of the defendants, in his evidence, says: "The draft sued on was accepted for the accommodation of H., B. & Co., and that fact was known to the plaintiff." This knowledge, however, cannot change the relation of the plaintiff, unless it

could be shown that, as between him and the drawers, there was no consideration; for the very purpose of the defendants, in the accommodation they afforded the drawers, recognized the consideration moving from the plaintiff to them. From respect to the commercial value of bills of exchange, the authorities go very far to preclude any defense against a bona fide holder, before due, by reason of knowledge that the bill was founded on an accommodation transaction. "The payee and acceptor, in the relation in which they stand to each other, are not immediate but remote parties, and between them two distinct considerations, at least, must come in question: 1st. That which the defendant received for his liability; and, 2d, that which the plaintiff gave for his title. Between them the action will not fail, unless there be absence or failure of both of these considerations."—Byles, 92.

Mr. Parsons, in his second volume on notes and bills, p. 27, says that "the principle is a general one, that a person making or endorsing a note, or endorsing a bill, or becoming liable in any way on negotiable paper for the benefit of another person, is liable to a third person, even with notice of the want of consideration, but is not to the person for whose benefit the paper was signed." The authorities to which he refers clearly support his position.

Mr. Chitty, in his work on bills, at page 305, says: "But where the bill is in the hands of a third person, who has given value for it, and who becomes the holder before it was due, the acceptance will, in general, be obligatory on the acceptor, though he received no consideration, and although the holder knew that circumstance, because the very object of an accommodation acceptance is to enable the party accommodated to ob-

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tain money or credit from a third *person, and, therefore, the want of consideration furnishes no defense to one who has advanced money on the credit of the acceptor, though he may have been defrauded by the drawer."

The same doctrine is announced in Byles, p. 93.

Where the payee himself is not the party accommodated by the acceptance, he is entitled to the same position as a holder for value with knowledge of the want of consideration between the drawer and acceptor. If the acceptance was for the benefit of the former, so far as the latter was concerned, it was a valid bill in the hands of the payee.

In Grant v. Elliott, 7 Wend., 227, it was held that "it is no defense in an action on a bill of exchange by the payee against the acceptor, that it was accepted without consideration, or, in other words, was an accommodation acceptance for the drawer, and that fact was known to the payee." Savage, C. J., delivering the opinion of the Court, refers to Charles v. Marsden, 1 Taunt., 224, and quotes

the language of Lawrence, J., there used, as follows: "In the present case it is to be supposed that the drawer persuades a friend to accept a bill for him because he cannot lend him money. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing it after it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it."

It is further alleged as error, that the Circuit Judge refused to charge the jury "that the acceptor for the accommodation of the drawer, with knowledge of the fact of want of consideration, is entitled to all the advantages of a surety, and if the plaintiff shall extend credit to the drawer, or shall have given up securities, the acceptor is discharged."

This exception raises a question of much interest, and one which, we believe, has never been presented for the judgment of the Courts of the State.

Where one is the holder of an instrument, in which principal and sureties are bound, he is not permitted to deal with the former in any way that would prejudice the sureties, as either by extending, for consideration, the time of payment, or releasing any collateral or counter security which he may have for the debt. The rule is an equitable one, and proceeds upon the ground that the creditor shall not, by a binding contract, change the

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agreement into *which the sureties have entered by extending the period for its performance; or where he has received from the principal debtor securities of any character for the protection of his demand, he is, as to such securities, a trustee for the benefit of the sureties, and holds them devoted to their protection and relief. Occupying that position by reason of the relation in which he stands to the sureties, he cannot vary their rights to their prejudice, or make a new contract with the principal, to their wrong or injury. The surety is entitled, on his payment of the debt, to be subrogated to all the rights of the creditor; and if he has so affected these, as against the principal, in regard to the original contract, as by binding himself to a change of its terms more favorable to the principal, or has made a surrender of collateral security in his possession or control, for the same debt by his own act he has put beyond his command, the power of realizing the means which he should have retained for the benefit of the sureties.

In the Courts of this State this equitable doctrine has been recognized to the full extent of holding that whatever would discharge a surety in equity may also be set up

as a defense at law.—*Wayne v. Kirby*, 2 Bail., 551.

The exception under review seeks to extend this principle in favor of an accommodation acceptor against a holder, knowing, when he took the bill, that it was without consideration as between the drawer and drawee, and accepted solely for the accommodation of the drawer. It follows, as a necessary consequence, that the rule cannot be applied to such acceptor, unless he is to be held a mere surety on the bill for the acceptor.

Laxton v. Peat, 2 Camp., 185, is the case mainly relied on to sustain the proposition submitted by the exception, and that case, decided in the King's Bench by a no less distinguished jurist than Lord Ellenborough, did hold "that, if the endorser of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer, and give him time to pay the residue, he thereby discharges the acceptor." The eminent Judge distinctly rested his decision on the ground "that the acceptor of an accommodation bill, within the knowledge of all the parties, can only be considered as a surety for the drawer."

The same Judge carried out the same view in *Collott et al. v. Haigh*, 3 Camp., 281, holding "that the drawer of an accommodation bill is not discharged by time being given to the acceptor," and rested his decision on

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the ground that "the drawer of an *accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety." The case of *Kerrison v. Cooke*, 3 Camp., 361, followed but a few months after, in the Common Pleas, and Gibbs, J., there said, "admitting *Laxton v. Peat* to be law, of which grave doubts have been entertained, the present case may be distinguished from it."

In *Raggett v. Axmorr*, 4 Taunt., 730, heard in the same year, Mansfield, C. J., said "that, except in the case cited from Campbell, it was never known that anything passing between the other parties could discharge an acceptor."

Fentum v. Pocock, 5 Taunt., 192, has been recognized as the leading case on this question, and it expressly and distinctly affirms that the ruling of Lord Ellenborough, in the cases from Campbell, were not law. It has since been followed by the approbation of many eminent Judges, both in England and America, and has been declared, by such learned jurists as Kent and Parsons, to express the true rule.—3 Kent, 86; 1 Parsons on Notes and Bills, 327.

In *Fentum v. Pocock*, Mansfield, C. J., said: "No doubt, if the defendant can succeed in establishing the principle that we must subvert and pervert the situation of the parties so as to make the acceptor merely a surety, and the drawer the principal, the consequent-

es contended for must follow." That case differs from *Laxton v. Peat* in this particular, that there the holder took the bill knowing that it was an accommodation one, while in *Fentum v. Pocock* he ascertained the fact after it came into his hands. Mansfield, C. J., said: "It is better not to rest this case on that foundation, for, as it appears to me, if the holder had known in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference, for he who accepts a bill, whether for value or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release."

In *Price v. Edmunds*, 10 B. & C., 578, Parke, J., approved of *Fentum v. Pocock* "as good sense and good law." In *Yallop v. Ebers*, 1 B. & Ad., 698, Tenterden, C. J., said, "*Laxton v. Peat* has been long overruled." It is needless to refer to the many English cases which either expressly or by necessary implication repel the conclusion of Lord Ellenborough and follow the rule adopted by Mansfield.

Mr. Story, in his work on Bills, p. 510, note,

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says: "The question has also come before some of the American Courts, and it has been held that the parties are bound by the character which they assume upon the face of the bill; if by that they are liable as primary debtors, or as principal debtors, then, as to the holder, they are bound as such; and his knowledge, at the time when he takes the bill, that they are, or either of them are, accommodation parties, will not vary the case." He refers to *Bank of Montgomery County v. Walker*, 9 Serg. & R., 229; *S. C.*, 12 Serg. & R., 352. To these may be added *Murray v. Judah*, 6 Cowen, 493, and many others. In the case last named, Sutherland, J., delivering the opinion of the Court, says: "The acceptor of a bill of exchange is undoubtedly the principal debtor, and the drawer the surety, though it be accepted without consideration and for the sole accommodation of the drawer, and nothing will discharge the acceptor but payment or a release. Lord Ellenborough certainly fell into an error when he held a contrary doctrine in *Laxton v. Peat* and *Collott v. Haigh*."

In the opinion of the Court in *Griffith v. Reed*, 21 Wend., 500, it is said, "The presumption" (that the acceptance by the drawee is an acknowledgment on his part that he has funds of the drawer in his hands) "may be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer, and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor. On this implied obligation the acceptor may

have an action against the drawer, but not on the bill itself."

Aside from the general application of the rule, there is a view of the facts in the case before us which materially strengthen its application against these defendants. Even where there may be a want of consideration between the immediate parties to a bill, it could only avail as a defense so long as the bill remained in the hands of the payee. When, however, he has been forced to take it up the law raises a promise on the subsequent payment, and gives a new cause of action.— See *Wood v. Lepold*, 3 Harris and J., 125. It was proved that the bill sued upon was given as a renewal of the one for the same amount paid by the plaintiff Israel, and the acceptor, therefore, stands to him as principal, for a valuable consideration was paid by the said plaintiff.

It is alleged as further error, that the Circuit Judge refused to instruct the jury, on the request of the appellants, "that if they find that the plaintiff discharged the

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defendants, or used any declaration to them from which a discharge, or the intention to discharge them, will be inferred, they should find for the defendants."

A discharge of a bill of exchange may be by any agreement between the parties, founded upon a sufficient consideration, and collateral to the payment of the money, or by some renunciation inducing an act on the part of the acceptor which might not otherwise have been done, which affects his interests, and it may be express or implied from circumstances. In the latter case, a clear intention to discharge, or a clear renunciation of all claims against the acceptor, must be established. Story, 266, and other elementary writers, affirm the same conclusion.

The defendants had a right to the judgment of the jury as to the fact of such discharge. However the judicial eye may fail to perceive any proof on which the claim could be sustained, yet it was a question for the jury, with proper instructions from the Court, as to what, in law, would constitute a discharge between the holder and acceptor of a bill of exchange.

As to the exception to the instructions which were given, save as hereinafter stated, we do not see that the defendants have any just cause of complaint. The error, so far as it may have been of prejudice to them, consists in the charge to the jury, "that, in determining whether H., B. & Co. could have secured defendants, after the fire they should determine whether they were in fact insolvent; if so, they could make no assignment by which a creditor could be preferred, and so could not have secured defendants." This was again repeated to them in a shape somewhat changed, on the enquiry by the jury,

"whether if they find H., B. & Co. were insolvent at the time of the fire, they can find that the said H., B. & Co. could make any assignment of policies to protect the plaintiff or the defendants?"

His Honor, in answer, instructed them, that if H., B. & Co. "were insolvent at the time, they would be unable to make any preference to secure any creditor, because such preferences were not allowed by the Bankrupt Act."

We think there was error in both of the said instructions.

1st. Without regard to the Bankrupt Act, such an assignment would only be voidable, and not absolutely void. A debtor, even when insolvent, may give a preference to one creditor over another, provided he does not secure to himself an advantage by such preference at the expense of creditors, and that it is not given with the fraudulent view to defeat, hinder or delay other creditors.

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*2d. In regard to the effect of the Bankrupt Law on the assignment, under the circumstances, to the plaintiff, if ever made.

"The two first sub-divisions of the thirty-fifth Section of the Bankrupt Act are intended to apply to and to defeat and invalidate what are deemed to be fraudulent preferences to creditors."—James' Bankrupt Law of United States, p. 154.

The fraudulent preferences so referred to must be made within four months of the filing of the petition. (See Bankrupt Act, Section 35.)

The third sub-division of the Section refers to payments, sales, assignments, &c., made within six months before the filing of the petition. In neither case are they absolutely void, because the person to be thereby benefited must have "reasonable cause to believe such person insolvent, and the sale, assignment, &c., made in fraud of the provisions of the Act." (See said thirty-fifth Section.)

The Act, so far from avoiding all sales, assignments, &c., by a party who may afterwards apply for its benefit, regards them as valid, unless, in a Court of Bankruptcy, found to be in violation of the provisions of the law which it administers.

All the proof submitted, in the brief before us, of the proceedings in bankruptcy, is "that H., B. & Co. were adjudicated bankrupts, 27th March, 1868." If the applicant is adjudged a bankrupt on the filing of the petition, which is an act of bankruptcy—for such is the language of the eleventh Section of the said Act—then more than six months had elapsed from the date of the averred assignment before the said H., B. & Co. were adjudged bankrupts. Connected with this inquiry there is a fact in the case which should not be overlooked. The assignment of the very same parties to Pelzer was on

April 10, 1867, and yet, although the assignors were afterwards declared bankrupts, Pelzer's assignment does not appear to have been affected by any objection in the Court of Bankruptcy. We are forced, therefore, to conclude that His Honor erred in his instruction to the jury as to the validity of the assignment to the plaintiff, assuming it to have been made.

It is with reluctance that we send the case back. We cannot, however, undertake to say what may have been the conclusion of the jury on the question of discharge, if that point had been submitted by the Court, nor can we say what influence the charge did have as to the validity of the alleged assignment to the plaintiff.

The motion is granted, and a new trial ordered.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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*THE STATE v. GEORGE B. ADDISON.

(Columbia, Nov. Term, 1870.)

[*Criminal Law* ⚡132.]

There is no case pending, in a prosecution for murder, until after bill found.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 249; Dec. Dig. ⚡132.]

[*Criminal Law* ⚡115.]

By the expression, "to change the venue," in the Act of 1868, is meant to change the place of trial from one County to another.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 235; Dec. Dig. ⚡115.]

[*Criminal Law* ⚡135.]

A motion to change the place of trial, in a criminal case, cannot be heard before bill found.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 253; Dec. Dig. ⚡135.]

[*Criminal Law* ⚡135.]

After bill found, it is within the discretion of the Circuit Judge whether he will hear such a motion before or after issue joined. The notice may be given before, but it is better, it seems, that the hearing of the motion should be after issue joined.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 253; Dec. Dig. ⚡135.]

[*Criminal Law* ⚡133.]

The prosecutor, in a case of homicide, is not a party interested by whom notice of a motion to change the place of trial may be given. It should be given by the Solicitor on behalf of the State.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 250; Dec. Dig. ⚡133.]

[*Grand Jury* ⚡34.]

Indictment for murder quashed on the ground that attorneys representing the Solicitor, he being absent, had entered the room of the grand jury when they were deliberating on the bill, and advised them in reference to their duty.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. § 73; Dec. Dig. ⚡34.]

[This case is also cited in *State v. McMinch*, 12 S. C. 89, and distinguished therefrom.]

Before Platt, J., at Edgefield, February Term, 1870.

Appeal by the State from certain orders made by the Circuit Judge in this case, which was a prosecution for murder.

Before bill found, Mr. Gary, acting for the Solicitor, who was absent, moved, on behalf of the State, that the venue be changed. This motion His Honor refused to hear, on the ground that the bill had not been found.

A true bill was afterwards found, and, thereupon, the motion was renewed, and again refused upon three grounds: (1.) That issue had not been joined, and the motion could not be heard before the prisoner had pleaded to the indictment. (2.) That the notice of the motion, required by law, had been given by the prosecutor, and not by the Solicitor of the Circuit; and, (3.) That notice of the motion cannot be given until after bill found and issue joined.

It was then moved, on behalf of the prisoner, that the indictment be quashed; and that motion was granted by His Honor, for the reasons set forth in the order, which is as follows:

"It appearing to the Court that M. W. Gary, being retained to assist the State's Solicitor in the prosecution of this indictment, (and having been appointed by the Solicitor, P. L. Wiggin, who had been compelled to leave the Court, to act as Solicitor in this case which appointment had been confirmed by the presiding Judge, said Judge being ignorant of his having been previously retained to assist in the prosecution, he having given notice to Mr. Griffin, one of the counsel for defendant, that he was going before the grand jury in regard to said bill

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of indictment, and no objection being *made to his appointment as Solicitor in this case until he had gone into the grand jury room.) had entered the room of the grand jury after the bill of indictment had been delivered to them, and after they had heard, on the first day of the term, the charge of the presiding Judge, and, without the fact of his intention to go to the grand jury having been brought to the attention of the Court, or its permission obtained, had then and there instructed the jury as to their duty under the law in disposing of the bill of indictment, by reading to them extracts from two several law books; and it also appearing that, afterwards, C. W. Miller, Esq., as the Deputy of the State Solicitor, (Mr. Gary having previously retired from the grand jury room, at the instance of defendant's counsel,) entered the room of the said grand jury, at the instance of the Court, and instructed them that, if there was sufficient ground for the reasonable suspicion that the defendant was guilty of the crime charged in the indictment, then, that it was the duty of the grand jury to find a true bill in this case—on motion of Mr. Carroll, and others of coun-

sel, on the part of defendant, ordered that the indictment in this case be quashed."

Appeals were taken by the Solicitor, on behalf of the State, as follows:

From the order refusing to hear the motion to change the venue before bill found, an appeal was taken, on the ground—

1. Because, it is respectfully submitted, that defendant having been arrested on warrant for the homicide, there was a criminal case pending in the Circuit Court for change of venue, in the trial of which the motion should have been heard, and that His Honor erred in deciding that a bill must be found before such motion could be heard.

From the order refusing to hear the motion to change the venue after bill found, an appeal was taken on the grounds:

1. Because, it is respectfully submitted, that a bill having been found against the defendant, who had been previously arrested on warrant, and admitted to bail, there was a criminal case pending, for change of venue, in the trial of which the motion should have been heard, and that His Honor erred in ruling that there was no case pending until issue was joined between the defendant and the State, by the prisoner's plea on his arraignment.

2. Because, it is respectfully submitted, that His Honor erred in ruling that the prosecutor was not a party interested by whom

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the *notice of application for change of venue could be given, and that the notice must be given by the Solicitor of the Circuit.

3. Because, it is respectfully submitted, that His Honor erred in ruling that the notice required by the Act cannot be given properly until true bill found, and issue joined between defendant and the State.

And from the order quashing the indictment an appeal was taken, on the grounds:

1. Because being retained to assist the State Solicitor in the prosecution of an indictment does not prevent the party so retained from being deputed to act as Solicitor.

2. Because the party deputed to act as Solicitor had all the rights and powers of the Solicitor of the Circuit, and among them that of entering the grand jury room, and counseling the grand jury.

3. Because there was nothing in the conduct of counsel in the grand jury room, of either of the parties deputed to act as Solicitor, to justify the indictment being quashed.

4. Because even if there was error in the counsel given to the grand jury by either of the parties deputed to act as Solicitor, such error affords no ground for quashing the indictment.

5. Because, it is respectfully submitted, that the causes assigned in the order were insufficient to warrant the quashing the indictment, and that His Honor erred in so ordering.

Wiggin, Solicitor, for appellant :

1. That change of venue may be moved for in "all cases, civil and criminal, pending in the Circuit Courts, over which such Courts have jurisdiction."—A. A. 1868, 14 St., 84.

2. That a case is pending as soon as first proceedings are instituted, certainly when defendant is made a party.

Civil case at law pending when writ is lodged with Sheriff, certainly when defendant is served.—1 N. and McC., 569, 603; 5 Co., 61; 3 Chitty's Pl., 904.

Civil case in equity pending when bill is filed, certainly when defendant is served with subpoena.—Speer Eq., 382; 1 McCh., 264; Bail Eq., 481; 1 Stroh Eq., 180; 2 Daniel's Ch. Pr., 725; Story's Eq. Pl. Sect. 737.

Criminal case pending as soon as affidavit made on which warrant issues, or warrant issued, certainly when defendant is arrested. Harper, 313; 4 Mc., 356; 1 Brev., 160; 1 East P. C., 186; 1 Den. C. C., 217; 2 C. & K., 402; Wharton's Amer. Cr. Law, Sec. 449, Note R; 15 Rich., 282.

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*3. That if a criminal case is not pending prior to bill found, it certainly is pending, and the record so made up as to be removable to some other County for trial, after true bill found against defendant who has been arrested on warrant.—A. A. 1839, 11 St., 72; Wharton's Amer. Cr. Law, Sec. 521.

4. That the prosecutor is a party interested in a criminal case, by whom notice of application for change of venue may properly be given—the words "some party interested," not being restricted in meaning to plaintiff or defendant.—A. A. 1868, 14 St., 85; 1 Waterman's Archbold's Cr. Pl. and Pr., 252; The People v. Webb, 1 Hill, N. Y., 179.

5. That even if the notice was defective, in being signed by the prosecutor, instead of the Solicitor, such defect was cured at October Term, 1859, by order of the Circuit Judge, on motion of the Solicitor, that the motion for change of venue be heard at February Term, 1870.

6. That notice may be properly given of motion for change of venue before bill found and issue joined between defendant and the State, according to the words of the Act, and its proper construction.

Even were the words doubtful, the argument drawn from the inconvenience attendant upon the other construction, would be potent in favor of this construction.—Co. Litt., 66 A.; Broom's Legal Maxims, 139.

On the appeal from the order quashing the indictment, he cited: 57th Rule of Court, Miller's Comp., 42; Wharton's Amer. Cr. Law, Sec. 495; 1 Chitty's Cr. Law, 816; 4 Blackstone's Com., 126, Note by Christian; 1 Waterman's Archbold's Cr. Pl. and Pr., 323; Oath of Grand Jurors, Miller's Comp., 159; A. A. 1768, 7 St., 240, Sec. XXI; A. A. 1868, 14 St., 88; 1 Waterman's Archbold's Cr. Pl. and Pr., 99; 4 Bla., 303; 7 Rich., 339; Whar-

ton's Amer. Cr. Law, Sects., 519, 520; Com. Dig., Indictment II.; 1 Waterman's Archbold's Cr. Pl. and Pr., 336, 338; 2 Hawk. P. C. C., 25, Sec. 146; 1 Salk., 372; 14 Rich., 280; 2 Hill, 288.

Carroll & Melton, contra :

1. The motion to change the venue, before true bill found, was wholly unauthorized by the A. A., 1868, 14 Stat., 84, 85.

1. Ordinarily no man can be held to answer "for a capital felony unless on presentment of a grand jury" of the County where the crime was committed.—State Constitution, Art. 1, Sec. 19; 3 Camp'l; Lives of the Lord Chancellors, ch. 90, p. 295.

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*2. Until true bill found there was no charge to be answered—no case pending in the Court—and no record to be removed.—Resp. v. Schaeffer, 1 Dall., 273.

11. The Act of Assembly referred to did not warrant the motion made for change of the venue after true bill found.

1. The twenty days' notice of the motion which the Act requires was not given to the defendant.

2. The only notice served upon the defendant was in reference to the motion of February 9, 1870, and that notice was not signed by the Solicitor of the Circuit, but by the mere witness upon whose affidavit the warrant was issued, styling himself "Prosecutor of G. B. Addison."

3. The motion of February 17, 1870, was premature, and ought to have been delayed until after arraignment, plea and issue joined upon matter of fact.—Mostyn v. Fabrigas, 1 Smith's Leading Cases, Eng. Notes, 366; Dowler v. Collis, 4 Mees. and W., 531.

III. The order to quash the indictment was amply justified by the extraordinary circumstances under which were held the deliberations of the grand jury, resulting in their finding "a true bill."

1. The presence of Mr. Miller in the room of the grand jury, and his undertaking to instruct them in the law, was irregular and unauthorized, and still more flagrantly so was the presence there of Mr. Gary, and his assuming to "instruct the grand jury as to their duty, under the law, in disposing of the bill of indictment."

2. "Ground for reasonable suspicion of guilt" is certainly insufficient to warrant the finding of "true bill;" and the fair probability is that such finding by the grand jury was influenced materially by loose and erroneous statements of the law and rules of evidence by which the grand jury were told that they should be governed.—2 Instit's, 384; 2 Hale, 157, note a; 1 Chit. Cr. Law, 318; 4 Bl. Com., 303; 2 Hale, 157, note b; 2 Story Constitution, 592; 1 Greenl. Evid., § 252; 1 Whart. Cr. Law, § 495; 2 Hawk. Ch., 25, § 145.

April 24, 1871. The opinion of the Court was delivered by

MOSES, C. J. The first ground of appeal submits that the Circuit Judge erred in deciding that, before a motion could be entertained to change the venue, where the party had been arrested on a warrant for homicide, a bill must be found.

A prosecution for same purposes may be said to have commenced at the time of the complaint; for others, at the issuing of the

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warrant and arrest of the defendant; and still for others, at the finding of a bill by the grand jury.

"The complaint made to a Magistrate is a commencement of a prosecution sufficient to arrest the Act of Limitation."—Clarkson v. Cantey, Harp., 312; State v. Howard, 15 Rich., 282, and the cases there referred to. Our own decisions in that regard have been in conformity with the English authorities.

A civil action at law may be said to be pending when the writ is lodged with the Sheriff, and an equity suit from bill filed. In each it is the proceeding to which the defendant is bound to answer when served with due process. A criminal "case" for homicide cannot, however, be said to be pending until bill found; for, until then, there is nothing to which the party charged can answer by plea or otherwise.

Technically speaking, no change can be made in the venue. That is a material averment in the indictment, and cannot be altered by the Court. The grand jury are sworn, *ad inquirendo pro corpore comitatus*, and their presentments and bills are limited to matters within the County for which they sit.

The term has, in some way, crept into the books, and into Legislative Acts, and, when used, means no more than a change of the trial from the County in which the bill was found, to some other within the jurisdiction of the court. The words, as used in the Act of 1868, 14 Stat. at Large, 84, (which, for the first time, appear in the Statutes of this State,) propose no more than to confer on the Circuit Judges in the cases, and subject to the provisions therein mentioned, authority to direct the trial elsewhere than in the County where the bill is found or the action brought. In fact, the language of the Act gives the construction, which it intends by the use of the words "to change the venue," for it authorizes the change to be made "by ordering the record to be removed, for trial, to some other County within the Circuit."

Can the motion to change the trial from the County which is laid as the venue be made before bill found, when it is that which alleges the place where the crime is charged to have been committed?

Suppose that, before bill found, the motion had been entertained, and the order made to change the place of trial. What was to be tried? There was nothing on which the party charged could be put to his trial

The bill might be ignored, and then there would stand on the journal an order for the

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trial of a party in another County who was not subject to trial in the County where the order had been made.

"The mode of changing the place of trial, in a criminal case, is to move the Court on affidavit, showing the necessity of the change, for leave to make the requisite suggestion on the bill."—1 Chitty's C. L., 495.

"Where an indictment or presentment has been removed into the K. B., or was instituted there, that Court has a general jurisdiction to direct the trial to take place in a County different from that where the offence was committed, when it shall be made to appear to them that an impartial trial cannot be had in the latter County. In this case, the same venue remains in the indictment, and the place where the inquiry is instituted is the only deviation from the ordinary course of proceedings."—1 Chitty's C. L., 494.

By the 19th Section of Article I of the State Constitution, "no person shall be held to answer for any high crime or offence, unless on presentment of a grand jury."

It is, therefore, inconsistent with the spirit of this provision that a motion should be entertained in regard to the trial on which he is not yet put, and to which he may never be required to answer in any way.

The next ground of appeal affirms that, after bill found, the motion to change the place should have been heard, and that the Circuit Judge erred in ruling that there was no case pending until issue was joined between the defendant and the State, by the prisoner's plea on his arraignment."

It does not follow as a matter of course, because the Judge may exercise the power "in all cases, civil and criminal, pending in the Circuit Courts," that he may not decide for himself when he will entertain the motion. Neither the rights of the State nor the prisoner are affected by the time when he may conclude to hear the application, for, if made, it must be before the trial. There seems to be a propriety in not allowing it to be heard in a criminal case until the indictment is answered by a plea. The prisoner might plead "guilty," and if that is persisted in, the motion would fail of itself, or he might plead *autrefois acquit* or *convict*, and the conclusion on either of these would be determined by record evidence, on which the Judge sitting in one County of his Circuit is as well prepared to decide as if presiding in another.

In regard to a motion for a change of the venue in a civil case, because it was not laid in the proper County, a difference of

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practice has obtained between the Courts of New York and those of England. In the latter it must be made before plea filed.—10

Bac., Title Venue, E., 371. But in the former it will be entertained even after issue joined, where no delay or loss of trial will be the consequence.—*Delavan v. Baldwin*, 3 Caines, 104; *Kent v. Dodge*, 3 John. 447. These cases apply to motions strictly in regard to a change of venue. The Act of 1868 is in reference to a change of place of trial because a fair and impartial one cannot be had in the County where the action or prosecution is commenced. Some latitude of discretion should be accorded to the Judge, as to the period when the motion should be entertained. Suppose it was limited to time of plea filed in a criminal case, and after that, and before the trial, the State, through its prosecuting officer, or the prisoner, should ascertain that a fair and impartial one could not be had in the County where the bill was found, should either be precluded from the opportunity of a motion to transfer the indictment to a jury of another County within the Circuit?

It is next assigned, as error, that the Circuit Judge ruled, "that the prosecutor was not a party interested, by whom the notice of application for change of venue could be given; that it must be given by the Solicitor of the Circuit, and that it could not be given until true bill found, and issue joined between the defendant and the State."

We have already said that a criminal case is certainly pending when a true bill has been returned by the grand jury, and we cannot see why the notice of the motion may not thereupon be given, leaving to the discretion of the presiding Judge the time when, after the expiration of the twenty days, he would hear it, and we have intimated that it should not be heard until the indictment has been answered by a plea.

It is difficult to determine in what sense the words "some party interested" are used in the Act. The State is the party to the record charging an offence committed against "its peace and dignity." As it represents the whole people within its territorial limits, in point of fact, each one of them is more or less, as citizens, interested in the issue. In every department of the Government, however, proper persons are by law delegated to represent it. Solicitors are elected and assigned to the several Circuits, whose duty it is to prosecute for violation of the public law, with a general supervision over all matters appertaining to this branch of the judicial department. The whole control of

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the manage*ment of all criminal cases is given to them, and especially the prosecution for crimes and misdemeanors. If every citizen of the State (for he who lives in the County where the offence is charged has no greater interest involved than all others living beyond it,) can assume to interfere with the prosecution in the hands of the Solicitor, it would be impossible to preserve and se-

cure that adherence to form and regularity so necessary and proper in all legal proceedings. Suppose that even the prosecutor by whom the charge is made should apply for the removal of the trial against the opinion and judgment of the Solicitor, is he to be heard, and thereby, in effect, substituted as the Solicitor? or, is it likely that the interest of the State would be promoted by a conflict of opinion between them, in which the Solicitor is to be made to yield to the prosecutor? But, how is any one citizen, in a legal point of view, to be considered more interested for the State in a prosecution for murder than another? Save for the just and proper vindication of the law, no one has an interest in the conviction of the prisoner. The prosecuting officer speaks for the State, and, if the motion is to be made for the removal of the trial on behalf of the State, it should be by him, and induced by his judgment. He is responsible for all errors in the official discharge of his duty, and he must be uncontrolled in the exercise of it.

The order of the Circuit Judge quashing the indictment is next submitted as error.

There cannot be any doubt of the power of a presiding Judge to quash an indictment, when it is clear, from the face of it, that no conviction can follow.

"Where the application is made on the part of a defendant, the English Courts have almost uniformly refused to quash an indictment where it appears to be for an enormous crime, as treason, felony, &c.—1 Whart. Crim. Law, Sect. 519.

The reason probably inducing the rule may be, that if the party is convicted on a defective indictment, he has reserved to him the benefit of a motion in arrest of judgment. In the case before us, the Judge undertook, from what he regarded, under the circumstances, as conducing to the ends of justice, to grant the motion which was made on behalf of the prisoner.

The inclination of all Courts has been against a motion, on the part of a defendant, to quash an indictment. Where, however, it is granted, not by reason of any defect in the bill, but in consequence of matters occurring in the course of the deliberation of the

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grand *jury upon it, and not properly in any way incidental to it, an appellate tribunal should not generally interfere.

Here the presiding Judge considered that the prisoner should not be put to trial on that bill, because the attorneys appointed by the Solicitor to act in his absence had successively entered the room of the grand jury; the one who entered without leave of the Court undertaking to instruct them as to their duty in disposing of the bill, reading extracts from two law books; and the other, who went in with consent, advising them directly against all law as to their duty in the return which they should make to it.

How what occurred in the jury room, and which is recited in the order, was made known, does not appear by the brief.

In some of the States the prosecuting officer is allowed to go into the room of the grand jury, conduct the examination, and give his opinion on any point, when requested. In others, his relation to the grand jury terminates when it takes charge of the bill. In this State it has not been the practice of a Solicitor to enter the room. There have been particular and special occasions when he has done so, but we may venture the assertion that it never has been done, and certainly should never be done, without the knowledge and consent of the Judge. In this case we are satisfied that no wrong intention influenced either of the acting solicitors, but still their conference with the grand jury in its room, and reading law books to them, were against the rights of the prisoner. The counsel given by one of them, "that if the jury had ground for reasonable suspicion of guilt, then it was their duty to find a true bill," is so utterly at variance with the conclusion they are to draw from the evidence to justify such a finding, that we are not surprised at its influence on the Judge in ordering the indictment quashed, as an act due to his official regard and the rights of the prisoner, and violating no positive law.

We do not see any objection to counsel retained to aid the prosecution acting as Solicitor, in the absence of the regular officer, because his position is not at all changed from that which he would occupy as assistant counsel with the Solicitor, although he may have received a retaining fee. We do, however, perceive that evil might follow from the unlimited right of a Solicitor to enter the room of the grand jury at his pleasure. What security would the prisoner have if wilfully wrong counsel was given to the jury? How is it to be known to the Court, if what transpires in their room is to be kept secret?

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*Whence the Judge derived knowledge of what was said or done in the jury room does not appear in the brief. He, however, acted on it without stating the source from which he received it. The facts on which he granted the order are recited in it.

When the grand jury desire any further information than that offered in the general charge of the Judge as to the nature of the offenses contained in the various bills committed to them, they can return to the Court, and ask it from the proper source.

Without the consent of the presiding Judge, no one should have access to the jury room during their deliberations.

The motion is refused, and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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JOSEPH H. MELLICHAMP v. JOSEPH B. SEABROOK and Others.

(Columbia. Nov. Term, 1870.)

[Dower ⇐99.]

An objection to a return to a writ for admeasurement of dower, on the ground that a sum of money assessed in lieu of dower is excessive, can only be taken by exception to the return. The Court will not, on motion, where a sale of the land has been ordered, disregard the value assessed by the Commissioners in dower, and order that the widow be paid a sum in proportion to the amount of the sale.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 345; Dec. Dig. ⇐99.]

Before Carpenter, J., at Orangeburg, October Term, 1869.

Appeal from a decree of the Circuit Court confirming a return to a writ for the admeasurement of dower.

The only papers contained in the brief were the return, the decree and the grounds of appeal.

The return bore date the 6th August, 1869, and certified that the Commissioners had valued the whole land at \$5,433.50; and, being unable, fairly and equally, to divide the same without manifest disadvantage, they had assessed the sum of \$905 to be paid the widow, Mrs. E. A. Pope, in lieu of dower.

The decree confirmed the return, and ordered that out of the proceeds of the sale directed by a previous order, and which had

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*not taken place, the sum assessed by the Commissioners be paid to the widow in lieu of dower.

The defendant, Joseph B. Seabrook, appealed, on the grounds:

1. That the wife's right of dower can only be admeasured in accordance with the actual value of the land upon which it attaches.

2. That, whenever it is necessary that the premises should be sold to make partition, the standard of value is the amount realized at the sale, although the proportion to be paid as dower may be determined by the Commissioners.

3. That His Honor erred in decreeing that the sum of \$905 should be paid to Mrs. Pope as her dower in the lands, without regard to what amount the lands should sell for; whereas His Honor should have decreed that the dower to be paid from the sales should be in proportion as the lands were valued and the dower assessed by the Commissioners, or as \$905 bore to \$5,433.50.

4. That the decree is otherwise contrary to law and evidence.

Whaley, for appellant:

First. The return of the Commissioners, in the admeasurement or assessment of dower, is always within the control of the Court. "The Court has the power of correcting the assessment of the Commissioners."—Payne v. Payne. Dud. Eq., 124.

3 Rich. Eq., 254, A. A., 1820.—“The return of the Commissioners in dower, like the report of the Master, is under the control of the Court.”

Code, Title Supreme Court, Sec. 12, p. 425.—“The Supreme Court may reverse, affirm or modify the judgment, decree or order appealed from, in whole or in part, and as to any or all of the parties, and its judgment shall be remitted to the Court below, to be enforced according to law.

Sedgwick on Damages, p. 278.—“It is the price, the market price, that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold.”

Second point. The wife's right of dower can only be admeasured in accordance with the actual value of the land upon which it attaches.

Wright v. Jennings, 1 Bail., 277.—“In this State it has been usual to assess one-sixth of the entire fee, as equivalent to the widow's estate for life in one-third of the land; and, as a general rule, the same proportion should always be adhered to in the assessment of

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*dower, except in extreme cases of youth on the one hand, and of age and infirmity on the other.”

Keith v. Trapier, Bail. Eq., 63.—“Dower must be assessed on the actual value of the land, subject only to the lien of prior incumbrances.”

From the above authorities it will be seen that the dower must be assessed from the actual value of the land; that one-sixth of the fee is the general rule of allotment, and that the market price, or what the lands sell for, is the standard of actual value.

It will be further seen that we have the right of appeal, and that the return is under the control of the Court.

We would ask this question: Suppose the whole land should only sell for \$905? The entire land would be absorbed in the dower, to the exclusion of heirs.

Hutson, contra:

I. The commission requires the Commissioners to admeasure the dower or to assess its value. They are not called upon to advise a sale as in partition. It is not a proceeding in partition. And the commission having once issued, the Commissioners are as much the judges of the case as arbitrators acting under an order for an award. A. A. 1786, 4 Stat., 742; Buckler v. Farrow, Rich. Eq. Cases, 178; Payne v. Payne, Dudley Eq., 124; Gibson v. Marshall, 5 Rich., 254.

The same seems to be the practice in the Common Pleas.—Douglas v. McDill, 1 Spears, 137.

II. If the assessment of \$5,433.50 was excessive, that should have been the ground of exceptions. A reference might be ordered. If the result were then doubtful, the com-

mission might be sent back or one issued to new Commissioners. This has been the uniform practice, and it is a good one.

III. It would not do to let the assessment for dower rest on the uncertain value to be determined by a public sale.

1. It would be too open to fraud.

2. Suppose a sale be now ordered subject to dower, and four years hence the widow asks dower, would the price paid be the measure? Surely not.

3. Suppose Mr. Pope had sold in 1859, would the measure of dower be the price paid him?

4. If the rule contended for is right, why did the defendant insist on a commission. The Court should have ordered the land sold and meted out one-sixth of the price.

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*5. Suppose Buck Island should turn out to be a mine of gold or a phosphate bed, and brought \$50,000 instead of \$5,400, would the widow be entitled to one-sixth of that? Would the Court permit the dower to be so fluctuating?

6. If the Commissioners had known that such was to be the rule, might they not, at all events, have assigned land.

7. Might not the Commissioners, in making their assessment, have taken interest into the account.—See Miller v. Cupe, 1 DeS.; Keith v. Napier, Bail. Eq., 64; May v. May, Rich. Eq. Cases, 378; Gordon v. Stephens, 2 Hill Ch., 429; Woodward v. Woodward, 2 Rich., 23.

IV. We conclude, therefore, that the Circuit Judge was right: 1st, To refuse the motion to make a fluctuating order. 2d, If there were any complaint, there should have been exceptions and a reference.

May 12, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. Even conceding all the propositions for which the appellant contends, it is enough to say that he is precluded from the benefit of which he now seeks to avail himself, by his own course, in regard to the return of the Commissioners. There is no doubt that the return is under the control of the Court.

It cannot, of itself, change the amount which it recommends as compensation in lieu of an allotment of a portion of the land, but it is in its power either to recommit the writ, that the return may be amended, or, if it is manifest that an assignment in land would be of prejudice to those invested with the fee, the Court may appoint a Referee, to enquire into, and report upon the money-value of the dower.

The difficulty that the appellant has to encounter arises from the fact that he made no exception to the return, which actually assessed “the sum to be paid to the widow.”

The writ had issued conformably to the long established practice of the Courts of

this State, and, if the appellant was not satisfied with the return, he should have made his objection known at the time.

"The return of the Commissioners, if accepted, is the law between the parties."—*Buckler v. Farrow*, Rich. Eq. Cases, 178.

The proceeding for the admeasurement of dower is not like that which attaches on a commission for the partition of real estate among heirs.

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*There the Commissioners, if they find that the land cannot be divided without manifest prejudice to some of the parties interested, may recommend a sale. In dower, however, they cannot advise a sale. Their duty is confined to the admeasurement of it by metes and bounds, or to assess the money value of the right.

How was the Circuit Judge to know that the appellant objected to the assessment made by the return in reference to the amount which the Commissioners fixed as the fee simple value of the whole land? Having made no objection to it, how can an appeal be entertained from his order, which merely confirms the return as to the value of the dower in the land.

If the appellant is right in the proposition for which he now contends, that the "wife's right of dower can only be admeasured in accordance with the actual value of the land upon which it attaches," and that this standard "is the amount realized at the sale," he had two opportunities to make this question in the Court below, both of which he neglected:

First, he could have presented it on the order for the issuing of the writ; and, secondly, on the return of the writ.

In fact, to give full effect now to his objection, would practically destroy the right of the Court to order the writ, unless it was previously made certain that the dower could be given in hand, for if the value of the claim is to be regulated by the actual amount which the whole land would bring on sale, it would be entirely unnecessary for the Commissioners to assess a value upon such whole. The result would be this, that unless the dower is given in land the Court must necessarily order a sale before the value of the widow's right in money could be ascertained.

This course would not only be at variance with the uniform practice in the State, but would make the value of this right (one, too, always favored by the Court) depend upon the chances and speculations of an auction sale; for anything that appears, or can be positively known, the land may sell for an amount beyond the sum affixed by the Commissioners as its value, and then the appellant would have no cause of complaint. The practice of the Court must be uniform and consistent, and not regulated by conjectures, or changed by circumstances which may arise

after its judgment is pronounced without exception being made. When the return of the Commissioners was confirmed it stood as the judgment of the Court.

For the general principles on which our

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opinion rests, see *Buckler v. Farrow*, Rich. Eq. Cases, 178; *Gibson v. Marshall*, 5 Rich. Eq., 254; *Payne v. Payne*, Dudley Eq., 124.

It is ordered and adjudged that the decretal order be affirmed and the motion dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

2 S. C. 371

NATHANIEL F. SMITH and Wife, and Others, v. WILSON E. PROTHRO and Others.

(Columbia. Nov. Term, 1870.)

[*Executors and Administrators* ⇐165.]

The defendants, executors of P., sold in January, 1865, chattels of their testator for one-half cash, and for the balance received notes from the purchasers at one and two years, payable in "current funds." The purchases were made with reference to Confederate currency; and, in 1866, the executors settled with the purchasers at one-tenth the price at which the chattels were bid off, receiving payment in national currency. This settlement was made in entire good faith, and the executors realized more than the value of the Confederate currency at the date of the purchases: *Held*, That the executors were not liable to the legatees of the testator for the amounts of the notes, but only for the amounts they received.

[Ed. Note.—Cited in *Bacot v. Heyward*, 5 S. C. 448; *Geigers v. Kaigler*, 9 S. C. 403, 427; *Wilson v. Braddy*, 16 S. C. 521.

For other cases, see *Executors and Administrators*, Cent. Dig. § 642; Dec. Dig. ⇐165.]

[*Evidence* ⇐423.]

Under the Ordinance of 1865, evidence is admissible to show that the parties to a note, payable in "current funds," dealt with reference to Confederate currency; and, upon such evidence, the amount of the note may be reduced so as to effect substantial justice between the parties.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1965; Dec. Dig. ⇐423.]

Before Platt, J., at Barnwell, ——— Term, 1870.

This was an appeal from a decree of the Circuit Court, made upon an appeal from the Probate Judge.

The case is stated in the judgment of this Court.

Finley, for appellants, cited *Rutland v. Copes*, 15 Rich., 84; *Thorington v. Smith*, 8 Wal., 1; *Austin v. Kinsman*, 13 Rich. Eq., 259; *Craig v. Pervis*, 14 Rich. Eq., 150; 2 *Story Eq.*, § 1272; *Hext v. Porcher*, 1 *Strob. Eq.*, 170; *Boggs v. Adger*, 4 Rich. Eq., 410; *Wagner v. Thompson*, 1 *DeS.*, 94; *Tuveau v. Ball*, 1 *McC. Ch.*, 450; *Darrell v. Darrell*, 3 *DeS.*, 241; *Chappel v. Brown*, 1 *Bail.*, 528; *Martin v. Jeffcoat*, 10 Rich. Eq., 128; *McCall*

v. Peachey, 3 Mmmf. R., 288; Meecher v. Vanderver, 3 Green R., 392; Swicard v. Wilson, 2 Mill, 218.

— — — — —, contra.

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*May 23, 1871. The opinion of the Court was delivered by

MOSES, C. J. The controversy here is not between the executors and the purchasers at the sale of the 31st of January, 1865. The notes which were given in consideration of the articles then bought have been satisfied. There is no fraud or mistake alleged, the existence of which would open the transactions between the vendors and vendees, nor is the bill framed with a view to that end.

It is brought for an account against the executors of the late Evan Prothro, on behalf of the infant children of Hickson N. Prothro, (a son of the testator, who pre-deceased him,) and the point of dispute arises out of the following facts: A sale of the personal estate of the testator was made by his executor on the day named, of which, according to the statement of the counsel for the appellants conceded by the Circuit Judge in his decree, "the terms were one-half cash, the balance on a credit of one and two years, with interest from day of sale, payable in current funds, with the privilege on the part of the purchaser to pay all in cash."

It is admitted "that the property then sold was bid off at Confederate rates, and that the cash payments, which in some cases embraced the whole amount of the said bids, were made in Confederate currency." In 1866, the executors, in view of the fourth Section of the ordinance of the State Convention adopted on 27th September, 1865, acting on the advice of counsel, that under its provisions the true measure of the indebtedness on the notes taken for purchases at the sale, in conformity with the prescribed terms, was the real value in good money of the articles so sold at the time, proceeded to effect an adjustment of the notes by a careful examination of the account sales, and a just estimate of the value of the property sold, procuring for this purpose the assistance of several gentlemen conversant with such matters, and it was determined that in the settlement to be had, each debtor should pay one-tenth of the price at which the articles were purchased, the payment to be made in National currency. Such arrangement was accepted by the executors, and for the amount thereon received they were ready to account. The plaintiffs object to this standard, and contend "that the whole amount of the credit part of the said purchases should be paid in funds current at the expiration of the credit, dollar for dollar, and exempt from any scaling process under the ordinance of the Convention or otherwise." The case was referred to the Probate Judge, who sustained the construction contended for by the defend-

ants, but His Honor the Circuit Judge de-

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creed his ruling to be *erroneous, and his judgment is made the subject of appeal to this Court.

It is manifest that the learned Judge determined the liability of the executors by his construction of the words which expressed the character of the "funds" in which the notes were to be paid.

That, however, is far from being the only question involved in the case presented by the brief. It would not follow as a matter of course that the executor must be liable if he settled, by adjustment or arrangement, a debt due him in his representative capacity, for less than the amount which he possibly may have recovered at law, particularly where the extent of the recovery was a matter of doubt. That would depend on the circumstances of the particular transaction, and very much on his honest belief that his act would tend to the advantage of the estate, or that the probable chances of gain in its favor would countervail those of loss to its prejudice. No one would undertake to say that, in 1866, there did not prevail much doubt as to the value of notes of this description given at the time these were executed. Whether, being within the period fixed by the ordinance, the Courts might hold them referable to it, or whether, so holding, regard would be had to the value of the consideration, or to that of the money current at the time they were drawn, was then a matter of much doubt, even among the most learned of the profession. If the Courts had adjudged that the value of the money must be the standard, then the settlement which these executors made was for the benefit of the estate, for they received one-tenth of the whole amount when Confederate money, at the date of the transaction, compared with lawful money of the United States, was as 24 to 1. If, on the other hand, the rule had been established that regard must be had to the value of the articles at the time of the sale, then the estate has lost nothing.

As the opinion of this Court is against the conclusion of the Circuit Judge, we will confine our comments to the ground on which he rested it. Questions arising on contracts entered into during the late war have been submitted in so many forms, that it is not necessary, specifically, to refer to the decision which has been made on each of them. The general principle which has guided the judgment of the Court, was to ascertain the intention of the parties, when this could be collected from the terms of the agreement, subject to the effect of such testimony as the ordinance recognized as competent.

The words of the ordinance are so general

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that they embrace *every action arising on any contract whatsoever, whether under seal or parol, written or oral, made between 1st January, 1862, and the 15th of August, 1865.

In all of them "it shall be lawful for either party to introduce testimony shewing the true value and real character of the consideration of such contract, so that, regard being had to the particular circumstances of the case, such verdict or decree may be rendered as will effect substantial justice between the parties." As was said, in *Rutland v. Copes*: "It would have been difficult for the Convention to have used language of a more comprehensive character."

The object of the Convention was to carry out the intention of the parties, and to provide a rule of evidence which might aid in conducing to that end. In every contract (made within the prescribed period) the intention was to govern, when it could be ascertained, and the ordinance afforded an additional facility for its discovery. Does an exception prevail where the notes are expressed to be payable "in current funds?" It is not necessary to consider whether, in legal acceptance, the use of such words is regarded as referring to funds current at the date of the transaction, or at the time of payment. Conceding, for the argument, that they are to be understood from their face as referring to the currency which may prevail when they fall due, still, if by competent evidence it can be shown that they were understood as referring to that which prevailed at the time of the contract, the intention, when ascertained, must prevail as the rule which the parties had adopted, and by which they were to be governed. On the one hand, the maker might be allowed to show, by satisfactory proof, that gold or silver coin was not intended to be the medium of payment, and, on the other, the payee might show that if, at the expiration of the credit, the Confederate money, the only circulating medium at the time of the contract, should still further depreciate in value, he was not to be held bound to accept it as satisfaction. There is, at least, reciprocity in the rule.

It is objected that the ordinance could no more apply to a note payable "in current funds," than if expressed to be payable "in gold." This assumes that, in a note of the latter character, testimony under the ordinance could not be admitted to show "the true value and real character of the consideration of such contract at the time it was made, so that regard being had to the particular circumstances of each case, such verdict or decree may be rendered as will effect substantial justice between the parties."

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*In the opinion of the Court in *Rutland v. Copes*, 15 Rich., 115, it is said: "If the contract in question had specified the payment of so many dollars in gold, it would be difficult to perceive how, under the ordinance, testimony could be excluded as to 'the true value and real character of the consideration.' What weight the jury might be bound to give to such evidence, when introduced, is

another question. Although a note might be so payable, yet in order to effect 'substantial justice between the parties,' it might be competent and important to inquire into the true value and real character of the consideration of the contract at the moment it was made, for it may have been based upon a gold standard fixed at the time, either in reference to United States or Confederate currency, or to the value of gold when the paper fell due, or its market value at the end of the war."

In *Bobo v. Goss* (1 S. C., 262) this Court set aside the verdict because the presiding Judge, after admitting the evidence to shew the true value and real character of the consideration, directed the jury "to reduce the amount appearing by the face of the note to be due, to the standard of Confederate money at the date." He did not leave it to them to decide "so that substantial justice" should be effected, but submitted an arbitrary rule, founded on his own conception, for their direction. The testimony, too, proved that the consideration, so far from being one of Confederate money, was founded on a basis of a totally different character. The Court, in its opinion in that case, said that "as the declared purpose of the ordinance was to secure such verdict or decree as will effect substantial justice between the parties, any verdict finding less than the true amount for which they had expressly stipulated would fall short of that substantial justice which they had established for themselves, and by which they had agreed to be regulated by the very language of their contract."

In *Thorington v. Smith*, 8 Wal., 14 [19 L. Ed. 361], the evidence was allowed, for the same reason that the ordinance authorized its admission, to shew the intention, in order that "justice may be done between the parties;" and *Bronson v. Rodes* [7 Wall. 229, 19 L. Ed. 141], and *Butler v. Horwitz*, 7 Wallace, 258 [19 L. Ed. 149], gave effect to such intention, to be ascertained from all the circumstances; and yet, in both these cases, the written obligation was to pay in gold and silver coin.

If it were necessary for the purpose in this case, it might be shewn that a wide difference exists as indicative or expressive of intention between a promise to pay in gold and silver

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coin, and one to pay in 'current funds.' In the first, the mode of payment may be said to refer to a medium of definite and known existence in a commodity having value in itself, while in the latter, the nature of the "funds" depending on a paper currency changing from time to time would be uncertain in value as compared to gold, the recognized standard of all values.

We do not perceive any difference between this case and that of *Craig, et ux., v. Pervis*, et al., 14 Rich. Eq., 150, or why the rule there enforced should not be applied here. In that case the note was given, in 1864, for \$1,000,

payable at the end of the war, without interest. Parol evidence was admitted to shew that, when due, it was to be paid in whatever money might then be current: and it was in consideration of that fact that no interest was charged. The Chancellor held that, notwithstanding the proof of the funds in which it was to be paid, it was subject to the provisions of the Ordinance, and the Court of Appeals sustained the decree, fixing the amount in favor of the plaintiff at \$81.63, with interest from the date of the note.

In *Harmon v. Wallace*, (ante, p. 208,) the single bill declared on was dated in 1863, payable in January, 1866, "in current funds." As no objection was made, on the trial, to the introduction of testimony to shew the true value and real character of the consideration, the question of the competency of the evidence was not directly involved. In the opinion pronounced here the case was referred to as one well calculated to shew the necessity of sometimes looking beyond the mere force of the language employed to discover the purpose and object of the parties through the words which they used to indicate their agreement. The mode of accomplishing this was provided by the Ordinance.

In the case in hand the proof was conclusive that the United States currency was not the medium of payment intended by the sellers and purchasers. The articles were bought at "Confederate prices," (to use the language of the brief,) and the right was reserved to the bidders to pay, if they pleased, in the then much depreciated currency.

The adjustment made by these executors, under the circumstances, can be viewed in no other light than as fair and reasonable, and in good faith to the trust confided to them.

It is ordered and adjudged that the decree of the Circuit Judge be set aside, and the case

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remanded to the Court of Common Pleas *for the County of Barnwell for such orders as may be necessary to give effect to the judgment now pronounced.

WRIGHT, A. J., concurred.

WILLARD, A. J. I do not deem it necessary to a decision of the present case to consider the force or effect of the ordinance of 1865. No question is raised as to the admissibility of evidence to shew what was the standard of value with reference to which the price of the property was adjusted. It is admitted that Confederate currency constituted this standard.

We have already held that contracts made with reference to Confederate currency, though maturing after such currency passed out of use, are to be treated in the same manner as contracts that matured while such currency was in general use.—*Neely v. McFadden*, (ante, p. 169.)

The fact that the contract was made payable at a future date in "current funds" does not change the rights of the parties in this respect. The object of this clause was to fix the character of the commodity by means of which the obligation of the contract might be discharged, while the present question concerns the nature and extent of the obligation itself. Under the decision in *Neely v. McFadden*, the true question is, what the parties meant by the terms employed by them under which they expressed the nature and extent of the obligation assumed. In the present case this is ascertained by the admission that the sale was effected according to the value of Confederate money.

The only question made being that the contract of sale should have been enforced with reference to the value of lawful money, the decree below should be reversed.

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*R. R. ROSBOROUGH v. J. M. RUTLAND and Others.

J. M. RUTLAND v. R. R. ROSBOROUGH and Others.

(Columbia. Nov. Term, 1870.)

[Wills ⚡821.]

Lands specifically devised will not be charged with the payment of a pecuniary legacy where no motive existed which could have influenced the mind of the testator to create the charge, and there is nothing in the will which can be laid hold of for that purpose.

[Ed. Note.—Cited in *Kirkpatrick v. Chesnut*, 5 S. C. 219.

For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. ⚡821.]

Testator, who died in November, 1860, bequeathed \$2,000 to R, in trust for certain slaves. He devised land and slaves to A, specifically; made him his residuary devisee and legatee; appointed him his executor; authorized him to pay the \$2,000 to R, in cash, or to give his bond or note for that sum, with interest, payable annually, and declared that, if A should attempt to defeat or make void his will, or any part thereof, every devise and legacy to him should be void, and go to others. In December, 1860, A gave his sealed note to R, for the \$2,000 and an action of law having been commenced upon it, he filed a bill in Equity to enjoin the action, on the ground that the legacy being void under the Act of 1841, prohibiting legacies for the benefit of slaves, the sealed note was without consideration and void, as against public policy:

[Executors and Administrators ⚡307.]

Held that A had no equity to be relieved against the consequences of his own voluntary act in giving the note, and that he must be left to defend himself at law as best he could.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1251; Dec. Dig. ⚡307.]

[Executors and Administrators ⚡303.]

Held that, as between A and R, the note must be regarded as payment, or satisfaction, of the legacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1229-1242, 1245; Dec. Dig. ⚡303.]

[Wills ⚡225.]

Neither creditors of the estate, nor of the executor, in his individual right, can, merely as such, acquire a locus standi in Court, entitling them to have a legacy declared void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 547; Dec. Dig. ⚡225.]

Before Boozer, J., at Fairfield, July, 1869.

A statement of the case and of the points made in the grounds of appeal is contained in the opinion of the Court.

Carroll & Melton, for appellants:

1. The testator's intention to charge the legacy to Rutland, upon the land specifically devised, is neither expressly declared, nor is it fairly and satisfactorily to be inferred from the language and dispositions of the will.—*Lupton v. Lupton*, 2 Johns. Ch., 623; *Laurens v. Read*, 14 Rich. Eq., 270; 1 Story Eq., § 565; *Rightley v. Rightley*, 2 Ves., 328, and note, page 332; *Pell v. Ball*, Speer's Eq., 524; 1 Roper, Legacies, 682.

2. The proposition that the legacy of \$2,000, to Rutland, is charged upon the land devised to R. R. Rosborough, conflicts with the express provisions of the will, and with the means and scheme devised by the testator for securing the payment of that legacy.

3. If such charge ever existed it was extinguished by the single bill dated 13th December, 1860, executed by Rosborough, and accepted by Rutland in payment of his lega-

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cy.—2 Williams' Ex'rs., *1866; *Gardner v. Hust*, 2 Rich., 608; *American Notes to Cumber v. Wane*, 2 Smith Lead. Cas., 460.

4. The legacy of \$500 to Mrs. Thomas is expressly charged upon the "property" devised to R. R. Rosborough; and, if the supposed charge of Rutland's legacy upon the land devised still subsists, so, also, must the charge upon the same of the legacy to Mrs. Thomas.—*Pell v. Ball*, Speer's Eq., 83.

5. If the devise to Rosborough was upon condition that he should pay the legacy to Rutland, then the condition, being illegal, was void, and the limitation over ineffectual, and the devise became single and absolute.—1 Roper's Legacies, 783, 786; *Co. Litt.*, 206, 223; *Poor v. Mial*, 6 Mad., 32.

6. The executor, Rosborough, is not estopped from denying the legality of the legacy to Rutland, that legacy being utterly and absolutely void, even as between the executor and the legatee.—*McLeish v. Burch*, 3 Strob. Eq., 225; *Blakely v. Tisdale*, 14 Rich. Eq., 90.

7. As to the loss of so much of the assets as consisted of negro slaves and debts due to the testator at his death, the executor is entitled to relief upon the grounds of mistake and accident.—1 Story's Eq. Jur., §§ 90, 93; 2 Story's Eq. Jur., §§ 878, 1251; *Edwards v. Freeman*, 2 P. Wms., 447.

8. The mere order of General R. Ely, a subordinate official in the Freedman's Bu-

reau, has not the force or effect of a judgment pronounced by a Court of competent jurisdiction, nor has it been affirmed or made valid by the Act of 22d September, 1868.

Rion, contra.

July 7, 1871. The opinion of the Court was delivered by

WILLARD, A. J. J. C. Rosborough died November 29, 1860, leaving a will by which, after providing for the payment of debts and funeral expenses, and appropriating specifically the proceeds of certain real estate, directed to be sold, to the payment of a debt due for the purchase thereof, he proceeds to dispose of his estate, real and personal, as follows, viz: to R. R. Rosborough the plantation on which testator resided at the time of his death, together with certain slaves by name, with directions as to a portion of such slaves; also certain other slaves by name in trust for the separate use of the wife of the legatee for life, with remainder over; to Jennet Kennedy certain slaves, on

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condition that she pay to *Jane F. Thomas \$500; to Jane F. Thomas \$500, to be paid by R. R. Rosborough out of the property given to him by such will; also to James M. Rutland a slave by name absolutely, and \$2,000 to be held by him in trust for certain of the slaves included in the bequest to R. R. Rosborough, leaving it to the discretion of R. R. Rosborough either to pay to Rutland the sum of \$2,000, in cash, or to give a bond or note for that sum, with interest, payable annually; to R. R. Rosborough the residue of his estate, upon certain conditions not involved in the present case. Testator then gives certain directions as to the kind treatment of the slaves intended as the objects of his bounty in the legacy of \$2,000. Then follows this language: "And if my brother, after receiving this my bounty, shall attempt to depart from or defeat the objects of this my last will and testament, or make void or ineffectual any part of the same, then, and in that case, it is my will that every devise and bequest hereinbefore made to him shall be entirely null and void; and all the property, real and personal, which otherwise would have passed to him, under this my will, I direct to be divided among the rest of my next of kin, according to the statute of distributions of this State, excluding my said brother." (R. R. Rosborough.) R. R. Rosborough was appointed executor, and qualified and assumed the execution of the will.

The bill in the first case above named was filed by R. R. Rosborough against J. M. Rutland, J. F. Thomas and Jennet Kennedy. It alleges that the testator was possessed of a large estate, consisting of lands, slaves and personalty; that debts against the estate were outstanding to the amount of from \$11,-

000 to \$12,000, and about a like amount was due to the estate; that the debts have been paid by substituting the individual obligations of the complainant therefor.

It alleges that the estate has become seriously injured by the devastations caused by the war, the premises injured and the stock carried away, and that the slaves have been lost through emancipation. It asks that, if necessary, the land may be sold to pay debts. It alleges, among other things that will be noticed hereafter, that on the 13th of December, 1860, complainant gave to J. M. Rutland his single bill for \$2,000, payable on or before the first day of January, 1862, with interest from January 1st, 1861. This single bill was executed in pursuance of the eighth clause of the will, to provide for the support of the slaves named as beneficiaries under the bequest of \$2,000. It is further alleged that this note has been put in suit by the trustee, and prays that the suit may

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be enjoined. *There is a prayer for liberty to the complainant to account as executor. It is submitted to the Court whether the legacy to J. M. Rutland should abate, under the circumstances detailed in the bill, and, also, whether the legacy to Jane F. Thomas should abate, and a decree is asked that the legacy of Jane F. should abate before resort had to the land specifically devised to the complainant.

The defendant, Rutland, answered, affirming the validity of the legacy of \$2,000, and claiming that the question of its validity had become conclusively adjudicated by some action taken under the authority conferred by Congress on the Freedman's Bureau. It does not appear by the brief whether the other defendants appeared and answered the bill, or whether it was taken as confessed against them.

The bill, in the second case, was filed by J. M. Rutland against R. R. Rosborough, James L. Rosborough, James T. Rosborough and Jane F. Thomas. It prays that the legacy of \$2,000 may be charged upon the real estate devised to R. R. Rosborough, and that the defendants, James L., James T. and Jane F., be restrained from enforcing against said lands judgments obtained against R. R. Rosborough on individual obligations given by him.

All of the defendants to this last bill answered, R. R. Rosborough separately, and the other defendants jointly. J. T. and J. L. Rosborough and Jane F. deny that the legacy to Rutland is a charge on the devised lands; they submit that it is a pecuniary legacy merely, subject to their judgments, and that it is subject to abatement.

The decree of the Circuit Court establishes the following propositions of law and fact, which, so far as they are not called in question by the grounds of appeal, are to be regarded as finally settled, viz:

1st. That the complainant, R. R. Rosbor-

ough, cannot dispute the validity of the legacy to Rutland.

2d. That, as between all other persons except creditors, the legacy must be supported.

3d. That the assets received by the executor were, at the death of the testator, amply sufficient to pay debts and legacies.

4th. That the executor paid by his own obligations most of the debts, and the estate was discharged to that extent.

5th. That the executor is not entitled to be subrogated to the rights of the creditors, whose debts he paid with his individual obligations, as it regards priority of payment out of the devised lands.

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*6th. That the legacy to Jane F. of \$500, to be paid by Jennet Kennedy, has failed and cannot be enforced.

7th. That the legacy of Jane F., to be paid by the executor, cannot be disputed; first, for the reason that there was express direction it should be paid out of the property given to him; and, second, because the executor has assented to the legacy.

8th. That all the other specific legacies have been fully satisfied by the executor, and that this legacy is chargeable on the property devised to the executor.

9th. That there is yet remaining a small amount of debts unsatisfied, and not assumed by the executor, that must be paid before the legacy in question.

10th. That the land and other property devised to the executor is chargeable with the payment of the legacy of \$2,000 to Rutland.

The decree appears to regard the legacy as established by the action of the Freedman's Bureau, but the decision is not put specifically on this ground.

It is accordingly decreed that Rutland, as trustee, recover from R. R. Rosborough \$3,041.11, the balance due for principal and interest on the legacy, and that he have the process of the Court for the purpose of making the tract of land liable for the legacy by levy and sale; also that J. L. and J. T. Rosborough and Jane F. Thomas be perpetually enjoined from enforcing their judgments and executions against the said tract of land. A subsequent decretal order was made to prevent waste by R. R. Rosborough. The first seven grounds of appeal present, under different aspects, the question of the validity of the legacy to Rutland, and are, in substance, that the legacy in question was void, under the Act of 1841, (11 Stat., 154) declaring null and void all devises and bequests made to or for the use of slaves; that that Act was based on grounds of public policy, and, therefore, the assent of the executor could not impart validity to the legacy; that emancipation cannot be allowed a retroactive effect; that Rutland was not competent to take, or, if competent, that he took for the next of kin; that the assent of the executor ought not to bind him or those likely to be

affected by his act—and this proposition is placed upon the peculiar disaster that affected the estate after the assent was given, and also on the bearing of the Act of 1841 on the right of assent: that no proceeding was requisite to declare the legacy void, it being made void by the statute: and, finally, that if

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R. R. Rosborough cannot *attack the legacy in his character as executor, he certainly can in the character of legatee and creditor.

The eighth ground of appeal asserts the right of James L. and James T. Rosborough and Jane F. Thomas to object to the validity of the legacy in question as creditors, alleging that the notes taken by them of the executor are unpaid, and are no satisfaction until paid.

The tenth ground of appeal claims that the \$2,000 legacy should abate before the devise of the land which is specific, there being a failure of assets to pay debts and legacies.

The eleventh ground disputes the authority of the Freedman's Bureau to affect the question.

The twelfth ground claims that the decree improperly ignored the fact that, if the executor forfeited his right, it went to the next of kin, under the terms of the will.

The foregoing were all the grounds of appeal that were presented on the first argument in this Court: but upon the re-argument two additional grounds were added under an arrangement of the respective counsel. The thirteenth ground, therefore, as the case now stands, is that the legacy of \$2,000 was not charged, but, if so charged, the giving of the single bill was a satisfaction of that legacy.

The fourteenth ground is, that the land devised is charged with the legacy of \$500 to Jane F. Thomas.

The thirteenth ground will be first considered, as it involves all that is necessary to be considered in order to dispose of the bill brought by Rutland against the other parties. That bill, as we have seen, seeks to charge the legacy of \$2,000 on the land devised to R. R. Rosborough, and claims that the defendants, James T. and James L. Rosborough, and Jane F. Thomas, be perpetually enjoined from enforcing their judgments against R. R. Rosborough. It cannot be claimed that any other reason exists for enjoining these defendants than that involved in the prayer that the devised land be charged with the legacy in question. Therefore, unless such a charge can be established, the bill must be dismissed. The legacy of \$2,000 is not in terms charged upon the land devised. To make out an intention to charge it by construction, the first step is to show the existence of a motive which can be presumed to have influenced the mind of the testator. To relieve the personalty or the residuary devises or bequests, or to establish a preference among pecuniary legatees, might be assumed

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*as a sufficient motive when such an intent appeared. But no such motive existed in the present case. R. R. Rosborough is both devisee of the land and residuary legatee of both realty and personalty. The legacy to J. F. Thomas is the only pecuniary legacy other than the legacy in question, and that is specifically provided for. It is not, therefore, possible to find a motive upon which a charge can be constructed. Nor is there anything in the will which can be laid hold of for such purpose. It is clear that the legacy in question was not intended to be a charge on the lands devised to R. R. Rosborough. The whole foundation of the bill brought by Rutland against R. R. Rosborough and others fails, and that bill must be dismissed.

The next question to be considered is, whether R. R. Rosborough is entitled to a perpetual injunction, to restrain the action at law commenced by Rutland to recover the amount of the single bill.

It does not appear whether the suit at law was commenced against R. R. Rosborough in his representative character or personally. As the single bill was his personal obligation, it must be assumed that the action is against him, personally. He is, therefore, alone interested in so much of the matter of his bill as seeks to enjoin the suit at law. The present question must, therefore, be disposed of on the state of the relations, legal and equitable, between Rutland, as trustee, holding the single bill, and R. R. Rosborough, the maker. If the single bill is void, as contravening the Act of 1841, or for want of consideration, that is a defence at law. Equity will not interfere, by way of staying proceedings at law, in order to enforce the prohibitions of a statute in the nature of a penal statute, and based on public policy alone, especially when in derogation of common right and natural equity. Such is the Act in question. Is there, then, any equity in the relations of the parties to the single bill requiring that Rutland should be enjoined from exercising any legal rights that he may have under the single bill? Had the legacy to Rutland been valid, R. R. Rosborough would have stood in the relation of a trustee for the use of the legatee,—*Boone v. Durand*, 1 Dess., 588. His obligation, voluntarily given, was a recognition of this relation. But, in addition to this, he is placed in the position of a purchaser in possession of the subject-matter of the purchase, seeking to avoid an obligation for the purchase money. Under the will, the condition upon which he took as devisee and legatee was, among other things, the payment

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of this legacy. As*suming that he was not bound to do so, still, he voluntarily gave the single bill, as he was authorized to do by the terms of the will. In the mind of the testator the legacy was consideration in its bearing on R. R. Rosborough's possible right as dev-

isee and legatee. It was evidently upon this idea that he gave the single bill from which he seeks to be relieved. New rights and relations have sprung out of this voluntary transaction upon which the equities before the Court, as between R. R. Rosborough and Rutland, depend. Nor is it necessary to look into that portion of the will alleged to be invalid in order to fix the character of these rights. The executor's bill and his answer in the Rutland case present them in a condition to be administered in a Court of Equity. Conceding that a valid trust could not be created of the nature of that attempted by the legacy to Rutland, still the prohibition of the Act of 1841 only extends to devises and bequests. Had R. R. Rosborough conveyed the devised land in trust for the benefit of slaves, that Act would not have affected its validity, although a question would have arisen in that case as to who was, under the law existing at the time of such transaction, ultimately entitled to the beneficial interest raised by the trust.—*Blakely v. Tisdale*, 14 Rich. Eq., 90.

So far as R. R. Rosborough is concerned, the effect is the same as if he had so conveyed, for instead of so doing he has taken the land to himself and substituted his obligation in the place of it. The question of the validity of the trust, as between the trustee and cestui que trust, is not before us now. Nor is that of the legal consequences from such trust, in view of the laws existing at its creation, or of the changes of legal relations and conditions that have since taken place. Apart from the reasons given by the Circuit Judge for his decision, we concur in the conclusion to which he arrived, that R. R. Rosborough cannot assert the invalidity of the legacy to the destruction of the rights created by his own act. R. R. Rosborough has no standing in a Court of Equity to ask that the suit at law upon the single bill be stayed.

Having disposed of Rutland's bill, and so much of R. R. Rosborough's bill as seeks to enjoin the suit at law, all that remains to be considered is so much of the matter of the latter bill as seeks an accounting of the executor and marshalling of assets.

The question next arises whether there are any parties before the Court, either in person or represented by the executor, who have a right to demand either that the legacy to

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Rutland shall be declared *void or shall abate? J. L. and J. T. Rosborough and Jane F. Thomas, as creditors, whether of the estate or of R. R. Rosborough personally, have no such right. If creditors of the estate, they are entitled to subject the whole estate to the payment of the debts. The legacies are not in their way, and they are entitled to be regarded in no other light, in reference to this question, than as volunteers in a controversy in which they have no interest.

The Circuit decree has disposed of the legacy of \$500 to be paid by J. Kennedy to J.

F. Thomas, holding that it had failed, and no appeal is taken from that part of the decree. The only other pecuniary legacy is that of \$500, payable by R. R. Rosborough out of the lands devised. This legacy is established by the decree, and is entitled to be paid before any fund coming into the hands of the executor can be applied to the payment of his individual debts. Except so far as the executor may have made himself responsible by the voluntary giving of the single bill, this Court is not at liberty, under the Act of 1841, to enforce the provisions of the will as to the legacy of \$2,000 to Rutland. If there is a remedy at law—a matter that we are not here called upon to decide—it must be against R. R. Rosborough personally.

The claim made by the tenth ground of appeal, that the legacy of \$2,000 should abate before the devise of the land, which is specific, there being a failure of assets to pay debts and legacies, is already disposed of by what has gone before.

As affecting R. R. Rosborough in reference to a right of abatement, the legacy of Rutland must be regarded as paid. He gave his personal obligation, as he was authorized to do by the terms of the will. Under the circumstances, he has no equity to ask to be relieved from the consequences of the course that he pursued in this respect, and to be let in at this time to the benefit of an abatement.

While, on the one hand, this Court cannot apply the assets of the estate to the payment of the legacy, it cannot, on the other hand, relieve the executor from any liabilities that may result, at law, from his action.

The matter of the eleventh, twelfth and fourteenth grounds of appeal is substantially disposed of by the conclusions heretofore expressed.

So much of the decree as adjudges the sum of \$3,041.11, as due from R. R. Rosborough, as executor of the last will and testament of J. C. Rosborough, deceased, to J. M. Rutland, and as awards execution for the same, for

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the purpose of making the tract of land, *described in the pleadings liable for such amount by levy and sale, and so much as enjoins James L. Rosborough, James T. Rosborough and Jane F. Thomas from enforcing their judgments and executions against the said tract of land, must be set aside, and the cause remanded to the Circuit Court for the taking and stating of the executor's account, and the sale of the real estate under the order and decree of the Circuit Court, should the liabilities of the estate demand that the same be sold, and such decree and order as may be requisite to conform to the principles hereinbefore laid down.

WRIGHT, A. J., concurred.

MOSES, C. J. I concur in the conclusions to which a majority of the Court has arrived. As to so much of the bill of Rosborough as

seeks to enjoin the action at law on his obligation, I cannot perceive anything which entitles him to the interference of a Court of Equity. His defense resting, as he submits, on the invalidity of the condition annexed to the devises and bequests to him under the will, is one purely of a legal character, and there is nothing in the aspect of his bill which should permit that Court to interfere with the Court of Law in passing on the validity of the Act of 1841, and deciding upon its effect in the cause before it. These are matters for the Court of Law.

Whether the instrument is void for want of consideration, or whether Rosborough has done any act which avoids the consequences of the said statute, is for the consideration of that Court.

What may be the rights resulting from the judgment of such Court, the one way or the other, cannot be passed upon until proceedings following the decision of the said cause shall be brought by the proper parties before a Court of competent jurisdiction.

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*JONAS BYRD and Others v. THOMAS R. SMALL.

(Columbia. Nov. Term, 1870.)

[*Appeal and Error* ⇨110.]

An appeal does not lie from an order of the Circuit Judge granting a new trial for error of fact in the verdict of a jury.

[Ed. Note.—Cited in *Massey v. Adams*, 3 S. C. 263; *Gilliland, Howell & Co. v. Gasque*, 6 S. C. 409.

For other cases, see *Appeal and Error*, Cent. Dig. § 746; Dec. Dig. ⇨110.]

[*Appeal and Error* ⇨110.]

Before an appeal from such an order will be entertained, it must be apparent that some question of law was involved which influenced the decision of the Judge.

[Ed. Note.—Cited in *Cureton v. Hutchinson*, 3 S. C. 607; *Steele v. Charlotte, C. & A. R. Co.*, 14 S. C. 332; *Southern Power Co. v. White*, 92 S. C. 221, 75 S. E. 459; *Daughly v. Northwestern R. Co.*, 92 S. C. 364, 75 S. E. 553.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 740-748; Dec. Dig. ⇨110.]

Before Carpenter, J., at Charleston, February Term, 1870.

This was an action of trespass to try title, commenced in June, 1869.

The jury found a verdict for the plaintiffs, and the defendant moved for a new trial on the Judge's minutes, on the grounds: "1. That the verdict is against evidence. 2. That the verdict is against law."

His Honor granted the motion, and made an order as follows:

"Ordered that the verdict be set aside, and a new trial granted."

The plaintiffs appealed, and stipulated that, if the order be affirmed, judgment absolute should be rendered against the plaintiffs, and in favor of the defendant.

Chamberlain & Seabrook, for appellants.
Corbin, contra.

The opinion of the Court was delivered by

WRIGHT, A. J. In this case a verdict having been rendered for the plaintiffs, a motion was made, on the part of the defendant, to set it aside, on the ground that "it was contrary to law, as stated in the charge of the Judge, and contrary to the evidence."

The Circuit Judge "ordered that the verdict be set aside, and a new trial granted," from which order the plaintiff has appealed.

By the 288th Section of Chapter III of the Code, p. 485, the Circuit Judge, before whom a cause has been tried, may entertain a motion "to set aside a verdict, and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages." The authority so conferred is without limit or restraint; but his judgment is subject to the correction of this Court when his order granting or refusing a new trial involves a question of law. The decrees of all Courts of final jurisdiction are, of course, conclusive.

Where they may take cognizance of ques-

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tions of fact, as well as of law, and both arise in the same case, if they find error either on the part of the Judge, or the jury, the result must be a new trial. If the question before them is confined to one of fact, the motion must turn upon the view which they take of the evidence, and in this regard they must be governed by their own sound legal discretion. Under the organization of the Courts of this State, prior to the adoption of the Constitution of 1868, the Circuit Court had no power over new trials—it was vested in a separate Court of Appeals, which entertained motions to set aside the verdict and grant a new trial, even where no complaint was made against the ruling of the law by the Judge below, and where the only error assigned was the wrong conclusion of the jury as to the facts in proof. As this Court has "appellate jurisdiction only in cases of chancery," and is constituted "a Court for the correction of errors at law," no questions of fact arising in an action at law can be determined by it. If, therefore, it does not appear that the order of the Circuit Judge granting the new trial was founded on an erroneous view of the law, we are without authority to interfere with it. No appeal can be entertained by this Court unless it is apparent that some question of law was involved which influenced the Court below in the result at which it arrived.

In other words, there must be a negation of all inference that the order below was based alone upon a consideration of, and conclusion from, the facts. In *Miller v. Schuyler*, N. Y., 20, 6 Smith, 522, it was held that "upon an appeal from an order granting a new trial the judgment cannot be reversed

unless the case negatives inference that the Court below may have granted the new trial because it came to a different conclusion upon the facts from that found in the original trial." See also *Morn v. Liverpool and London Fire Ins. Co.*, N. Y., 35, 8 Tiff., 644; *Baldwin v. Van Densen*, N. Y., 37, 10 Tiff., 487. In the case in hand, there is nothing in the record to show that the order granting a new trial was founded on some error of law, and we are therefore without power to entertain the appeal.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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*A. A. McMILLAN v. JAMES S. McCALL and Others.

(Columbia. Nov. Term, 1870.)

[*Appeal and Error* §90, 119.]

In February, 1870, an order was made that plaintiff give security for costs on or before the 1st May, 1870, or be non-suited. He failed to comply with the order, and the Clerk having refused to enter judgment defendants obtained a rule against him to show cause, at June Term, 1870, why he should not be attached for contempt. On return to the rule an order was made discharging the rule, re-instating the action on the docket without prejudice, and giving plaintiff further time to comply with the previous orders: *Held*, That as neither of the orders made in the cause was final or involved the merits, the Supreme Court had no jurisdiction to review them.

[Ed. Note.—Cited in *Cureton v. Hutchinson*, 3 S. C. 607; *Chichester & Co. v. Hastie*, 9 S. C. 334; *Williams, Black & Co. v. Connor*, 14 S. C. 621; *Dulany & Co. v. Elford & Dargan*, 22 S. C. 307; *Johnson v. Cobb*, 29 S. C. 377, 7 S. E. 601; *Bomar v. Railroad Co.*, 30 S. C. 458, 9 S. E. 512; *Cummings v. Wingo*, 31 S. C. 427, 433, 10 S. E. 107; *Brown v. Easterling*, 59 S. C. 477, 38 S. E. 118.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 611, 838; Dec. Dig. §90, 119.]

[This case is also cited and overruled in *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118.]

Before Rutland, J., at Marion, June Term, 1870.

Appeal from orders made in the case stated, and two other actions against the same defendants. The case is stated in the judgment of the Circuit Judge, which is as follows:

"At the February Term of this Court, the plaintiffs in each of these aforesaid cases, being resident beyond the limits of the State of South Carolina, were required by order of the Court, at the instance of the defendants, to give proper security for the costs of the said actions, on or before the first day of May, A. D. 1870, or be non-suited. At the present term of this Court, a rule was issued against W. W. Brady, Clerk of the Court of Common Pleas, requiring him to show cause why he had refused to enter non-suit on the

said three cases, because of the failure on the part of the plaintiffs to comply with the aforesaid order of this Court. To this rule, the Clerk returned for cause, that on the 30th day of April, 1870, the plaintiffs, by J. M. Johnson, one of their attorneys, deposited with him one hundred dollars, which he did not regard as sufficient, but became satisfied, upon being assured in writing by the said attorney, that more would be deposited, if desired. The terms of the said rule and return thereto will appear fully from the originals on file, and which this judgment is intended to accompany. An order was asked for by defendants' counsel to discharge the said rule against the Clerk, upon his entering a non-suit, in said actions, against the plaintiffs. The plaintiffs appeared by counsel, and resisted the granting of the said order of discharge in terms aforesaid, contending that the Clerk was not in default, nor the plaintiffs subject to non-suit, because the order of the Court, requiring security, if not literally, at least had been substantially complied with. They further contended, that even if a non-suit had been suffered by the strict operation of law, according to the terms of the order of February last, yet under the 197th Section of

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the Code, in force May 1, 1870, *the Judge, in the exercise of his discretion, could vacate, set aside and reverse the said judgment of non-suit, on such terms as the Court might deem calculated to further the ends of justice. These propositions of law were stoutly disputed by the counsel for the defendants, in said three cases. The Court is of opinion that the plaintiffs, having failed fully to comply with the order of February last, did, on May 1, 1870, become non-suited: but that the same arose by mistake, or, at furthest, excusable neglect on their part, and not a willful disregard of the order of the Court, and that, being willing still to comply with any further requirements in this regard, they are entitled, under the peculiar circumstances of the case, to be reinstated in Court without prejudice. Wherefore, it is ordered and adjudged, that the rule against the said Clerk be discharged; that the said judgment of non-suit be set aside, and the parties plaintiff be re-instated in Court, with their actions on the docket or calendar as before, and without prejudice because of said judgment herein vacated. Ordered, further, that the previous order of February last be so modified as to allow the said plaintiffs to comply fully therewith, on or before July 1, A. D. 1870, and failing so to do, that they be absolutely non-suited."

The defendants appealed, and now moved this Court to reverse the order, granting further time to the plaintiffs to put in security for costs, and for an order requiring the Clerk of the Court of Common Pleas for

Marion County to enter up judgment of non-suit in the above stated cases, upon the following grounds:

1. Because the time for entering security for costs having expired without entry of the same, the defendants were entitled to enter judgment of non-suit.

2. Because His Honor Judge Rutland had no authority to extend the time within which plaintiffs should enter security for costs.

Warley & McKerrall, McIver, for defendants:

An order requiring non-resident plaintiff to put in security for costs, can only be complied with in one of two ways. Either by the entry of security in a certain prescribed form on the back of the record, or by a deposit of a sum of money with the Clerk sufficient to secure the costs.—*Boyd v. Graham*, 2 Hill, 558; 74th Rule of Court. *Miller's Comp.*, p. 44; 22d Sec. Act of 1839, XI Stat., p. 77.

An order that the plaintiff give security

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for costs by a day certain is final, after the expiration of the time limited, and unless it has been previously modified or rescinded, the Court possesses no authority subsequently to extend the time for complying with the requisition.—*McCullum v. Massey & McNeill*, 2 Bail, 606; *Fonville v. Rich-ey*, 2 Rich., 10; *McDermaid v. Earnest*, 4 Strob., 322.

Hudson & Johnson, Sellers, contra:

The particular form of security for costs, under order of the Court, is fixed by the 74th Rule of Court, which, like all rules of practice, is not to be so rigidly and arbitrarily construed and enforced as to inflict hardship upon suitors and defeat the ends of justice, but, in the exercise of a sound discretion by the Judge, may be so construed as to promote the same.—*Boyd v. Graham*, 2 Hill, 558; *Furman v. Hannan*, 2 McC., 442.

A substantial compliance with an order of Court should be accepted in good faith, and avert the penalty of willful disregard. In this instance the honest intention of plaintiffs substantially to comply with the order, and, in fact, the substantial compliance therewith, are apparent, and the defendants have suffered no damage from disobedience thereof.—*Ferret v. Wilson*, 3 Hill, 340; *Furman v. Hannan*, 2 McC., 442; *McCullum v. Massey and McNeill*, 2 Bail., 606.

A non-suit is not suffered until an unconditional order and absolute judgment of the Court to that effect has been entered up, to which moment the Court holds itself free to exercise its discretion in rendering or declining the judgment. The Clerk cannot enter up a judgment which has never been rendered. Wherefore the motion in this case, coming in the particular form presented, might well have been, and should have been, refused by the Court, on the ground of

irregularity, the Clerk being without authority to have done as desired. The cause was open for amendment until final judgment.—*Simpson ads. Bank*, 2 Speer, 45.

The ordering of a non-suit is discretionary with the Court. In the exercise of a sound discretion, under the facts and circumstances of these cases, the strict rules of our former practice would not have justified the ordering of a final judgment of non-suit.—*McDermaid v. Earnest*, 4 Strob., 192.

If, according to the strict interpretation of the 74th Rule of Court, the plaintiffs could be said to stand absolutely non-suited on the first day of May, A. D. 1870, certainly, under the wise and liberal provisions of Sec-

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tion 197 of the Code, the Judge had the authority to grant the order he did restoring the plaintiffs to their unprejudiced standing in Court, and his discretion was wisely exercised in so doing. Circuit Judges possessed similar powers to set aside the final and interlocutory judgments before the adoption of the Code.—*Thomas v. Brown*, 1 McC., 557; *Sergeant v. Wilson*, 2 McCord, 512; *Evans v. Parr*, 1 McCord, 283; *Messervey v. Hillier*, 12 Rich., 483; *Walton v. Parsons*, 4 McC., 368; *Code*, Sec. 197.

The Supreme Court will not disturb or reverse the order, decree or judgment of the Court below in matters permitting the exercise of a sound discretion, unless hardship and injury to the party cast, or gross abuse of discretion and error of judgment be shown.—*Code*, Sec. 197; *Messervey v. Hillier*, 12 Rich., 483; *Barnes, Bateman & Ruderow v. Bell*, 11 Rich., 20, and cases there cited.

June 1, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. By an order issued by the Court below, on the 17th of February, 1870, the plaintiffs, being non-residents, were required to enter security for costs, on or before the 1st day of May of the same year, or be non-suited.

The Clerk of the Court failed to enter such judgment, and a rule was obtained against him to show cause why he should not be attached for contempt for not entering judgment of non-suit; and, on his return to the rule, he showed that he had received from the plaintiffs in the actions one hundred dollars as security for costs, and had taken a written obligation from them and their attorneys to increase the same if desired. The rule against him was discharged, and the plaintiff's action ordered to remain upon the docket as before, without prejudice.

The only question in this case for this Court to consider is as to its jurisdiction to review, on appeal, an order made by the Court below amending a previous order made by the same Court.

The first order in the cause was made

previous to the adoption of the Code. The last, or order discharging the rule against the Clerk, and permitting the plaintiff's actions to remain upon the docket, was made after the Code took effect; and, under Section 197, the Judge had full power to amend the previous order; and as neither of the orders made in the cause was final, or involved the merits, the Court has not the jurisdiction to review them.—The Code, Title 2, Section 11.

The motion is denied.

WILLARD, A. J., concurred.

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*MOSES, C. J., (dissenting.) I cannot concur in the opinion of the majority of the Court.

It has been long settled in this State that an order requiring a plaintiff to give security for costs by a fixed day, is final, after the expiration of the time, and beyond the control of the Court, as to its rescission or modification.—*McCollum v. Massey and McNeill*, 2 Bail., 606; *Fouville v. Richey*, 2 Rich., 10; *McDermaid v. Earnest*, 4 Strob., 192.

If the Circuit Judge had considered the security taken as a compliance with the order and discharged the rule against the Clerk, his action could not have been reviewed by this Court; holding, however, "that the plaintiffs, having failed to comply with the order, became non-suited," which, in my judgment, placed the whole matter beyond his control, he, nevertheless, regarded it as within his power to excuse the default as arising from "mistake, or, at furthestmost, excusable neglect," setting aside the order for non-suit and extending the time for entering the security. The moment he admitted that the plaintiffs were non-suited (which, in express terms, he did,) what order could he make for the restoration of the cases? The plaintiffs by the non-suit were out of Court.

The order was made on the 17th of February, 1870. The Code was adopted on the first of the following March. How could the Code apply to an order made before its passage, the result of which, on the non-performance of the conditions it imposed, was final and conclusive.

The order of June 4th, 1870, was not made by any proceeding under the Code. If a party out of Court can be restored to the status which he has lost in it by the 197th Section, which allows relief in cases of mistake, a proceeding for that purpose must be entered according to the requirements of the Code. No conformity to any course prescribed by it was shown in the Court below; on the contrary, the whole matter was disposed of on the rule against the Clerk, which had issued on the defendant's motion. If it is put upon the ground that it was relief to a party from a judgment under the Section referred to,

the record fails to shew any action on the part of the plaintiff to that end, or notice to the defendant of any motion by which it could be attained.

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*S. R. CLOWNEY v. JAMES CATHCART and Others.

(Columbia. Nov. Term, 1870.)

[*Mortgages* ⇨267.]

Under a decree of the Court of Equity land of an intestate was sold by the Commissioner, and purchased by A, one of the administrators of the estate, B being the other. A gave his bond, with B and C as sureties, and a mortgage of the land, to secure the payment of the purchase money. Under an order of the Court the Commissioner assigned the bond and mortgage to the administrators, to be applied by them in a due course of administration, and A, who was the acting administrator, assigned them to a creditor of the intestate, in satisfaction of his claim on the estate. A afterwards mortgaged the land to D, and, under a decree to foreclose this last mentioned mortgage, B became the purchaser of the land: *Held* that the assignment of the bond and mortgage did not extinguish them by mere operation of law; that they were valid securities in the hands of the creditor to whom they had been assigned by A, and that the mortgage could be enforced for his benefit as against B.

[Ed. Note.—Cited in *Charles v. Jacobs*, 9 S. C. 298; *Chick v. Farr*, 31 S. C. 470, 10 S. E. 176, 390.

For other cases, see *Mortgages*, Cent. Dig. § 697; Dec. Dig. ⇨267.]

[*Assignments* ⇨71.]

Where securities for the payment of a debt are assigned to the debtor in a different right from that of his obligation to pay they are not thereby extinguished by mere operation of law. Some act expressive of an intention to treat them as extinguished, and in its nature equivalent to payment, must be done, or they will remain valid and subsisting securities for the benefit of those in whose right they were assigned.

[Ed. Note.—Cited in *Jacobs v. Woodside*, 6 S. C. 499; *Murray v. Witte*, 16 S. C. 511, 512; *Finch v. Finch*, 28 S. C. 170, 5 S. E. 348, 13 Am. St. Rep. 665; *Chick v. Farr*, 31 S. C. 472, 10 S. E. 176, 390.

For other cases, see *Assignments*, Cent. Dig. § 130; Dec. Dig. ⇨71.]

Before Boozer, J., at Fairfield, July Term, 1869.

This was a bill to foreclose a mortgage of a tract of land.

The land had been a portion of the real estate of Robert Cathcart, deceased. By a bill filed in the Court of Equity for Fairfield District, wherein James Cathcart and Richard Cathcart, the administrators of the estate of Robert Cathcart, deceased, were complainants, and the heirs and creditors of the deceased were defendants, a sale of all the real property of deceased was prayed; and the same having been ordered to be sold by a decretal order made in the cause in July, 1849, James Cathcart became the purchaser of the tract of land in question; and to secure the payment of the purchase money

thereof, he gave his bond to James B. McCants, then Commissioner in Equity for Fairfield District, with Richard Cathcart and Daniel Nelson as sureties thereto, and a mortgage of the premises. This is the mortgage now sought to be foreclosed.

By order made in the same cause by Chancellor Dargan, of date 12th July, A. D. 1850, the Commissioner in Equity was directed, after making certain payments in said order specified, to pay over to the administrators of Robert Cathcart, the funds remaining in his hands, "upon their giving bond with a penalty of double the amount so paid over to them, with sufficient sureties thereto, to be approved by the Commissioner, conditioned for the faithful disbursement of said funds so paid over in due course of adminis-

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tration." Under this order the bond and mortgage in question were transferred by William R. Robertson, the successor of James B. McCants in the office of Commissioner in Equity, to the administrators.

After the said assets had been paid over to the administrators as aforesaid, James Cathcart, who was the acting administrator, and the obligor and mortgagor, assigned the bond and mortgage, in satisfaction of a claim which they held against the estate of Robert Cathcart, deceased, (the one in question in this cause), to Robinson and Caldwell. The assignment of the mortgage had only one subscribing witness. These assignments bear date the 8th day of July, A. D. 1852, the assignor styling himself administrator.

Subsequently, on the 12th day of July, A. D. 1852, a return was made before the Commissioner in Equity last aforesaid, which, although appearing from its heading to have been the return of the administrators of Robert Cathcart, was, in fact, made by James Cathcart alone, who was the acting administrator. In this return James Cathcart charged himself, as administrator, with the amount of said bond, both principal and interest, (\$2,356,) as received by him in full on 29th June, 1852, and credited himself with payment to Robinson & Caldwell, of their bond and interest in full, (\$14,718).

Subsequently, James Cathcart mortgaged the same tract of land to the Exchange Bank. Proceedings were afterwards instituted to foreclose the last mentioned mortgage, and at a sale of the land, under an order made by the Court of Equity in said proceedings, it was purchased by Richard Cathcart, at a price which would have been a full and fair consideration had the land been unencumbered. This land is now in the possession of Richard Cathcart, who holds the title of John H. Pearson, Commissioner in Equity for Richland District.

The proceedings in this case were to foreclose the prior mortgage given by James Cathcart to the Commissioner in Equity. The bill was filed by Samuel B. Clowney, Clerk of the

Court, as successor in office of James B. McCants, late Commissioner in Equity for Fairfield District, against James Cathcart, Richard Cathcart, and Daniel Nelson, in the Court of Common Pleas for Fairfield County, alleging the existence of the mortgage and bond, and that the bond was unsatisfied, and praying a foreclosure and sale of the land. The bill was ordered pro confesso against the defendants, James Cathcart and Daniel Nelson. The defendant, Richard Cathcart,

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filed his answer *thereto, alleging, by way of defense, that by the transfer of the bond to the administrators by the Commissioner in Equity, under the decretal order hereinbefore referred to, the bond became, in law, paid, the encumbrance of the mortgage removed from said land, and James Cathcart chargeable, in his capacity as administrator, with the amount due on the bond; also that Samuel B. Clowney has no interest in the bond as the successor of the said Commissioner, and he sets up and opposes the title to him of the Court of Equity in the proceedings by the Exchange Bank.

On hearing the pleadings, evidence and arguments of counsel, His Honor Judge Boozer decreed the sum of three thousand two hundred and seven dollars and eighty-four cents against the defendants, and ordered the land to be sold for a foreclosure.

His opinion is as follows:

Boozer, J. The bond and mortgage described in the bill, in this case, was given to the Commissioner in Equity for Fairfield District in 1849. The first installment, when it fell due, was paid to him. It is not denied that the second and last installment remain unpaid.

In obedience to an order made in a suit instituted in the Court of Equity, at Fairfield Court House, by James Cathcart and Richard Cathcart, administrators of Robert Cathcart, deceased, v. the heirs-at-law and creditors of the estate of their intestate, about the year 1850, this bond and mortgage, together with others held by the Commissioner, were paid over or transferred to said administrators, to be by them applied in due course of administration.

Two of the obligors are administrators of Robert Cathcart, and one of them, James Cathcart, is the mortgagor; and it is contended by Richard Cathcart, now in possession of the mortgaged premises, that this transfer, by order of Court, operates a payment or satisfaction of the bond and mortgage.

In order to determine this question, the Court must look to the order directing the transfer and the intention of the Court in making said order. It is clear it was not intended to operate as a satisfaction. The obligees were acting in a fiduciary capacity. They were required by the order to employ the funds in due course of administration.

What was that? First, to satisfy debts established against the estate of their intestate; and then, if anything remained, to distribute it.

In carrying out the order and intention of the Court, this bond and mortgage were transferred by the mortgagors to a creditor

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of the intestate who had established his claim before the Commissioner. The creditor received it as money, and has since received various small payments on it by one of the administrators, the principal obligor.

The transfer to an administrator could not operate as a satisfaction. Even the appointment of a debtor as administrator of a creditor does not amount to payment. Suppose the administrator to be a mortgagor, does his appointment satisfy the mortgage? All the authorities point to a contrary conclusion.

But it is insisted that the Commissioner has no status in this Court, because, by operation of Chancellor Dargan's order, he no longer has any right to control the bond and mortgage. It may be answered that he never had any personal interest. He was a mere custodian—an instrument which the Court might control at all times to subserve the purpose of justice and equity. He transferred (turned over) the bond and mortgage to the administrators, who transferred them to a creditor, who holds them unsatisfied. Will it be denied that the Court may direct the Commissioner to allow his name to be used to collect the debt? Nay: it would require it of him, as is often done.

It is not necessary to decide the point whether the creditor might not in his own name maintain this suit. Perhaps he might be regarded in this Court as a sort of equitable assignee; but he unquestionably had the right to use the name of the officer of the Court to enable him to recover his demand. Even a full written assignment, duly attested, from the obligee and mortgagee, would not deprive him of the right to maintain his suit in the name of the latter. This position is undeniable. That course has been pursued here, and the Court is of the opinion that the complainant can sustain his suit.

It is insisted that the defendant, Richard Cathcart, has a high equity; that he purchased at a sale ordered by the Court to foreclose a junior mortgage, and paid a full price. That, itself, does not create an equity, unless he was "an innocent purchaser without notice." But here he had express notice. There is no doubt about it. He is a party to the bond, the payment of which is secured by the mortgage. He knew of the execution of the mortgage, and that it was unsatisfied. As one of the administrators, he was bound to know what disposition had been made of it. He knew that it was held by a creditor, and was unpaid. How, then, does his equity arise? He may have paid a full price

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at the Commissioner's sale. That cannot change the nature of his case. It was a public, a judicial sale.

There is nothing in the ground taken, that the Commissioner was bound to take notice of all proceedings in this Court. In order to bind him or any other one, he must be made a party to the proceedings. In the proceedings of the Exchange Bank against James Cathcart, under which Richard Cathcart purchased, neither the Commissioner nor any creditor of Robert Cathcart was made a party. Therefore, according to all the authorities, they are not precluded by the decree in that case—that is, their lien is not destroyed or affected by that decree. The whole question might have been adjudicated in that case, and it is to be regretted that it was not done; yet the creditor holding the bond and mortgage in this case cannot be affected by that omission.

It is the judgment of the Court that the complainant is entitled to the relief he asks, and the necessary orders have been accordingly made.

The defendant, Richard Cathcart, appealed, and now moved this Court to modify the decree, and the order based thereon, by reversing the same so far as they decree an amount as owing by Richard Cathcart, and direct a sale of the land for a foreclosure, upon the following grounds:

1. Because by the transfer of the bond and mortgage (upon which suit is brought) by the Commissioner in Equity, in compliance with the terms of the decree of Chancellor Dargan, of date 12th July, 1850, to the obligor and mortgagor, James Cathcart, the bond secured by the mortgage became, in law, paid, and James Cathcart chargeable, in his capacity as administrator, with so much money (to wit, the principal and interest due on the bond,) received as assets of the estate of his intestate, to be by him administered.

2. Because thereupon the appellant, Richard Cathcart, became released from all liability as surety, and the land from the encumbrance of the mortgage.

3. Because James Cathcart did, in fact, charge himself, in his returns as administrator, with the receipt of the amount due on said bond, which operated in law as a payment by him.

4. Because the transfer by James Cathcart as administrator to Robinson and Caldwell of the bond and mortgage, after its transfer to him by the Commissioner, was inoperative to bind the appellant as surety, or continue the encumbrance on the land.

5. Because the assignment of the bond by

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James Cathcart could not amount to a renewal of the bond so as to continue appellant's (Richard Cathcart's) liability as surety; nor could the assignment of the mortgage amount to the renewal of that, the said

assignment having only one subscribing witness.

6. Because the order of Chancellor Dargan gave the administrators no authority to make transfer of bonds upon which they were obligors.

7. Because the order of Chancellor Dargan, as between the Commissioner in Equity, and his successors in office, and the administrators, forever barred, after the transfer of the bonds, any action by the Commissioner and his successors in office against the administrators upon said bonds.

8. Because the appellant, as purchaser of the land at the sale made by the Court of Equity, is entitled to all the equities of the Exchange Bank; and if the bank is charged with notice of the prior mortgage, that knowledge must be coupled with notice of the return of James Cathcart, as administrator, wherein he charges himself with the full amount of the principal and interest due on the bond secured by the prior mortgage.

9. Because the appellant is entitled to have the benefit of the technicalities of the law, inasmuch as he stands upon a high equitable position, to wit: He bought the land at a sale made by the authority of the Court, in pursuance of proceedings to which Robinson & Caldwell ought to have been (if they were not) parties, provided they had any rights recognizable in a Court; and after consultation with legal gentlemen, his long afortime adviser never intimating to him any defect in the title, he gave a price for the land to the full extent of its value, if unencumbered; showing thereby that he was induced to believe that it was unencumbered.

10. Because the real plaintiffs in the cause, Messrs. Caldwell & Robinson, are not entitled to anything at the hands of the Court besides their mere technical rights, inasmuch as they suffered the sale before referred to to take place, without warning the public that they claimed to have an encumbrance upon the land; and their silence at said sale shows that they looked merely and solely to James Cathcart's equitable or constructive guarantee as assignor of the bond, as security for their debt.

Rion, for appellant.

Robertson, McCants & Douglass, contra.

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*May 31, 1871. The opinion of the Court was delivered by

WILLARD, A. J. James and Richd. Cathcart, the administrators of Robert Cathcart, deceased, filed a bill and obtained a decree for the sale of the real estate of their intestate. The real estate was sold under this decree, and James Cathcart, one of the administrators, became a purchaser of a tract of land, giving his bond, with Richard Cathcart and Daniel Nelson as sureties, and a mortgage upon the land purchased. This bond and mortgage was taken by the Commission-

er in Equity, and held by him until transferred by him to James Cathcart, under an order made by Chancellor Dargan. This order, after directing the Commissioner to apply the funds in hand, appertaining to the estate of Robt. Cathcart, to the payment of certain specified debts, directed the balance to be paid to the administrators of Robert Cathcart, "upon their giving bond, with a penalty of double the amount so paid over to them, with sufficient sureties thereto, to be approved by the Commissioner, conditioned for the faithful disbursement of said funds in due course of administration."

The transfer was made by delivery of the bond and mortgage to the administrators, without the execution of any formal assignment.

On the 8th of July, 1852, James Cathcart, the acting administrator, assigned this bond and mortgage to Robinson and Caldwell, in satisfaction of a demand held by them against the estate of his intestate. Subsequently, James Cathcart mortgaged the same land to the Exchange Bank. Upon a foreclosure of the last mentioned mortgage, Richard Cathcart became the purchaser.

The bill, in this case, was filed in the name of the Clerk of the Court of Common Pleas, as the successor of the Commissioner in Equity, but for the benefit of Robinson and Caldwell, who are the equitable, if not the legal, assignees of the bond and mortgage, assuming such instruments to be legally valid. The principal question in the case depends upon the fact that, after the bond and mortgage passed into the hands of James Cathcart, as administrator, he transferred them to a creditor of his intestate.

The questions are, were the bond and mortgage valid securities in the hands of the obligor holding them as administrator? And had he authority to transfer them as assets of the intestate estate in satisfaction of the debts of that estate? Taking the view most favorable for the appellant, namely, that under the terms of the order, and the transfer of the securities thereunder, he became the

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owner of the bond and mortgage, still the bond and mortgage were not extinguished in the hands of the administrator by the mere act and operation of law. The rules of extinguishment and merger are inapplicable, because the possession of the securities, and the obligation to pay, were in different rights, though vested in the same person. Creditors and distributees had the right to treat the bond and mortgage as paid from the maturity of the debt, but no rule of law or principle of equity compels them to do so unless they deem it for their interest.—Griffin v. Bonham, 9 Rich. Eq. 77.

If they chose, they could waive this equitable remedy, and, in a proper case, pursue the bond and mortgage as available assets in the hands of the administrator.—Kennedy v.

Ewinger, 18 Pick., 232. The administrator had authority to transfer these assets in discharge of the debts of the estate, and the circumstance that they were his own bond and mortgage makes no difference in this respect. —Ipsich Man. Co. v. Story, 5 Met., 310.

Had the administrator done any act expressive of an intention to treat the securities as extinguished, and, in its nature, equivalent to payment, the debt would have become extinguished, and the mortgage discharged. In Ipsich Man. Co. v. Story, accounting before the Probate Court, for the amount of the debt as so much cash in hand, when followed by a decree of distribution, and satisfaction of such decree, was held to be equivalent to actual payment. In that case the security would be destroyed.

It is contended by the appellant that the entries in the administrator's account of a credit, under date of June 29th, to the estate, of the amount of the bond, with interest computed to July 1, 1852, evidences such an act and intent on the part of the administrator as amounts to payment in fact. But it appears by the decree that this return was filed subsequently to the transfer of the bond and mortgage, to-wit, on the 12th of July, 1852, and the entries must be referred to the latter date. Regarding the act of the administrator in this light, it is a conclusive objection to its validity that it took place subsequent to the transfer of the bond. But these entries do not sustain the construction sought to be put upon them. Under date of July 1st, 1852, the time up to which interest was credited on the amount of the bonds, the estate is debited with an amount paid to Robinson & Caldwell, including the amount of the bond. It is, therefore, evident that the entry in question, including the credit under date of June 29, and the debit of July 1st, was intended to express the transaction which was

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complete by the transfer of the *bond and mortgage into the hands of the administrator, and the subsequent transfer of the same by him to Robinson & Caldwell. It is evident, therefore, that the administrator did no act equivalent to the payment of the bond and mortgage, and that they are valid in the hands of Robinson & Caldwell. The appellant has cited the language used in Griffin v. Bonham, 9 Rich. Eq., 77, as sustaining the proposition that the transfer of the bond to the administrator worked an extinguishment of the debt and securities, without regard to the act or intent of the administrator. The question in Griffin v. Bonham was one of commissions on a debt due from the executor to the testator's estate, as between the administrator of a deceased executor and the surviving executor. The Court had evidently in mind the ordinary case of a debtor becoming the executor of his creditor when all parties in interest are disposed to treat the debt as

an asset realized. Had the question been presented to the Court whether it should be in the power of the executor to compel the creditors and distributees to take the personal security, and that of his official bondsmen, in lieu of a well secured mortgage, there is no reason to believe, from anything contained in that case, that the Court would have assented to so unreasonable and inequitable a demand.

Reference has also been made to the very general expression used in Schnell v. Schroder, Bail. Eq., 334, to the effect "that the authorities concur that a debt due by an administrator to his intestate estate is assets in his hands." This expression is unquestionably correct in the sense in which it is employed, namely, that the creditors and distributees may charge such debt as a cash asset. But to say that a mortgage made by a person subsequently becoming the administrator of the mortgagee is ipso facto destroyed thereby, ceasing to be an available asset of the intestate estate, is a very different proposition from that quoted from Schnell v. Schroder.

The foregoing disposes of all the objections made to the decree by the grounds of appeal except one. It is contended that the authority of the administrator to dispose of the bond and mortgage is affected by the terms of Ch. Dargan's order. The order in question simply placed the securities in the hands of the administrators, under special securities, in order that they might employ them in the course of administration. It did not affect the powers of the administrators as to such assets, either by way of enlarging or restricting them.

The appeal must be dismissed and the decree affirmed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*THE STATE ex rel. ROBERT H. ADAMS
v. J. S. FILLEBROWN, Trial Justice.

(Columbia. Nov. Term, 1870.)

[*Criminal Law* ⚭84.]

The Act of March 1, 1870, giving to Trial Justices jurisdiction to "punish by fine, not exceeding \$100, or imprisonment in the jail or house of correction, not exceeding thirty days, all assaults and batteries" not of a high and aggravated nature, is not unconstitutional.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 119; Dec. Dig. ⚭84.]

[*Justices of the Peace* ⚭31.]

The Court of a Justice of the Peace is an inferior Court in the technical sense of the term.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 71; Dec. Dig. ⚭31.]

[*Courts* ⚭43.]

The term "inferior Courts," in Sec. 1, Art. IV, of the Constitution, is used therein in its technical sense, as signifying a Court of special and limited powers, whose jurisdiction must ap-

pear on the face of the proceedings, or its judgment will be void.

[Ed. Note.—Cited in *State v. Glenn*, 14 S. C. 125.

For other cases, see *Courts*, Cent. Dig. § 166; Dec. Dig. ⚡43.]

[*Courts* ⚡43.]

Under Sec. 1, Art. IV, of the Constitution, the General Assembly may confer upon an inferior Court created by itself the same powers which, by the Constitution, is intended for Justices of the Peace.

[Ed. Note.—Cited in *Rhodes v. Railroad Co.*, 6 S. C. 390; *State v. Harper*, Id., 470; *State v. Glenn*, 14 S. C. 121, 124; *State v. McKettrick*, Id., 352; *State v. Jenkins*, 26 S. C. 122, 1 S. E. 437; *State v. Cooler*, 30 S. C. 108, 8 S. E. 692, 3 L. R. A. 181; *State v. Williams*, 40 S. C. 378, 19 S. E. 5; *Catawba Mills v. Hood*, 42 S. C. 205, 20 S. E. 91; *City Council of Anderson v. Fowler*, 48 S. C. 14, 25 S. E. 900; *Grimball v. C. W. Parham Co.*, 96 S. C. 447, 81 S. E. 186.

For other cases, see *Courts*, Cent. Dig. § 168; Dec. Dig. ⚡43.]

Before Rutland, J., at Chambers, October, 1870.

Appeal from an order directing a writ of prohibition to issue from the Court of Common Pleas for Darlington County.

The facts were these: Robert H. Adams, the relator, was tried and convicted by J. S. Fillebrown, a Trial Justice for Darlington County, of an assault and battery, committed in that County, upon one Samuel Abraham, and sentenced to imprisonment in the jail of the County for fifteen days, and to pay a fine of fifteen dollars. He applied to the Circuit Judge of the County for a writ of prohibition to restrain the execution of the sentence, on the ground that the Act of March 1, 1870, defining the criminal jurisdiction of Trial Justices, is unconstitutional, null and void. A rule to shew cause was issued, and on the return thereof an order was made directing a writ of prohibition to issue.

The respondent, the Trial Justice, appealed.

Chamberlain, Attorney General, for appellant, cited *Bac. Abr.*, Tit. *Courts*, (D); *Kempe's Lessee v. Kennedy*, 5 Cr., 184-5; *Skilern v. May*, 6 Cr., 267; *McCormick v. Sullivan*, 10 Wheat., 192; *Cooley on Cons. Lim.*, 35; and commented on Section 19, Art. I, and Sections 1 and 22 of Art. IV of the State Constitution.

Spain, *contra*, filed no brief.

May 29, 1871. The opinion of the Court was delivered by

MOSES, C. J. The single point raised upon the record in this case is as to the jurisdiction of a Trial Justice to prosecute for the

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*offence of assault and battery, and the judgment of the Court will be confined to it.

The appointment of Trial Justices is provided for by the Act of February 28th, 1870, 14 Stat. at Large, 376. The mode of appointment, their number, term of office, and

condition on which it shall terminate, are all prescribed by the said Act. Their criminal jurisdiction is defined by the Act of March 1, 1870, same Vol., 402, and is to be exercised "within their respective Counties."

The second Section confers upon them "jurisdiction of all offenses which may be subject to the penalties of either fine or forfeiture, not exceeding one hundred dollars, or imprisonment in the jail, or work house, not exceeding thirty days, and they may impose any sentence within those limits either singly or in the alternative."

The third Section is in the following words: "They may punish by fine not exceeding one hundred dollars, or imprisonment in the jail, or house of correction, not exceeding thirty days, all assaults and batteries, and other breaches of the peace, when the offense is not of a high and aggravated nature, requiring, in their judgment, greater punishment." It can, therefore, admit of no doubt that the Legislature has authorized the exercise of the power assumed by the said Trial Justice, Fillebrown, as set out in the suggestion.

This is in no way contradicted by the relator, but he contends that the Act so conferring the power is void, because in repugnance to the Constitution of the State. His proposition is, that as the Constitution, by the first, twenty-first and twenty-second Sections of the fourth Article, in express words, names and includes Justices of the Peace among those in whom the judicial power of the State shall be vested, and as the election of the said Justices, for each County, is required to be made by the qualified voters, in such manner as the General Assembly may direct, and as the performance of the same duties are enjoined upon them as are given to the Trial Justices by the said Act, the Legislature is without power to create a new office for the execution of the same duties, to be appointed in an entirely different mode, and that the Act, therefore, is unconstitutional and void.

If it can be made to appear, from the several parts of the Constitution in regard to the office of Justice of the Peace, all to be construed together as a whole, that his jurisdiction as a County officer, in prosecutions for assault and battery, is exclusive, then the relator is right. The Convention which framed it were at liberty to suggest to the people who were to pass upon it their scheme

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for *the establishment of the Judiciary Department, both as regarded the Courts which were to be organized and the Judges, who were to preside over them.

It is necessary, therefore, to inquire and ascertain if the jurisdiction which it was proposed to confer on Justices of the Peace was to be exclusive.

Section 19 of Article I provides "that all

offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information without indictment or intervention of a grand jury, saving to the defendant the right of appeal.

This Section (which includes the offense of assault and battery, because it is "less than felony.") does not restrict the jurisdiction contemplated by it to Justices of the Peace. On the contrary, it extends it to "other officer authorized by law;" and if there can be found in the Constitution any power on the part of the General Assembly to confer a like authority on some other officer, then it was not intended to be exclusively in Justices of the Peace.

If no portion of the judicial power of the State can vest in any officer except such as may be expressly named in the Constitution, then the hands of the Legislature are tied by that instrument, and they can make no further distribution of the judicial power of the State.

The 1st Section of 4th Article of the Constitution vests "the judicial power of the State in a Supreme Court, two Circuit Courts, to wit, a Court of Common Pleas, having civil jurisdiction, and a Court of General Sessions, with criminal jurisdiction only, in Probate Courts, and in Justices of the Peace. The General Assembly may also establish such municipal and other inferior Courts as may be deemed necessary." If the Section had closed with the words, "Justice of the Peace," yet, as the 19th Section of 1st Article had declared "that all offences less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily by a "Justice of the Peace," and as the same jurisdiction, by the very Section, was also to be extended to some other officer authorized by law, there was a reservation to the General Assembly to declare who should be the officer thus authorized.

With an apparent design to leave their intention without doubt they employ, in the said 1st Section of 4th Article, words which

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*put their purpose beyond dispute. A Court in which a Justice of the Peace presides is an inferior one, and the jurisdiction accorded to it by the Constitution is not exclusive, because the General Assembly may establish "such other inferior Courts as may be deemed necessary," and the right to do so being permitted by the Constitution, such other Court is as much a Court established by the Constitution as is that of a Justice of the Peace.

If the signification which attaches, in common parlance, to the word "inferior," is to be considered as intended by its use in the

Constitution, then every Court, save that of the last resort, would be included under the term, because it is subject to control and direction by another; but that is not the sense in which the word is employed in the Constitution. We do not concur with the learned Attorney General in his conception of what is said by Chief Justice Marshall, in *Kempe's Lessee v. Kennedy*, 5 Cranch, 184-5 [3 L. Ed. 70]. Technically, "an inferior Court is one of limited jurisdiction, and it must appear, on the face of its proceedings, that it has jurisdiction, or its proceedings will be void." It is in that sense, according to our understanding, that the learned Chief Justice accepted the definition. He says, "the law respecting the proceedings of inferior Courts, according to the sense of that term, as employed in the English books, has been correctly laid down. The only question is, was the Court in which this judgment was rendered an inferior Court, in that sense of the term."

"All Courts from which an appeal lies are inferior Courts, in relation to the appellate Court, before which their judgment may be carried, but they are not, therefore, inferior Courts, in the technical sense of those words. They apply to Courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction."

We think, therefore, that the term "inferior Court," as used in the Constitution, is to be accepted as referring to the technical language usually employed to designate it, and not to be understood as importing that it is inferior only because its judgments may be corrected by an appellate tribunal.

It does not, however, follow that such "other inferior Courts" are to be of a more limited jurisdiction than the Court of the Justice of the Peace. It is by the authority of the Constitution that they are to be established, and if, by the same Section, it had already provided for a Court, which

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is already recognized as an inferior one, it clearly shows an intention not to limit such Courts to the one expressly named, but to leave it to the discretion of the Legislature to multiply them, if, in its judgment, necessary.

The 19th Section of 1st Article of the Constitution confers on a Justice of the Peace, or other officer authorized by law, jurisdiction in all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days. The 22d Section of the 4th Article would appear to limit the jurisdiction of a Justice of the Peace, in prosecutions for assault and battery, to such as would be punishable by fine only. The two Sections must be construed by regarding them as a whole, or otherwise the plain intent of the Legisla-

ture would be defeated in giving to a Justice of the Peace any jurisdiction over the offense named. The punishment at common law for assault and battery is not confined to a fine; therefore if the jurisdiction of that officer is to be held fixed by the 22d Section of 4th Article, irrespective of the 19th Section of 1st Article, the power conferred, in this particular, by the 4th Article, would be inoperative. The jurisdiction, under the 1st Article of the Constitution, cannot be affected by the apparent limitation in the 4th, otherwise a Court not named in the Constitution, and only to have existence by the will of the General Assembly, and, when established, to be but a like inferior one, would have a larger jurisdiction in this class of offenses than a Court specifically designated among those in whom, in part, the judicial power of the State is to be vested.

In *McIver v. Townsend*, (ante, p. 1,) referred to in the argument of the counsel for the appellee, the exercise of jurisdiction in mandamus by the Court of General Sessions was claimed, although the Constitution conferred it on the Court of Common Pleas, on the ground that a concurrent right still remained. The Court rested its refusal on the fact that the Constitution took from the Sessions jurisdiction in all criminal cases, whenever it gave it to another Court, and therefore the former jurisdiction of the Court of Sessions was gone. Here, however, so far from there being words which even imply an exclusive jurisdiction in Justices

of the Peace, there is an express grant of it also to other officers, which makes the power concurrent.

The argument virtually ignores the words of the first Section of the fourth Article of the Constitution, "other inferior Courts," unless they are to create a jurisdiction of less extent than that conferred on "Justices of the Peace." There is no warrant in the

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*language to sustain such a conclusion. No matter what inferior Courts are established by the Constitution, and it makes no difference, in this aspect, whether "other" is to refer to the Court of a Justice of the Peace, or to "municipal Courts," power is given to the General Assembly to establish inferior Courts to any extent they may deem necessary.

The decision of the question made cannot be influenced by the fact that the Legislature has, so far, failed to provide for the election of Justices of the Peace. That is a matter with which this Court cannot interfere. Their want of action in this particular may be induced by sound and proper reasons. Our judgment must conform to our views of the law, and without regard to any supposed failure of duty on their part.

The order granting the motion has already been entered.

WILLARD, A. J., and WRIGHT, A. J., concurred.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

AT COLUMBIA—APRIL TERM, 1871.

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.

HON. A. J. WILLARD, ASSOCIATE JUSTICE.

HON. J. J. WRIGHT, ASSOCIATE JUSTICE.

2 S. C. *410

*GRIFFIN, BRO. & CO. v. E. T. REMBERT
and Others.

(Columbia. April Term, 1871.)

[*Guaranty* ⇐6.]

Defendants signed a letter, addressed to F., as follows: "As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make, under this letter of credit, in Baltimore, not exceeding in the whole fifteen hundred dollars:" *Held*, That any party advancing goods to F., upon the faith of the promise contained in the letter, could maintain an action thereon against the defendants as guarantors.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 8; Dec. Dig. ⇐6.]

[*Frauds, Statute of* ⇐107; *Guaranty* ⇐30.]

A party may maintain an action on a written agreement, within the fourth Section of the Statute of Frauds, though his name does not appear therein. The fact that he became a party to the agreement may be shown by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 213; Dec. Dig. ⇐107; *Guaranty*, Cent. Dig. § 31; Dec. Dig. ⇐30.]

[*Guaranty* ⇐7.]

One who gives a guaranty for future advances to be made is entitled to notice of the acceptance of the guaranty; but the notice need not be express, nor is it necessary that it should be given by the creditor. It may be inferred from circumstances.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 9; Dec. Dig. ⇐7.]

Before Green, J., at Sumter, October Term, 1870.

This was an action of assumpsit against E. T. Rembert, D. A. Foxworth, F. Joye and I. W. Bradley, defendants, upon the letter

of guaranty hereinafter mentioned. Rembert and Bradley were the only defendants who appeared and pleaded to the action.

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*The appeal was heard upon a case containing exceptions, which is as follows:

"The plaintiffs then, to maintain the issues on their part, called as a witness Francis Joye, one of the defendants, who testified that the signatures of the defendants to a certain letter were genuine.

"The letter was then read in evidence, and is as follows:

"Sumter, S. C., October 15, 1866.

"Mr. Francis E. Joye—Dear Sir: As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make, under this letter of credit, in Baltimore, not exceeding in the whole amount fifteen hundred dollars.

"E. T. Rembert,

"D. A. Foxworth,

"F. Joye,

"I. W. Bradley."

"The same witness further testified that, under a power of attorney from F. E. Joye, he went to Baltimore, taking with him the letter, and purchased there, in November, 1866, for his principal, from six different firms, bills of goods, amounting, in the whole, to something less than \$1,500. The plaintiffs' was one of the firms. Their bill amounted to \$341.70. The goods were shipped to and received by F. E. Joye. The purchases were made on a credit of four months. Witness exhibited the letter from defendants to all

the firms, and the purchases were made under it.

"The plaintiffs' bill was identified by the witness, and received in evidence. It is dated November 12, 1866, and headed 'F. E. Joye to Griffin, Bro. & Co., Dr.'"

"The same and other witnesses for plaintiffs testified that, in December, 1866, the defendants, Rembert and Bradley, learned from F. Joye and F. E. Joye that the latter had purchased goods in Baltimore. They were also allowed to testify, against the objections of Rembert and Bradley, that some time after the goods were purchased, in February, 1867, they, Rembert and Bradley, received notice that F. E. Joye was not conducting his business properly; and, thereupon, they applied to him to turn over what remained of his goods and effects to them—saying they were the only responsible ones of the parties, and that they would pay the debts; that, after some hesitation, he consented, and turned over to Bradley, for himself and Rembert, a little money and some goods and credits,

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*the whole amounting, as the witness, F. Joye, thought, to about \$1,400.

"The plaintiffs here rested, and the defendants, Rembert and Bradley, by their counsel, moved for a non-suit, on the grounds:

"I. That the letter read in evidence did not sustain the allegations of the declaration—that, according to its legal construction, it was not a guaranty, but a mere promise to F. E. Joye himself that the defendants would guaranty such bills as he might purchase, &c.—that such promise was void for want of consideration, and no action could be maintained upon it by any one.

"II. That a guarantee is an agreement, within the fourth Section of the Statute of Frauds; that no party can maintain an action upon any agreement, within that Section, unless he be named in it; and as the plaintiffs are not named in the letter they can maintain no action upon it—the name being an essential part of the agreement, which parol evidence is inadmissible to supply.

"III. That, assuming the evidence of an agreement to guaranty to be otherwise sufficient, still the proof was fatally defective, for plaintiffs had not shown, nor offered evidence tending to show, that they had given notice to Rembert and Bradley, or either of them, that they had accepted the guaranty, and such notice was necessary.

"The Court denied the non-suit, and the defendants, Rembert and Bradley, by their counsel, excepted.

"The defendants offered no evidence, and the cause was summed up by the respective counsel.

"The Court charged the jury:

"I. That it is not necessary that a party should be named in an agreement, within the fourth Section of the Statute of Frauds,

to enable him to maintain an action thereon.

"II. That the construction of the letter was for the jury, and if they should find, first, that it was intended as a guaranty, and not as a mere promise to F. E. Joye, himself, to guaranty; second, that the plaintiffs' bill was made in Baltimore; and, third, that defendants had reasonable information that the goods had been purchased under the guaranty; then they should find for the plaintiffs.

"III. That notice of acceptance was necessary in order to bind the defendants, but notice might be presumed from the fact that the defendants, Bradley and Rembert, took the goods out of the possession of F. E. Joye on the ground that they were the only solvent parties who had signed the letter of credit.

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*To the charge in each and all the points stated, the defendants, Rembert and Bradley, by their counsel, excepted.

"The jury found for the plaintiffs \$341.70, the amount of their bill."

On the case containing exceptions the defendants, Rembert and Bradley, on October, 1870, moved for a new trial. The motion was denied, and on 22d October, 1870, the plaintiffs entered judgment on the verdict.

The defendants, Rembert and Bradley, appealed to this Court, and now moved:

1. That a non-suit be granted on the grounds, or some one of the grounds, taken for a non-suit in the Court below.

And, failing in that motion, then,

2. That a new trial be granted on the ground that the Judge below erred in his charge to the jury on all, or some, or one of the points to which exceptions were taken at the trial.

J. S. G. Richardson, for appellants.

Blanding, contra.

May 18, 1871. The opinion of the Court was delivered by

MOSES, C. J. The action seeks to charge the defendants on the guaranty of which the following is a copy:

"Sumter, S. C., October 15, 1866.

Mr. Francis E. Joye—Dear Sir: As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make under this letter of credit in Baltimore, not exceeding, in the whole amount, fifteen hundred dollars." Signed by the defendants.

The first ground on which the non-suit was asked, was "that the letter read in evidence, according to its legal construction, was not a guarantee, but a mere promise to F. E. Joye, himself, that the defendants would guaranty such bills as he might purchase, &c.; that such promise was void for want

of consideration, and no action could be maintained upon it by any one."

The letter is to be construed as a whole, and effect is to be given to it by looking to the several parts which it contains. It is addressed to the party to be benefitted, in answer to some request for aid in the purchase of a stock of goods.

A direct obligation is assumed to guaranty the payment of any bills contracted in Baltimore, not to exceed a certain amount,

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and "those bills were to be made "under" the writing which the signers call "a letter of credit."

If A were to address a letter to B, saying, I will guarantee the payment of any bills which C makes with you for goods to be sold him, we apprehend but little doubt would exist that a collateral liability would attach.

The introduction of the word "therefore," in the paper before us, can, in no way, qualify, much less defeat, the legitimate consequence which must result from the assumption which was intended by the terms employed by the signers.

The word was used to designate the mode by which the request of F. E. Joye for assistance was answered, and the "help" was extended by their guaranty of his purchases in Baltimore.

"No special words or form are necessary to constitute a guaranty. If the parties clearly manifest that intention, it is sufficient."—2 Parsons on Contracts, 5.

If the paper only amounts to an overtore, notice of its acceptance, with the assent of the signer, converts it into a guaranty.

Regarding it as an absolute guaranty, we are then to consider whether, in the language of the next ground taken, "the plaintiffs can sustain their action as on an agreement, within the fourth Section of the Statute of Frauds, when they are not named in it, the name being an essential part of the agreement, which parol evidence is inadmissible to supply." The 4th Section of the Statute of Frauds provides that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This proposition, on the part of the appellants, raises a question which we supposed had been long settled in this State. Though, at one time, our Courts adopted the rule established in *Wain v. Walters*, 5 East, 10, later decisions, most of which are referred to in *Fyler, adm'r, v. Givens*, 3 Hill, 48, reversed it, to the extent of holding that it was not necessary that the consideration of the

promise must be stated in the note or memorandum.

The argument used here to convince the Court that the guaranty is void because "the plaintiffs are not named in the letter," is of the same character as that which enforced the necessity of the statement of the consideration in the instrument itself. It pro-

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ceeded upon the ground that the word "agreement," as used in the statute, was employed in a technical sense, that the consideration being an essential and a vital element in an agreement, and as the statute requires the latter to be in writing, all that necessarily form component parts of it must be stated. So here it is contended, that an agreement implies the assent of two or more minds, and, therefore, the contracting parties should be named. It is not necessary to follow the argument by which the Courts of this, and some other of the States of the Union, have felt themselves impelled to a contrary conclusion. It may be enough to say, that the statute merely requires that a memorandum or note of the agreement shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. Following the analogy of the decision made on the other question arising under the word "agreement," we hold that the statute is fulfilled if the party against whom the performance is sought has signed the letter.

The result to which we have arrived on this point is sustained by abundant authority, independent of the sound reasons which led to the decision in *Fyler v. Givens*.

Mr. Fell, in his work, on "Guarantees," at page says, "But it seems very questionable whether a note or guarantee need shew upon the face of it all the contracting parties. Suppose a guarantee given in the following form: "I promise to guarantee the payment of goods furnished to A B. (signed) D C." This may be a very useful form of guarantee where a person of known reputation wishes to gain credit for another, leaving to him the choice of such person to deal with as he might find most to his advantage."

Chancellor Kent, in his 2 Commentaries, 510, says "the signing of the agreement by one party only is sufficient, provided it be the party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party who sues for a performance."

In Pitman on "Principal and Surety," p. 75, it is said "the word 'agreement,' in the fourth Section of the Statute of Frauds, is satisfied if the writing states the subject-matter of the contract, the consideration, and is signed by the party to be charged, and it is not essential to the validity of the writing that it should shew mutuality."

Mr. Parsons, in his 2d volume on "Con-

tracts," p. 9, says, "it is now quite settled that the agreement need not be signed by both parties, but only by him who is to be charged by it."

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*Mr. Story, in his work on "Contracts," at p. 737, says, "It is not indispensable that a guaranty should be addressed to a particular person. It may be general, as a general letter of credit, and designated as a circulating guaranty in favor of any person who shall advance money or goods upon the faith thereof. In such a case, any person may avail himself of the security thus held out by giving notice to the guarantor, within a reasonable time, that he has accepted the guaranty, and acted upon it, and the guarantor will be bound for all advances made on the credit thereof."

In *Lawrason v. Mason*, 3 Cranch, 492, the note was in the following words and figures: "November 27, 1800.

"Mr. James McPherson—Dear Sir: We will become your security for 130 barrels of corn, payable in 12 months.

"Lawrason & Smoot."

The objection submitted in the case before us was made there. Marshall, C. J., delivering the opinion of the Court, said: "If it be said that, in such a case, the law raises the assumpsit from the facts, and, if the facts do not imply an assumpsit, no action will lay, it may be answered that, in the present case, there is an actual assumpsit to all the world, and any person who trusts, in consequence of that promise, has a right of action."

On the question of notice, it appears by the brief that the Circuit Judge did charge the jury "that notice of acceptance was necessary to bind the defendants, but that notice might be presumed from the fact that the defendants, Bradley and Rembert, took the goods out of the possession of F. E. Joye, on the ground that they were the only solvent parties who had signed the letter of credit."

That notice of acceptance of a guaranty for future credit must be given to the guarantor before he can be bound, is the settled law of this State, as established by various decisions.—*Sollie and Warley v. Meugy*, 1 Bail., 620; *Lawton v. Maner*, 9 Rich., 335; *Wardlaw, Walker and Burnsides v. Harrison*, 11 Rich. 626.

Mr. Justice Story, in *Adams v. Jones*, 12 Pet., 213 [9 L. Ed. 1058], says: "It is not now an open question," in the Court whose judgment he was pronouncing.

The notice of assent need not be express. It may be implied from the circumstances of the particular transaction. The reason that notice is necessary, is that the guarantor may have the opportunity of indemnifying him-

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self for the risk incurred by his assumption.

As is said by Mr. Parsons, "the principle which underlies the whole law of guaranty is, that this contract, like every other, must be known to the parties to it." If this knowledge is brought home to him who is sought to be charged, he is aware of the relation in which he stands to the party for whose benefit he became bound, and has full opportunity to protect himself, from time to time, if he considers that there is danger of a loss from the engagement into which he has entered.

No precise rule can be laid down as to the time when notice should be given of the acceptance of a guaranty which is to be prospective in its operation, or in what manner it should be given. Even without direct information from the person to whom the guaranty is addressed, circumstances might shew that the guarantor was fully advised of its acceptance; and, in such a case, the end to be obtained by express notice would be fulfilled. A time, reasonable in regard to the purpose for which it is required, is all that should be demanded.

The Circuit Judge did narrow the scope which should have been allowed the jury on this question of notice, which, he charged them, was necessary to bind the defendants, by saying that it "might be presumed from the fact that the defendants, Bradley and Rembert, took the goods out of the possession of F. E. Joye, on the ground that they were the only solvent parties who had signed the letter of credit." How far this was of prejudice to the other defendants it is not necessary to inquire, for they do not seek here to set aside the verdict. In connection with this part of the charge, we cannot pass over the evidence of the witnesses, F. Joye and D. A. Foxworth, that the appellants, in December, 1866, knew that F. E. Joye had purchased the goods in Baltimore, and, when they took from F. Joye the money and remaining stock, said "they would pay the debts." F. Joye, too, one of the guarantors, actually made the purchases under the guaranty. The whole evidence as to notice was before the jury, and we do not see enough of misdirection in the charge to justify us in setting the verdict aside.

It is ordered and adjudged that the motion be refused, and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. *418

*JAMES McCREARY v. MOSES C. TAGGART and JAMES TAGGART.

(Columbia. April Term. 1871.)

[*Arbitration and Award* ⚡86.]

In pleading an award it must appear that all the conditions required by the terms of the submission were complied with.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. § 507; Dec. Dig. ⚡86.]

[*Arbitration and Award* ⇨86.]

A plea of an award, alleging that the arbitrators "made their award in writing * * * in the following terms" setting out a copy with the names of the arbitrators thereto, sufficiently shows that the arbitrators complied with the terms of the submission requiring them "to make and sign" an award.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. § 506; Dec. Dig. ⇨86.]

[*Arbitration and Award* ⇨81.]

Plaintiff brought a civil action against defendant for assault and battery, and also preferred an indictment against him for the same offense. They then agreed to refer the whole matter to arbitration, the plaintiff agreeing to withdraw the civil action, and also the indictment, "as far as he may be able," upon the award being made and complied with. An award was made, which defendant complied with, and pleaded in bar of the civil action: *Held*, that the plea was good, the award not being vitiated by the agreement in reference to the indictment.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. § 428; Dec. Dig. ⇨81.]

Before Orr, J., at Abbeville, August Term, 1869.

The plaintiff, James McCreary, brought an action of trespass against the defendants for assault and battery, and also preferred an indictment against them for the same offense. After issue joined in the civil action, the plaintiff and Moses C. Taggart, one of the defendants, made an agreement to refer all matters in issue between them, as well in the civil action as in the indictment, to arbitration—they mutually binding themselves to abide by such award as the arbitrators, or a majority of them, "shall make and sign," and the plaintiff agreeing to withdraw the civil action, and also the prosecution, "as far as he may be able," as to the said Moses C. Taggart, upon the award being made and complied with. A majority of the arbitrators made an award requiring the defendant, Moses C. Taggart, to pay to the plaintiff \$150, and each party to pay his own costs.

Moses C. Taggart tendered the amount of the award, which was refused, and he then, by leave of the Court, pleaded the submission and award in bar of the civil action. The plea alleged that "a majority of the said arbitrators made their award, in writing, of and concerning the premises so referred to them as aforesaid, in the following terms, viz: " setting out a copy of the award, with the names thereto of the majority who made it; but the plea did not allege that the arbitrators composing the majority had signed the award.

The plaintiff demurred generally to the plea, and His Honor the Circuit Judge overruled the demurrer.

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*The plaintiff sued out a writ of error and assigned for error:

1. That the plea does not show and aver that a majority of the arbitrators "made and

signed" the award in conformity with the submission.

2. That the plea shows and avers that an indictment for a criminal offense was one of the causes and matters submitted to arbitration, and was embraced in the award pleaded.

Burt, for plaintiff in error:

1. In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defense, must be stated in the pleadings.—1 Chitty on Pleadings, 215.

A long established form of pleading applicable to the facts of the particular case, should be observed.—*Idem*, 222.

The circumstances which constitute the ground of defense in this cause are the alleged submission and award.

The terms of the submission are that the award "shall be made and signed by a majority of the arbitrators."

Signing the award by the arbitrators is made, by the submission, the indispensable condition of its validity.

A submission to arbitrators is the delegation of a special authority, and any condition may be annexed to such special authority; the terms of the submission are the law which define the powers of arbitrators. Every fact or circumstance, which is an element in the validity of an award, must be alleged in pleading; the signing of the award is such an element, and must be alleged. An award must be alleged to have been made in form and in substance in pursuance of the submission—or if the submission require the award to be in writing, or under the hand and seal of the arbitrators, it must be alleged to have been so made; and the omission would be fatal on demurrer, or in arrest of judgment, or in error.—Watson on Arb. and Awards, 372-3; Russell on Arb., 492; Billings' Law of Awards, 130; Viner's Abridg., Title Arbitrators, 118, 119; Henderson v. Williamson, 1 Str., 116; Everard v. Patterson, 2 Marsh. Rep., 304; same case, 6 Taunt., 614; 2 Saund. Rep., 62, note 3; Stanton v. Henry, 11 Johns. Rep., 133.

2. Matters purely of a criminal nature cannot be submitted to arbitration.—Watson on Arb. and Awards, 59.

As a general rule, indictments, the subject-matter of which may be the foundation of a civil action, may, with the assent of the

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*Court, be referred to arbitration.—Billings' Law of Awards, 26; Thorpe v. Cole, 1 M. & W., 531.

The submission in this case was not by order of Court.

Perrin & Cothran, for defendant in error.

May 18, 1871. The opinion of the Court was delivered by

MOSES, C. J. The action was trespass vi et armis. The defendant, Moses C. Taggart, plead (*pais darrein continuance*.) in further bar of the action, that he and the said plaintiff had, in writing, under their hands and seals, mutually referred to arbitration all matters and things between them to the arbitrament of certain persons named in the submission, and that they had mutually bound themselves to abide by the award of the arbitrators, or a majority of them, which they or such majority "shall make and sign." That an award was made in writing, which is fully set out, to which each of the arbitrators who concurred (being a majority of the whole,) severally subscribed their names. That the amount awarded to be paid the said plaintiff was tendered and refused.

The defendant filed a demurrer, and alleged as cause, that, as the agreement to refer required the award to be made and signed by the arbitrators, it should have been averred, not only that it had been made, but also that it had been signed.

There is no doubt that all the circumstances necessary to constitute the cause of complaint, or the ground of defence, must be alleged in the pleadings. On the one hand, they constitute the gravamen on which the plaintiff rests his action, and on the other they furnish the means by which it is sought to defeat it. The precision that is necessary must not only be of a character sufficient to inform the plaintiff of the objection relied on to resist his writ but must be submitted in conformity with the rules of pleading, which have been established by a long line of precedents well understood and easily to be ascertained.

Though technical in their mode, yet the obligation is as strongly imposed on a Court to adhere to their application as to enforce any legal principles. They constitute, of themselves, perfect legal rules intended to secure rights and to punish wrongs.

An action on an award, or a plea of award rendered, forms no exception to the requisition. It is not sufficient that the award should be set forth in substance; all the essential conditions which the parties prescribe in the submission must be shewn to have been complied with. They make it the law

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by which they are to be *governed in the particular matter, and they have the right to attach their own qualifications and limitations.

If, as in the case referred to, of *Everard v. Patterson*, 1 Taunt., 645, the submission requires that the award should be in writing under the hands and seals of the arbitrators, it is not sufficient to aver that it was in writing merely, "it must be shewn in pleading that it is under seal, as well as in writing;" and so, in *Stanton v. Henry*, 11 John, 134, (both of which cases were refer-

red to by the counsel for the appellant.) it was held "that if the proviso, in the bond of submission, required that the award shall be in writing, under their hands and seals, an award in writing, but not under seal, was bad."

It cannot, however, be said that, in the case in hand, the plea does not aver that the award was "made and signed;" when, not content with merely referring to it as made by a majority of the arbitrators, it actually sets it out with their names subscribed to it, and refers to the names as signed by them.

The rules of pleading would have been fully satisfied if, after stating it in its own words, it had alleged that the award was made in conformity with all the conditions required by the submission; and is it weakened or affected because a copy of the whole of it is recited, followed by the names of the arbitrators, in number necessary to a concurrence?

The second ground of appeal seeks to reverse the order of the Circuit Judge overruling the demurrer, because the plea shews that an indictment was one of the causes and matters submitted by the agreement for arbitration.

Mr. Watson, in his "Treatise on the Law of Arbitration and Awards," p. 35, says: "Matters of a criminal nature, for obvious reasons, are not capable of being submitted to the decision of an arbitrator. But there are many offences which may be made the subject of an indictment, as assaults, nuisances, and the like, and for which the prosecutor may proceed by action, where those reasons do not apply. Indictments for these may be referred to arbitration by leave of the Court where they are depending." In this State indictments for the like offences are regarded, to some extent, within the direction of the prosecutor, for even after a verdict of guilty, and the parties are reconciled, a nominal punishment is imposed. Unless the assault has been violent or enormous, it has always been the practice of our Courts, where damages have been given in a civil action, to inflict a mitigated sentence for the violation of the public peace.

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*It is not necessary to discuss this question here. Though the indictment and the civil suit were to be withdrawn by the plaintiff, it is distinctly stated in the agreement and bond that, as to the former, "he will, as far as he may be able to do, withdraw his prosecution, aforesaid, as to Dr. M. C. Taggart, the defendant."

It comes with an ill grace from him, now that the award has not probably equalled his expectations, to aver against the terms of an agreement to which he is a party. The defendant, against whom the indictment still stands, makes no complaint in this particular, and he is the person who alone can suffer

from its enforcement, if the prosecutor is without control over it.

The motion is refused, and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 422

JAMES R. BOYLSTON and Another v.
JOSEPH CREWS.

(Columbia. April Term, 1871.)

[*Appeal and Error* ⇐419.]

A notice of appeal, under the Code, held sufficient as a notice of appeal from the judgment of the Circuit Court, though, in its terms, the notice was of an appeal from the order directing the judgment to be entered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2145; Dec. Dig. ⇐419.]

[*Appeal and Error* ⇐103.]

A judgment upon an answer as frivolous is appealable to the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 710; Dec. Dig. ⇐103.]

[*Pleading* ⇐346.]

An answer, to be adjudged frivolous, must be clearly so in its whole scope and bearing, and not merely through a formal defect that might be cured by amendment. If argument is required to establish its character as frivolous, the Court will not dispose of it in the summary manner authorized by the Code.

[Ed. Note.—Cited in *Grayson v. Harris*, 37 S. C. 607, 16 S. E. 154.

For other cases, see *Pleading*, Cent. Dig. § 1062; Dec. Dig. ⇐346.]

Before Melton, J., at Chambers, Columbia, August, 1870.

Appeal by the defendant from a judgment upon an answer adjudged to be frivolous, under Section 270 of the Code of Procedure.

The allegations contained in the complaint were as follows:

"1. That the defendant, on the 2d day of November, in the year 1865, at Charleston, in the said State, by his bill of exchange, commonly called an inland bill, required J. M. Brawley to pay to the order of Wylie T. Burge and Albert Z. Demorest, by their firm

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*name of W. T. Burge & Co., thirty days after the date thereof, the sum of twelve hundred and forty-four dollars and twenty-three cents, for value received.

"2. That the said bill was presented and accepted by the said J. M. Brawley.

"3. That, some time subsequently, the firm of W. T. Burge & Co. was dissolved, and the plaintiffs, for full consideration, purchased jointly the accounts and choses in action belonging to the said firm, which were assigned, and, by delivery, transferred to the plaintiffs; and among the choses so purchased and delivered was the inland bill of the defendant, hereinbefore described.

"4. That the said bill of exchange was

regularly presented to the said J. M. Brawley for payment, but was not paid.

"5. That the defendant had notice of the non-payment, and the defendant subsequently made partial payments upon the said bill, to wit: Three hundred and thirty-eight dollars and eighty-nine cents (\$338.89) on the 17th May, 1866; on hundred dollars (\$100) on the 4th June, 1866; two hundred dollars (\$200) on the 29th June, 1866; one hundred and forty dollars (\$140) on the 29th May, 1867; and one hundred and twenty dollars (\$120) on the 18th December, 1867; and fifty dollars (\$50) on the 16th November, 1869.

"6. That the balance of the principal and interest due upon the said bill of exchange is still due and unpaid to the plaintiffs, who are the legal owners of the said bill of exchange, and legally entitled to receive the same. Wherefore the plaintiffs demand judgment against the defendant, as drawer of the said bill, for the balance of the principal, to wit: Two hundred and ninety-five dollars and thirty-four cents, (\$295.34,) with the lawful interest that has accrued thereon, with costs of this action."

The answer was as follows:

"The defendant, Joseph Crews, by his attorneys, Chamberlain, Seabrook & Dunbar, answering the complaint herein:

"1. Admits that he drew the bill of exchange alleged in the said complaint, but denies that he incurred any personal responsibility for the same, inasmuch as he drew it as the agent of L. Dial, of the County of Laurens, in the State aforesaid, for whom he was at the time acting as mercantile agent, in a mercantile business, in the town of Laurens; and that W. T. Burge & Co., in whose favor the said bill of exchange was drawn, were well acquainted with the fact

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*that the goods purchased, for which the said bill of exchange was given, were purchased by the said Joseph Crews, as agent for the said L. Dial, and also believes that the plaintiffs, James Reid Boylston and Albert Z. Demorest, knew the fact before they purchased the said bill of exchange, and that it was generally known that the said defendant was then and afterwards acting as agent for the same L. Dial.

"2. He denies that the payments alleged to have been made by him at the divers times named in the said complaint were made out of his individual funds, but alleges that they were made out of the funds of his principal then in his hands.

"3. He denies that, as agent of the said L. Dial, he has any moneys in his hands belonging to his said principal, and avers that he never was, nor is now, liable in any manner, shape or form, personally, for the balance alleged in the said complaint to be due on the said bill of exchange.

"Wherefore the defendant demands judgment for costs in this action."

On the 22d August, 1870, His Honor Judge Melton made an order as follows:

"On reading and filing the pleadings in this action, and notice of this motion, and proof of due service thereof, and on motion of Pope & Haskell, for the plaintiffs, and after hearing Messrs. Chamberlain, Seabrook & Dunbar, in opposition thereto: Ordered, That the answer of the defendant, Joseph Crews, herein, be overruled as frivolous, and that the plaintiffs have judgment thereon for the relief demanded in the complaint, with costs of this action, and ten dollars' costs of this motion."

On the 23d August, 1870, judgment was entered for the plaintiffs.

The defendant appealed, his notice or ground of appeal being as follows:

"The Court below erred in overruling the answer as frivolous, and ordering judgment to be entered against the defendant for the relief demanded in the complaint, with costs of the action, and ten dollars' costs for the motion."

Chamberlain, for appellant:

First. An appeal lies from a judgment entered upon an order to strike out an answer as "frivolous."—*Manning v. Tyler*, 21 N. Y., 570; *People v. McCumber*, 18 N. Y., 315.

"The practice in regard to frivolous an-

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swers, demurrers and replies is regulated by Section 247 (corresponding to Section 270 of our Code) of the Code, which provides that the party aggrieved may apply, upon a notice of five days, to a Judge out of Court, for judgment, and that judgment be given accordingly.

"The frivolous pleading in such cases is not stricken out, but remains upon the record and becomes part of the judgment roll. An appeal may be taken from the judgment, in such cases, from the special to the general term, and from thence to the Court of Appeals. But the manner of dealing with sham and irrelevant answers is entirely different," &c.—*Briggs v. Bergen*, 23 N. Y., 163.

"It is first insisted that the order directing final judgment is erroneous; that the Judge has only power to adjudge the demurrer frivolous, leaving the parties precisely as if no pleading had been interposed.

"Whether a decision, under Section 247, is an order or judgment, has given rise to many conflicting opinions, as well as adjudications, both at special and general terms. The better opinion seems to be, and the majority of cases so hold, that such a decision is a judgment upon an issue of law, and not an order simply, from which alone an appeal can be taken."—*Witherhead v. Allen*, 28 Barb., 663, and authorities there cited; *King v. Stafford*, 6 How. Pr. Rep., 127; 5 How., 30, 247; 6 id., 21; 7 Barb., 581; 7 How., 393.

Second. The answer, in this case, sets up

a valid defense, or, at least, such a defense as would require the intervention of a jury to determine its sufficiency.

"Every contract made with an agent, in relation to the business of the agency, is a contract with the principal, entered into through the instrumentality of the agent, provided the agent acts in the name of his principal. The party so dealing with the agent is bound to his principal; and the principal, not the agent, is bound to the party. It is a general rule, standing on strong foundations, pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power. If he makes the contract

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in behalf of his principal, and discloses *his name at the time, he is not personally liable, even though he should take a note for the goods sold, payable to himself," &c.—2 Kent. Com., 629 and 630.

"But although the rule is thus strict in relation to the mode of executing sealed instruments, where, for one, the objects of the instruments, as well as the due technical and legal operation of the same, it is essential that they should be in the name of the principal, and under his seal, yet a more liberal exposition is allowed in cases of unsolemn instruments, and especially in cases of commercial and maritime contracts, which are usually drawn up in a loose and inartificial manner."—*Story on Agency*, Section 154, p. 181.

Third. This answer is not such an answer as to fall within the meaning of the term frivolous, as used in the Code, and interpreted by the Supreme Court of New York.

"An answer which denies a material allegation of the complaint is not frivolous."—*Davis v. Potter*, 4 How. Prac. Rep., 156; also, *Richter v. McMurray*, 15 Abbot Prac. Rep., 346.

The defendant may set forth as many defenses, whether legal or equitable, or both, as he may have.—Subdivision 2, Section 173, of Code.

The insufficiency of a pleading must be so apparent that the Court can determine it upon bare inspection, without argument.—*Sixpenny Savings Bank v. Sloan and others*, 13 How., 544.

"Although there is but slight evidence of merits in a defense, it is sufficient to prevent the answer from being struck out as sham or frivolous."—*Munn and others v. Barnum*, 12 How., 563.

"The doctrine of the cases is, that the Court must be well satisfied that such plead-

ing is clearly frivolous, and is interposed in bad faith, for the purposes of delay, or some other improper motive."—*Temple v. Murray* and *Ely*, 6 How., 329.

"An answer which is so framed that it does not set up a valid defense, but which states facts that may, by being properly averred, constitute a defense, will not be struck out as sham, irrelevant or frivolous."—*Struver v. The Ocean Insurance Company*, 9 Abb., 23.

The same doctrine is held in *Alfred v. Watkins*, 1 Code, Rep. U. S., 343.

Pope & Haskell, contra.

May 29, 1871. The opinion of the Court was delivered by

WILLARD, A. J. It is objected to the notice of appeal that it is based upon the order for judgment, and not upon the judgment

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itself. *This, if applicable, would be fatal to the appeal. But the notice of appeal, though certainly informal, refers to a judgment in terms, and it is obvious that the object of the appeal is to get rid of the effect of such judgment.

Placing this liberal interpretation on the terms of the notice, with reference to the manifest object of the appeal, we are enabled to treat it as substantially an appeal from the judgment itself.

A judgment upon an answer as frivolous is appealable to this Court.

An answer to be adjudged frivolous must be clearly so. If argument is required to establish that character, the Court will not dispose of it in this summary manner.

The complaint was on a draft drawn by the defendant Crews and accepted. The plaintiffs are holders for a valuable consideration. The answer alleges that the defendant Crews drew the draft as agent for a third party, and for the payment of a debt due by such third party to the drawee, and that the drawee took the bill upon such understanding. It also charges that the plaintiffs took the draft with knowledge of these facts.

With the truth or falsity of the answer we have nothing to do. If demonstrably false the remedy was to strike it out as sham. Its truth must be assumed. If frivolous it is only so in its legal bearings. Nor will we merely criticise the mode in which the facts contained within it are alleged, upon an application of this nature. It is not the purpose of such a motion to enable the plaintiff to take advantage of defects or inadvertences in the form of pleading.

To meet the charge of frivolousness the pleading must be of that character in its entire scope and bearing, and not merely through a formal defect that might be cured by amendment.

All that we are called on to say of the defense set up by the answer is that it is not frivolous. If the fact stated is true, the drawee could not hold the defendant personally upon it, nor could a holder for value with notice have any higher rights than the drawee himself.

The judgment below must be reversed and the case remanded for further proceedings.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*NOAH WEBSTER v. J. J. BROWN and CHARLES B. HAMMETT.

(Columbia. April Term, 1871.)

[*Mortgages* \hookrightarrow 374.]

A mortgage of land contained a power authorizing the Sheriff, in case default of payment should be made to sell the land to the highest bidder, make him titles, and satisfy the mortgage debt out of the proceeds of the sale. Default was made, and the Sheriff sold the land, and made a deed of conveyance to the purchaser in his own name, reciting therein that he sold by virtue of the power given by the mortgage: *Held*, That the deed did not transfer the estate of the mortgagor to the purchaser.

[Ed. Note.—Cited in *Robinson v. Amateur Association*, 14 S. C. 151.]

For other cases, see *Mortgages*, Cent. Dig. § 1119; Dec. Dig. \hookrightarrow 374.]

[*Principal and Agent* \hookrightarrow 126.]

A deed made under a power of attorney, must be executed and delivered in the name of the principal.

[Ed. Note.—Cited in *De Walt v. Kinard*, 19 S. C. 292; *Ramage v. Ramage*, 27 S. C. 42, 2 S. E. 834; *Johnson v. Johnson*, 27 S. C. 316, 3 S. E. 606, 13 Am. St. Rep. 636; *Dendy v. Waite*, 36 S. C. 574, 15 S. E. 712; *Sullivan v. Sasong*, 40 S. C. 163, 18 S. E. 268; *Givins v. Carroll*, 40 S. C. 415, 18 S. E. 1030, 42 Am. St. Rep. 889; *Williams v. Washington*, 40 S. C. 461, 19 S. E. 1; *Peiper v. Shalid*, 101 S. C. 364, 85 S. E. 905.]

For other cases, see *Principal and Agent*, Cent. Dig. § 444; Dec. Dig. \hookrightarrow 126.]

[*Principal and Surety* \hookrightarrow 147.]

A creditor is entitled to the benefit of all securities given as indemnity by the principal debtor to his sureties, and to be subrogated to their rights therein; but this equity does not enable the creditor to maintain trespass, to try title against a purchaser from the mortgagor to recover the possession of land mortgaged by the principal debtor to his sureties to indemnify them.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 411; Dec. Dig. \hookrightarrow 147.]

Before Orr, J., at Spartanburg, Spring Term, 1870.

Appeal by the plaintiff from a judgment for the defendant. The facts of the case relating to the question decided by this Court are stated in the judgment of the Court.

Bolo, Carlisle, McKissick, for appellant.
Evans & Duncan, contra.

May 29, 1871. The opinion of the Court was delivered by

MOSES, C. J. The action is trespass to try title. The plaintiff can only recover by the force of his title, and if this is defective in any material link of his whole chain, he must fail.

We shall, therefore, only consider the effect of the deed of January 13, 1868, executed by J. H. Blassingame, Sheriff of Spartanburg District; for, if this is inadequate to convey the right in the land to the plaintiff, he cannot recover in this action, no matter how insufficient may be the title of the defendants.

It appears that the fee in the land in controversy was, on the 16th of June, 1863, in the plaintiff, Webster. On that day he conveyed all his right and interest to Lee L. Smith, who executed two notes for the purchase money, with Abner E. Smith and Jennet Shipley as sureties. At the same time the grantee executed a mortgage of the premises (which were situated in the District of Spartanburg,) to the said sureties, for the purpose of protecting the payment of the note, with a condition that if he paid them off as they became due, with all interest and costs, it was to be null and void. The mort-

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gage *contained a further stipulation, that if the mortgagor failed to pay the said notes when the last of them fell due, the Sheriff should advertise and sell the land to the highest bidder, make titles to the purchaser, and pay as much of the proceeds of the sale as would satisfy the notes with the costs for selling.

On the 28th of December, 1864, Lee L. Smith conveyed the same land to the defendant, Hammett, and the said Abner E. Smith joined in the deed. Jennet Shipley, the other surety, died in 1867, intestate, and the plaintiff, Webster, administered on her estate. Some time during the latter part of the same year, the notes being unpaid, he, as such administrator, with Bobo & Carlisle, styling themselves "attorneys for E. A. Smith," endorsed on the mortgage a direction of which the following is a copy:

"The Sheriff of Spartanburg District will sell the property described within by virtue of the power given within."

John H. Blassingame, then being Sheriff of Spartanburg District, on the 6th of January, 1868, after three weeks' advertisement sold the mortgaged premises to the plaintiff, (he being the highest bidder,) and on the 13th of the same month executed a deed to him of the same, reciting in it that he sold "by virtue of the authority" given in the said mortgage. He binds himself and his heirs to warrant and defend all and singular the said premises to the said Webster and his heirs against all persons lawfully claiming the same under him or his heirs.

If the said deed conveyed the title of the mortgagor, Lee L. Smith, to the plaintiff, it might be necessary to enquire how it stood affected by the action of the sureties in re-

gard to the mortgage and the rights to which the plaintiff may be entitled under it. Not doubting, however, that the deed conveyed no title from Lee L. Smith to him, it is not our purpose to discuss or decide any of the other points made, so that the parties may be without prejudice, should he pursue his supposed rights in such other form as he may be advised.

Title to real estate can only be transferred by deed from him who is vested with the fee. It may be directly from himself, or through an authorized attorney on his behalf. It must, however, in either form, be by his act. The power under the mortgage, to the Sheriff, "to sell and make title," can be regarded only as the creation of an agency. The deed, however, to the plaintiff does not purport to be that of the mortgagor under whose authority the Sheriff acted, but is executed by him in the same manner as

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if he had *been vested with the fee, and proposed by the instrument a transfer of it. He actually binds himself and his heirs by a covenant of warranty, and affixes his own name and seal. To enable him to convey whatever title may have been in Lee L. Smith to the plaintiff, Blassingame should first have held title under or through him. Smith might have transferred his title to Blassingame, coupled with a power to sell and apply the proceeds of the sale; but this he has not done. Under the Act of 1791, while in possession, he retained the title in himself; and if he had executed a deed, or if his agent had so done, in the name of the principal, by such agent, whatever title he had would have passed to the purchaser. It is not necessary that the formal mode usually employed when an agent signs an instrument, by virtue of the authority of his principal, should be pursued. If the fact appear on the face of it, or from a proper construction of all its parts, that will be sufficient.

"The execution and delivery of a deed must be in the name of the principal; and if it be the execution of the agent only, it is void as to the principal; as where the King granted authority to one to make leases, a lease made by him in the King's name, but executed by himself, was held void, for the execution ought to have been with the King's seal; thus the King, by A. B., puts his seal," &c.—Moore Pl., 108.

In Coombes' case, 9 Co., 76, it was resolved "that when any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and, therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gave the authority."

"If attorneys have power by writing to make leases by indenture for years, &c., they

cannot make indentures in their own names, but in the name of him who gives him warrant."

This ruling was adopted in *Frontin v. Small*, 2 Lord Raymond, 418; *White v. Cuafer*, 6 T. R., 176, and many other English cases.

Elwell v. Shaw, 16 Mass., 42, presented the following facts: Jonathan Elwell, by deed, constituted Joshua Elwell his attorney, for him and in his name to sell real estate, and in his name to execute such deeds and instruments with such covenants as he shall deem expedient and necessary, thereby ratifying and confirming whatever he might do in the premises. Joshua conveyed the premises to a party in fee, correctly reciting the letter of attorney in the deed, adding, that

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"in testimony *thereof I have hereunto set the hand and seal of the said Jonathan, this," &c., and signing his own name opposite to the seal. The Court held that it was invalid to pass the fee, and that the objection was "supported by all the adjudged cases relating to the point."

In *Lessee of Clarke v. Courtney et al.*, 5 Pet., 349 [8 L. Ed. 140], Story, J., delivering the opinion of the Court, says: "It is certain that Coombes' case has never been departed from, and has often been acted upon as good law," and applied it to the case before him, in which the question arose as to the validity of a deed intended to convey land, and executed under a power of attorney, in the name of the attorney. He adds, "the act does not, therefore, purport to be the act of the principals, but of the attorney. It is his deed and his seal, and was not theirs. This may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact whether that has been executed in such a manner as to possess a legal validity."—See also *Wells v. Owens*, 20 Wend., 251; *Bogard v. DeBussey*, 6 John., 94.

In our own Courts, in *Pryor v. Coulter*, 1 Bail., 517, and *Welsh v. Parish, Miller & Co.*, 1 Hill, 155, the same doctrine is held, and the authority of Coombes' case, which it is said laid the foundation for the rule which has been followed ever since, was recognized to its fullest extent. The objection is so conclusive that it is not necessary to consider what title the plaintiff would have held, under all the circumstances developed on the trial, even if the deed had been so executed as to carry out its intent.

There is no doubt, as contended by the appellant, that the creditor is entitled to the benefit of all securities or pledges in the hands of the surety which were designed to indemnify him, and has the right to be subrogated to such interests. Though the

doctrine is an equitable one, still it will be enforced in a Court of law in a proper case. Of what value is the principle to the plaintiff here. It can never operate to clothe the creditor with the legal title to property which is held by the surety as indemnity for the liability which he has incurred. All that the creditor can do is by a proper proceeding to compel the surety, where the debt is unpaid by the principal, to apply it to the purpose for which it was designed. The plaintiff, however, instead of doing this, preferred to stand on his legal title, and this is not strong enough to sustain him.

The motion is refused, and the appeal dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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*JOHN B. EARLE v. J. W. HARRISON and Others.

(Columbia. April Term. 1871.)

[*Contracts* ⇨§§.]

In December, 1859, A agreed to sell to B a tract of land for \$2,250, received from the latter his note for the purchase money, and gave him a bond for title on payment of the note. B made payments on his note, leaving a balance of \$1,667.67 due thereon on May 21, 1862, on which day B sold his interest in the land to W and H for \$3,000, transferred to H the bond for title, and they paid him by giving their sealed note to A for \$1,667.67, the balance due him, and their note to B for \$1,332.33: *Held*, That, as between A and W and H, the transaction was not within the Ordinance of September, 1865, and that A was entitled to recover from them the full amount of their note to him.

[Ed. Note.—Cited in *Earle v. Stokes*, 4 S. C. 310.

For other cases, see *Contracts*, Cent. Dig. § 405; Dec. Dig. ⇨§§.]

Before Orr, J., at Anderson, May Term, 1870.

Bill for specific performance of a contract for the sale of a tract of land.

The bill stated that on December 25th, 1859, the plaintiff bargained with Ezekiel Harris, one of the defendants, to sell him a tract of land, describing it, for \$2,250, received his note for the purchase money and gave him a bond to make title when the note should be paid: that Harris took possession of the land and made payments on the note, leaving a balance of \$1,667.67, due thereon on the 21st May, 1862: that on that day Harris, with the consent of the plaintiff, sold his interest in the land to the defendants, J. W. Harrison and H. H. Whitaker, who gave to the plaintiff their note, under seal, for the balance due him by Harris: that the latter then assigned to Harrison the bond for title, and that Harrison and Whitaker entered into possession of the land. The bill prayed specific performance of the

contract, or that the land be sold and the proceeds applied in payment of the amount due the plaintiff.

The defendants filed separate answers. They all admitted the facts alleged by the plaintiff to be substantially true. Harris stated that he assigned the bond for title to Harrison, and conveyed the land to Whitaker. Harrison stated that Whitaker was the purchaser of the land from Harris; that the price he agreed to pay for it was \$3,000; that he (Harrison) became surety on the note to the plaintiff, and that the bond for title was as "collateral security." Whitaker stated that he and his "joint tenant" purchased the land from Harris at the price of \$3,000; that he purchased at an "enhanced price, in consequence of the depreciation of the currency of the country, and enhancement of all values," and he claimed "the benefit of the Ordinance of the Convention relating to contracts of this nature, and that the note may be reduced to its true value."

The decree of His Honor the Circuit Judge is as follows:

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*Orr, J. The bill filed in this case by complainant is to compel the defendant, J. W. Harrison and H. H. Whitaker, to pay the balance of the purchase money of the Centreville Mills, and the tract of land appurtenant thereto, or to surrender his bond for titles given to one E. Harris, which has been assigned by said Harris to Harrison. It appears that, in 1859, Earle, the complainant, sold the mills and tract of land (300 acres,) to Harris, for the sum of \$2,250.00. That, on the 21st day of May, 1862, Whitaker and Harrison purchased from the said Harris his interest in the said tract of land on that day, and executed to Harris their note for \$1,332.33 cents, which they subsequently paid, and also their note to the complainant for \$1,667.67, it being the balance of the purchase money due by Harris to Earle, deducting the payments Harris had made to him. Harris, thereupon, assigned the bond for titles he held from Earle to Harrison. The only question in the case is this: Shall the defendants be permitted to set up their purchase as a Confederate transaction, and show the value of the property at the time, or shall they be held to pay complainant the full amount of his note, dated in May, 1862, without reference to the value of the property purchased?

The proof taken in the case shows that they agreed to pay Harris for the mills and land, in 1862, the sum of three thousand dollars, and a little more than two years before he had purchased the same from complainant for two thousand two hundred and fifty dollars. Harris, in the meantime, had reduced his debt by payments to \$1,667.67, the amount of complainant's note sued on in this case. When he transferred his contract and bond for titles to defendants, Harrison

and Whitaker, with Earle's consent, and when Earle accepted their note in lieu of Harris', he made himself a party to the new contract, and cannot now recover from defendants more than Harris could claim if he were complainant in this case.

The testimony is somewhat conflicting as to the value of the land in 1862, in good money—the estimates of the witnesses varying from \$2,000 to \$2,500. I shall take the medium of the valuations, which will be \$2,250, and that is the sum at which complainant sold to defendant Harris, in 1859. The value of the property at the time of sale was \$3,000, in Confederate money; but, instead of adopting the value of Confederate money as the measure of recovery in this case, I take the value of the property as the true standard at the time of sale. Assuming \$2,250 as the true value of the property

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*in 1862, what should be the recovery in the case against Harrison and Whitaker? It should be twelve hundred and fifty dollars and seventy-five cents, (\$1,250.75,) and interest on the same from the 21st day of May, 1862, until the 1st day of August, 1870—seven hundred and seventeen dollars and forty-five cents, (\$717.45)—making the aggregate sum due one thousand nine hundred and sixty-eight dollars and twenty cents on the 1st August, 1870.

It is, therefore, adjudged, ordered and decreed that the said James W. Harrison and H. H. Whitaker do pay to the said John B. Earle the sum of one thousand nine hundred and sixty-eight dollars and twenty cents, with interest from the 1st day of August, 1870, on the sum of twelve hundred and fifty dollars and seventy-five cents, on or before the first Monday in October next; and, in case of failure to pay the same, that the tract of land and mills described in the pleadings be sold by the Sheriff of the County, on the first Monday of November next, after giving twenty-one days' notice by public advertisement, for cash. On payment of the said sum of money by the said Harrison and Whitaker, the said John B. Earle shall execute a good and legal title to the parties aforesaid, with all proper renunciation of dower. And, should the same be sold as herein ordered, the said Earle shall execute title to the purchaser, with proper relinquishment of dower, &c.; the costs of papers and stamps to be paid by the purchaser.

It is ordered that the costs of this bill be paid by the defendants, Harrison and Whitaker, and the bill be dismissed as to Ezekiel Harris, at the cost of the parties.

The plaintiff appealed, and now moved this Court to reform and modify the decree on the following grounds, and in the following particulars:

1. Because it is a total misconception of the relations and rights of the parties to the cause above mentioned, to assume that the

plaintiff, by accepting the note of Harrison and Whitaker for sixteen hundred and sixty-seven dollars and sixty-seven cents—the residue of the purchase money of the land sold by plaintiff to the defendant, Harris—became a party to the contract of sale between Harris and Harrison and Whitaker, of the date of 21st of May, 1862, and that his sale of land to Harris, in 1859, should be regarded, as to Harrison and Whitaker, as a sale to them on the 21st of May, 1862.

2. Because, in no just sense, can the plain-

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tiff be regarded as the *vendor of the land described in the pleadings to Harrison and Whitaker, they being the vendees or assignees of the equity in the land by Harris, purchased from the plaintiff, and the consideration of the note of Harrison and Whitaker to the plaintiff being the extinguishment of the debt to the plaintiff of Harris, and his release from its obligation.

3. Because the sale of the land by plaintiff to Harris, in 1859, and the sale by Harris to Harrison and Whitaker, in May, 1862, were transactions, not only at different times, and for different sums or prices, but between different parties; and the execution and delivery of their note to the plaintiff for the purchase money due to him by Harris, was merely the payment to Harris of the purchase money stipulated by Harrison and Whitaker to be paid to him.

4. Because the most favorable view of the right of Harrison and Whitaker, as the vendees or assignees of the equitable title of Harris, is that they occupy the position of Harris to the plaintiff, and are entitled to his equities, but to no higher equities than Harris; and, on payment to the plaintiff of the purchase money due by him, are entitled to demand titles to themselves under plaintiff's bond for titles to Harris.

5. Because the sale of the land, by plaintiff, to Harris having been made in 1859, and the consideration of the note of Harrison and Whitaker, to the plaintiff, being the extinguishment of Harris' debt to him, neither transaction is within the terms of the Ordinance of 1865.

6. Because the judgment of the Circuit Court should have been rendered for the principal sum of the note of Harrison and Whitaker to the plaintiff, with interest agreeably to its terms, without abatement or diminution.

7. Because the judgment of the Circuit Court requires the plaintiff, on payment of the inadequate sum set down in the judgment, or on the sale of the land, to execute and deliver a good and legal title to the land in question, "with all proper renunciation of dower," thereby constraining the wife of the plaintiff, who is not a party to the cause, to renounce her dower, whether she be willing or unwilling, or subjecting the plaintiff to attachment for not doing an act

which he has no power or ability to perform.

8. Because the bill should not have been dismissed as to Harris, but as all the parties in interest were before the Court, their rights and equities to each other, in the premises, should have been adjusted and adjudicated in this cause.

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*Burt, for appellant:

This case suggests but two questions for discussion:

First. Whether the contract between the parties is embraced by the Ordinance of the Convention of 1865, or the Act of 1869.

Second. If within the contemplation of either, then what was the consideration of the obligation of defendants to plaintiff?

The following are extracts from the Ordinance and from the Act:

The Ordinance of 27th September, 1865, p. 177, Sec. 4, confirming and making valid "sales, conveyances, contracts," &c., made since 19th December, 1860, contains the following proviso:

"Provided, That in every action arising on any contract, whether under seal or by parol, written or oral, made between the first day of January, in the year of our Lord one thousand eight hundred and sixty-two, and the fifteenth day of May, in the year of our Lord one thousand eight hundred and sixty-five, it shall be lawful for either party to the action to introduce testimony showing the true value and real character of the consideration of such contract at the time it was made, so that, regard being had to the particular circumstances of each case, such verdict or decree may be rendered as will effect substantial justice between the parties."

The Act of 26th March, 1869, Sec. 1, p. 277, is in the words following:

"That the value of all debts and obligations, whether under seal or not under seal, created or contracted in Confederate States notes, or with reference to Confederate States notes, as a basis of value, issued by the so-called Confederate States Government, or in or by any bills, bonds or notes assimilated or made equivalent in value to Confederate States notes by any law or custom of trade during the years 1861, 1862, 1863, 1864 and 1865, shall be determined by the value of the said Confederate States notes in the lawful money of the United States at the time such debts or obligations were created or contracted."

The price or motive of the contract is the consideration.—2 Bl. Com., 144.

An injury to the party to whom the promise is made, or a benefit to the party promising, is a sufficient consideration.—3 John. R., 100; Chit. on Con., 29, 30; 1 Caine's, 45.

A., being indebted to B. for money won at play, gave his note for \$500 to C., to whom

B. was indebted, upon which C. released the debt of B., was held a good consideration,

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and the note of A. held *to be valid.—Bowen v. Doggett, 2 Mill. 127; Stewart v. Eden, 2 Caine's Rep., 150; Jackson v. Henry, 10 Johns. R., 185.

Reid & Brown, contra, filed no brief.

May 30, 1871. The opinion of the Court was delivered by

MOSES, C. J. The bill states that on the 25th day of December, 1859, Earle, the plaintiff, agreed to sell to Ezekiel Harris, one of the defendants, the land referred to in the pleadings, at the sum of \$2,250, who gave his note for the amount and received a bond for the delivery of title when the note was fully paid. Harris went into possession, and some time in May, 1862, having paid a portion of the purchase money, the defendants, Whitaker and Harrison, bought from him, (the said Harris,) his interest in the land at the price of \$3,000, and the said Harrison received from him an assignment of the bond, which he held for title from Earle, who assented to the transfer, taking from Whitaker and Harrison their note, payable at one day, for \$1,667.67, being the balance due him on the Harris note. It prays that Harrison and Whitaker be required specially to perform the contract under which they hold the said bond for title, by paying the amount due on their note, he being ready and willing to make title, or that, in default of such payment, the land be sold, and the proceeds applied to the said note, so far as may be necessary for its satisfaction.

The answer of Harris substantially admits the facts as alleged in the bill, except that it states that the sale of his interest in the land was made to Whitaker, and the assignment of the bond for title was to Harrison. Whitaker answers that the transfer of the interest of Harris in the land was to him and Harrison, and says nothing of the bond. Harrison answers, in effect, that the sale was to Whitaker, for whom he joined in the note to plaintiff as surety, and that the bond was assigned to him as collateral security for his liability thereon.

The defence which the Circuit Judge seems to have considered as material, arises out of the answer of Whitaker, to wit, that the purchase was "a Confederate transaction," and the makers of the note only liable to respond to it as one of that character, and are to be permitted to shew the value of the property at the time they bought of Harris, or, in other words, that the contract was subject to the provisions of the Ordinance of 1865.

The decree proceeds upon the ground that

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when Harris assigned the bond for title, the plaintiff, by giving his assent thereto, and accepting the note of Harrison and

Whitaker for the balance due on that of Harris, so made himself a party to the new contract that he is bound by its results to the same extent as if Harris himself were now complaining against his co-defendants.

This view of the liability of the plaintiff to an abatement of the amount due on the note now held by him cannot be sustained. He was no party to the agreement between the defendants. Harris could have assigned his bond without his consent, and his mere reception of the note of Whitaker and Harrison, in substitution of the balance due him on that of Harris, can, in no wise, change his rights under his contract with the latter, as to the sum for which he originally agreed to sell to him. The acceptance of the note for the balance unpaid on the Harris note was an act of grace and favor to the other parties, which, by the decree, is made to operate as a wrong and with prejudice to him. He sold in 1859, to be paid in gold or silver coin, or its equivalent representative. He received no additional price as a consideration for the note of Harrison and Whitaker, which he took for the balance due him by Harris. When in 1862, they agreed to purchase, a sale by plaintiff to a third party, without his consent, would have been a fraud on Harris, to whom he had already contracted to sell, and who, under the bond, could, on payment of the amount due on his note, have compelled the execution of a title to him.

It is difficult to perceive on what principle of law or equity the plaintiff, on the facts before the Court, could be deprived of any of his rights under his sale to Harris. There is no proof that on the subsequent arrangement he agreed to abate anything on the Harris note; so far from it, the defendants, Harrison and Whitaker, actually gave him their note for the full balance due him, thus refuting the idea of any intention, at the time, to change his original contract as to the sum he was to receive in payment for the land. In no sense can his claim be made subject to the provisions of the Ordinance of 1865, as claimed by the two defendants, and to hold him bound by its operation would be inconsistent with the very purpose it was intended to accomplish.

It is ordered and adjudged that the decree of the Circuit Court, except as to the dismissal of the bill against Harris and the payment of costs, be set aside.

It is further ordered that on the payment, on or before the 15th day of July next, by the said Harrison and Whitaker, to the said

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*plaintiff, of the full amount which may be then due on their note, he, the said plaintiff, do execute title to the said Harrison for the land referred to in the pleadings, and thereupon the said Harrison shall deliver to the plaintiff the bond for title assigned to him by Harris. On default of payment by the day aforesaid, the Sheriff of Anderson County,

after due advertisement, shall proceed, on the sale day in September next, to sell the said land at public outcry for cash, and shall apply the proceeds, so far as may be sufficient, to the payment of the amount then due on the note above referred to, the balance, if any, to be paid into Court, subject to its order.

The plaintiff to be at liberty to apply to the Circuit Court for any order necessary to give full effect to the judgment of this Court now pronounced, and the said Whitaker and Harrison to have leave to apply to the said Court for any orders necessary to settle the equities between them arising out of the transaction which forms the subject-matter of the bill.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 439

THE STATE v. ORLANDO C. SCARBOROUGH.

(Columbia. April Term, 1871.)

[*Jury* ⇨149.]

Where one of the juries is charged with an indictment for an assault and battery, and after the evidence and argument have been heard, one of the jurymen absents himself from the panel, a member of the other jury who heard the evidence and the argument cannot be substituted in his place against the consent of the defendant.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 635-637; Dec. Dig. ⇨149.]

[*Jury* ⇨149.]

If such substitution be made, and defendant be found guilty, the judgment will be arrested.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 635; Dec. Dig. ⇨149.]

Before Rutland, J., at Darlington, February Term, 1871.

Motion in arrest of judgment. The facts upon which the motion was based, and the ground thereof, are stated in the judgment of the Court.

Warley, for the motion, cited *State v. McKee*, 1 Bail., 651, 654; *Bostick's case*, cited in 1 McC., 254; *Edwards' case*, 2 N. & McC., 17; *State v. Starling*, 15 Rich., 134; *Creiger v. Bunton*, 2 Stro., 491; 2 Hale P. C., 295, 296; *Coke on Lit.*, (Thomas,) ch. 9, p. 457; 2

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*Bish. C. L., § 670, 673; *United States v. Haskell*, 4 Wash. C. C., 402; *Garrat v. Garrat*, 4 Yeates, 244; *People v. Damon*, 13 Wend., 351; *State v. Williams*, 3 Stew., 454; 5 Bac. Abr., 335, Title *Juries*, (C.) 369, (Note.) 371. (G.); *Rex v. Edwards*, Brit. C. Cases, 224; *Rex v. Deleany*, 3 Ib., 88.

Shaw, Solicitor, contra.

May 30, 1871. The opinion of the Court was delivered by

MOSES, C. J. The motion is in arrest of judgment.

It appears from the brief that the defendant, with one John E. Andrews, was indicted for assault and battery. The trial progressed, and, on the conclusion of the argument of the defendant's counsel, the Court adjourned to the next morning. On re-assembling, it was discovered that one of the jury charged with the case was absent. After a little delay, on his non-appearance, the Judge directed that a member of jury No. 2, who had heard the testimony and the argument of the counsel for the defendant, should be sworn, and directed to take his place on the panel to which the cause had been committed. This was done, against the objection of the counsel, who insisted that the jury should be discharged, and the indictment submitted to another jury. The trial proceeded, and resulted in the acquittal of Andrews, and the conviction of this defendant, who moved the Circuit Court in arrest of judgment, on the grounds now submitted for the motion here, the said Court having dismissed it.

There is no right pertaining to the citizen which the Court watches with more jealous care than that which secures to him, when charged with a violation of the public law, a fair and impartial trial by jury in conformity with form and manner which have regulated it for centuries. The least infringement of these is looked to with sad forebodings as the precursor of changes in the administration of the law, which, if not checked, may impair the safeguards by which his life, liberty, character, and property are protected. Our people have persisted in preserving it with all its ancient privileges and prerogatives, and the form of jury trial, as it now exists, has outlived the changes wrought in the government itself by the revolution which converted the Colonies into independent States.

While they have been willing, to a large extent, to realize the necessity of varying the forms of action, the rules of evidence, the punishment for crime, they have adhered al-

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most with a reverential devotion to all the incidents which have attached to trial by jury from a period beyond which the memory of man runneth not.

The tribunal which is to pass upon the guilt or innocence of a party charged with an offense "against the peace and dignity of the State," and known as the "jury," is to be composed of twelve men. "It can be no more, and no less than twelve, and all must assent to the verdict."—2 Hale, 161. Here a jury had been sworn well and truly to try the defendant. Each member assumed the oath as of the panel charged with the cause committed to it, and by it the verdict was to be rendered. If the absence of a single one justified the substitution of another in his stead by the presiding Judge,

the same rule would apply if eleven had been found absent. If, in such an event, that number could have been added to the remaining juror, not only after the testimony had closed, but the defense presented by the counsel, can it be said that the jury thus composed, and which was to find the verdict, constituted the panel to which the case had been submitted? The records of the Court would then shew that the same cause had been committed to thirteen men.

The oath of the jury requires them to find a "true verdict according to the evidence." What evidence, if not that which, as jurymen, under all the obligations the high office imposes, they had heard? They were to be persuaded the one way or the other, by the effect of the testimony on their minds in the capacity of jurors. Except that the person who was called in the place of the absent member was included in the venire, he was, as to this case, concluded save as to the argument of the Solicitor and the charge of the Court, as much a stranger as any indifferent spectator. The rule, too, that the jury are to be sworn before the evidence is heard, was here entirely reversed, for he was not sworn as of the jury until after all the testimony had been taken.

By law a party charged with the offence for which the prisoner was on trial, is entitled to a certain number of challenges. If the juror thus put into the box against the consent of the defendant had been presented to him originally, who can say that he might not have objected to him? The effect, then, of the order of the Judge, would be to deprive the defendant of the exercise of this important privilege. When the jury was formed, by accepting it he admitted it was not subject to exception, but when one was added to it, there was a change which imposed on him no obligation to submit to its verdict as that of a jury legally charged with his trial.

The substitution of another juror must be

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regarded as the discharge of him in whose place he was seated. His connection with the jury had ceased.

In *Greer v. Norvill*, 3 Hill, 262, it is said, "that after a trial has commenced, and the jury is charged with the case, no juror can be withdrawn except from necessity, the consent of the parties, or the permission of the law," and although this language was commented on in *Boland v. Railroad Co.*, 12 Rich., 374, yet we do not understand the latter case as overruling the former, where the dismissal of a juror and the substitution of another was against the consent of one of the parties.

We cannot see any reason why the rule which was prescribed in *The State v. McKee*, 1 Bail., 651 [21 Am. Dec. 499], that where a jury has been charged with the trial

of a prisoner on an indictment for a capital offence, the absence of one of the jurymen will be a good cause for discharging it and directing a second trial, should not apply to the trial of one charged only with a misdemeanor. It is founded on due regard both to the rights of the defendant and the State.

The motion in arrest of judgment is granted, and it is so ordered and adjudged.

WILLARD, A. J., and WRIGHT, A. J., concurred.

2 S. C. 442

R. S. GILLIAM v. W. S. McJUNKIN.

(Columbia. April Term, 1871.)

[*Executors and Administrators* ⇐508.]

On the petition of a surety of an administrator to be relieved from his liability as surety, the Judge of Probate, having cited the administrator before him, proceeded to take an account of his administration, and, finding a balance to be due by him, he made an order that the balance be paid into Court, and that the letters of administration be revoked. The administrator having failed to comply with the order to pay the money into Court, the Judge of Probate issued a warrant to the Sheriff to arrest and imprison the administrator until he complied with the order. The sheriff arrested the administrator under the warrant, and he applied, by writ of habeas corpus, to a Circuit Judge, who ordered his discharge, on the ground that his imprisonment was without warrant of law: *Held*, that there was no error in the order of the Circuit Judge.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2192-2198; Dec. Dig. ⇐508.]

[*Executors and Administrators* ⇐531.]

Where a surety on an administration bond petitions to be relieved from his liability as surety, the Judge of Probate may revoke the letters of administration or require a new bond to be given, with other sureties, but he cannot give a money decree against the administrator.

[Ed. Note.—Cited in *Hall v. Hall*, 45 S. C. 179, 22 S. E. 818.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2430; Dec. Dig. ⇐531.]

[*Executors and Administrators* ⇐508.]

A Judge of Probate has no jurisdiction to issue a warrant to arrest and imprison an administrator for failure to comply with the terms of a money decree.

[Ed. Note.—Cited in *Kennesaw Mills Co. v. Walker*, 19 S. C. 111.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2197; Dec. Dig. ⇐508.]

[*Habeas Corpus* ⇐106.]

One arrested and imprisoned under a warrant in a civil proceeding, will be relieved from imprisonment by writ of habeas corpus, if the Court from which the warrant issued had no jurisdiction to grant it.

[Ed. Note.—Cited in *In re Stokes*, 5 S. C. 72.

For other cases, see *Habeas Corpus*, Cent. Dig. § 95; Dec. Dig. ⇐106; *Contempt*, Cent. Dig. § 220.]

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*Before Orr, J., at Chambers, Columbia, December, 1868.

This case was brought up by writ of error to the Circuit Court of Union County.

R. S. Gilliam, plaintiff in error, was one of the sureties on the administration bond of William S. McJunkin, defendant in error, who was the administrator of William H. Kelly, deceased. On the 16th November, 1868, Gilliam filed a petition in the Court of Probate for Union County, praying to be relieved from his liability as surety. A citation was issued, and, on the same day, both parties appeared before the Judge of the Court, with their respective counsel. An account of the administration was taken, and it appeared that the administrator was indebted to the estate in the sum of \$3,634.98. The Judge made an order, by consent, that this sum be paid into Court, on or before the 27th November, 1868, and he revoked the letters of administration. McJunkin having failed to pay the money into Court, on 30th November, 1868, a warrant was issued by the Probate Judge, directed to the Sheriff of the County, commanding him "to apprehend and imprison the said William S. McJunkin in the common jail in said County, until he shall perform such order, or be delivered by due course of law." The Sheriff having arrested McJunkin under the warrant, he applied for, and obtained, a writ of habeas corpus, and, on the return thereto, he moved for his discharge from custody under the warrant. The motion was granted, and an order, with the reasons therefor, filed with the record, as follows:

"It is not necessary to decide, in this proceeding, whether the Probate Judge had legal authority to make the order to pay the money into Court. The uniform practice in the Court of Ordinary in this State, which is abundantly sustained by authority, has been to fix the amount of indebtedness by the accounting, and a decree to pay the same to the parties in interest entitled in law to receive the same, whether it was distributees, or administrator, de bonis non, if the first administration was revoked, or to creditors. It has not appeared in the argument of counsel or the authorities cited, where an Ordinary has, upon an accounting, adjudged that an administrator should pay the balance found into his Court. The Ordinary's decree, fixing the sum due and requiring its payment, is enforced by an action upon the administration bond in the Court of Common Pleas, which action may be instituted by

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any party entitled to receive all or a part of the sum decreed, and the decree fixes the sum to be recovered.

"It has been expressly ruled, in this State, in case of Lyles, Ordinary, v. McClure, 1 Bail., 7 [19 Am. Dec. 648], that 'the Ordinary is authorized to take and adjust the accounts of administrators, but there his powers end. He has no authority to enforce the performance of any order or decree which he might make.' It has likewise been decided that an administrator cannot even be

sued on his administration bond until he has been cited to account before the Ordinary, and a decree has been made by that officer. Has the legislation of 1868, organizing Probate Courts, &c., enlarged the powers of the Probate Judge so as to authorize him to enforce a money decree made by him against an administrator, by committing the administrator summarily to jail, on his failure to pay the same on a given day? In cases of indebtedness the higher Courts may render their judgments requiring the defendant to pay what he owes, and execution thereupon issues; but, in such a case, what Judge in South Carolina can order, as part of his judgment, that, if the money is not paid by a given day, the debtor shall be seized and incarcerated in the common jail? Would it be safe or just to adopt a construction of a statute, by implication merely, conferring such extraordinary and arbitrary powers on any judicial or other officer in the absence of positive legislation? But the legislation of 1868 leads the mind to the reverse conclusion, when construed in connection with the laws existing at the date of the enactment.—Acts '68, p. 70. The 39th Section expressly declares 'that all laws and parts of laws of the late Provisional Government of South Carolina, relative to the powers, duties and course of procedure of the Courts of Ordinary and Equity, as far as the jurisdiction of said Courts is herein conferred on the Courts of Probate, not inconsistent with the Constitution and this Act, or supplied by it, are hereby adopted and declared to be of force, and applicable to the Courts of Probate,' &c. The 12th Section of the same Act is relied upon as conferring upon the Probate Judge the extraordinary and novel power of committing, by warrant, to jail, a debtor administrator, who, upon an accounting before that Court, is found indebted to the estate of his intestate, and who fails to pay the same by a given day fixed in his decree. 'If any person shall refuse or neglect to perform any order, sentence or decree of a Probate Court, such Court may issue a warrant, directed to any Sheriff or Constable in the State, requiring him to

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apprehend and imprison such person in 'the common jail of the County, etc., until he shall perform such order, sentence or decree, or be delivered by due course of law.' A party unlawfully detaining a will, known to be in his custody, might be the subject of the order, because it is authorized by the statute on the subject; but how could an unfortunate administrator, who had not means to pay, and no friends to pay for him, ever be relieved from such imprisonment by a 'due course of law'? The key to the true interpretation of this Section is found in the preceding Section, (11, p. 77): 'Probate Courts may issue all warrants and processes (of what kind?) in conformity to the rules of

law, which may be necessary to compel the attendance of witnesses, or to carry into effect any order, sentence or decree of such Courts, or the powers granted them by law."

"The limitation, therefore, on the process to be issued by Probate Judges, is the general law of the land, as modified by the Act of 1868. That Act may be searched in vain to find any new power given to imprison a defaulting debtor, and the Probate Judge is invested with no new power to enforce, by imprisonment, upon his warrant, an administrator found to be a debtor on an accounting which he fails to pay. His decree can only be enforced by suit upon the administration bond of the party found in default or arrear.

"Without undertaking to decide upon the regularity or validity of the decree rendered against the prisoner, in this case, by the Judge of Probate, his warrant for the arrest of the prisoner, and his detention in jail until the decree is paid, is, upon its face, illegal. It is a process unauthorized by law, and is, therefore, void. The detention of the prisoner is illegal, and it is hereby

"Ordered, That the prisoner, William S. McJunkin, be forthwith discharged from custody by the Sheriff of Union District, under said warrant by the Probate Judge."

R. S. Gilliam moved this Court to reverse the order discharging the prisoner, upon the following grounds:

1. That as the case discloses a commitment in a purely civil proceeding by a Court of competent authority, and in a matter clearly within its jurisdiction, assuming the judgment upon which the warrant was founded to have been erroneous, the only remedy was by an appeal, and not by habeas corpus.

2. That the Probate Court is not a court of inferior jurisdiction, but is of co-ordinate jurisdiction with the Circuit Courts, and its proceedings cannot be reversed by a Circuit

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Judge in vacation, but *only by appeal, in the mode and manner prescribed by the Act of the Legislature creating said Court.

3. Because it is manifest, from the face of the writ under which the prisoner was discharged, that jurisdiction was claimed for it under the statute of the 31 of Charles II, of which our statute is a literal transcript. It is equally manifest that the sole object and design of the writ was the speedy enlargement, upon bail, of persons charged with "criminal or supposed criminal, matters, where, by law, they are bailable."

4. That the constitutional provision abolishing imprisonment for debt was not intended to apply to the case of a party imprisoned under a warrant issued by a Probate Judge to enforce obedience to an order, sentence or decree pronounced by said Court.

Munro for plaintiff in error:

The Probate Court had jurisdiction of the case—Constitution of the State, Art. 4, Sec-

tions 1 and 20; Statute at Large of 1868, No. 33, Sections 2 and 4; Code, p. 432, Sections 36, 38, 45, 46 and 71.

That the Probate Court had all the authority in this case that formerly belonged to either the Court of Ordinary or the Court of Equity, or both.—Statutes at Large of 1868, No. 33, Sec. 39; Code, p. 436, Sec. 73.

That the Court of Ordinary had power to make such order as would give relief to the surety.—5 Statutes at Large, 111.

That the Court of Equity had power to relieve against the principal in behalf of the surety.—1 Story's E. J., 327.

That the Probate Court had the right to pass the order against the defendant for the payment of the money adjudged, and to enforce the same by attachment and imprisonment, upon his refusal to comply therewith.—Statutes at Large of 1868, No. 33, Sections 11 and 12; Code, p. 433, Sections 45, 46, 65 and 71; Statutes at Large, Vol. 5, p. 111.

That the Court of Equity had power to enforce payment of money decree by process of contempt.—2 Daniel Chan. Plead. and Prac., 1252.

That the constitutional provision abolishing imprisonment for debt did not affect this case.—Webster's Dict., Title Fraud; 1 Story's E. J., Sections 186 and 256; 3 Black. Com., 154; 2 Williams on Ex'ors, 1529.

That this being a purely civil proceeding, the remedy against any error in the judgment was by appeal, and not by habeas cor-

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pus, as *claimed, which only applies when a party is charged "with criminal or supposed criminal matter."—Habeas Corpus Act, 1 Brevard's Digest, 394; 3 Black. Com., (Sharwoods) 131 to 135; Yates v. Lansing, 4 Johns. R., 357, and 9 Johns. R., 421; The State v. The Sheriff, 3 Green, 68; Ex parte Wilson, 6 Cranch, 52; Harvey v. Huggins, 2 Bail, 252; Ex parte Gilchrist, 4 McC., 233; Hurd on Hab. Corpus, 1 Kent Com., 11th ed., 623; Coon v. Luckey, 1 Watts, 68; Hobhouse's case, 3 B. and Ald., 420.

That a writ of habeas corpus cannot be granted when a party has been committed for a contempt adjudged by a Court of competent jurisdiction. Nor in such case can any other Court inquire into the sufficiency of the cause of commitment.—Ex parte Kearney, 7 Wheat. R. Cond. Reps. Sup. Court, U. S., 225; 3 American Law Journal, 438; Hurd on Hab. Corpus, 412; Gist v. Bowman, 2 Bay, 182.

Wallace, for defendant in error:

The warrant in this case is without authority of law, because issued to enforce the performance of an illegal order.

Ordinary has no power to order the funds of an intestate estate to be paid into his Court.

(a.) He is required to grant administration.—5 Stat., 108, A. A., 1789.

(b.) Administrator is the legal owner of

intestate property, and derives his right from the law, not from the Ordinary.—*Kirby v. Quinn*, *Rice*, 267; *Crawford v. Elliott*, 1 *Bail.*, 206 and 207; *Poag v. Carroll*, *Dudley L.*, 5.

(c.) If no administration, Ordinary no right to the possession of intestate property.—*State v. Mitchell*, 2 *Bail.*, 225, *A. A.*, 1857, § 5.

(d.) Ordinary prohibited from administering.—*A. A.*, 1852.

(e.) Judge of Probate no more power in this respect than Ordinary.—*A. A.*, 1868.

(f.) Consent cannot give jurisdiction.—*Gallman v. Gallman*, 5 *Strob.*, 207.

2. The warrant being, therefore, without authority of law, the imprisonment of respondent was illegal, and the remedy by habeas corpus the proper one.—2 *Black. Com.*, 130, et seq.

Steedman, same side:

The order of the Probate Judge was extra-judicial and void.—*A. A.*, 1868, § 39, 14 *Stat.*, 80; *A. A.*, 1789, § 24, 5 *Stat.*, 111; *A. A.*, 1839, § 19, 11 *Stat.*, 43.

Condition of administrator's bond.—*A. A.*,

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1789, 5 *Stat.*, 110; **Shelton v. Cureton*, 3 *McC.*, 416; *Hill v. Calvert*, 1 *Rich. Eq.*, 55; *Triammier v. Trail*, 2 *Bail.*, 485; *Waterman v. Brigham & Hudson*, 2 *Hill*, 512; *Owens v. Walker*, 2 *Strob. Eq.*, 289; *Cross v. Gabeau & Hunt*, 1 *Bail.*, 214; *State v. Baskin*, 1 *Strob. L.*, 37; *A. A.*, 1852, 12 *Stat.*, 607; *Bigelow v. Stearns*, 19 *Johns.*, 39.

Consent did not confer authority to make the order.—*Coffin v. Tracy*, 3 *Cal.*, 129; *Dudley v. Mahew*, 3 *Conn.*, 9; *Hyer v. Berger*, *Hoff.*, 1.

The warrant to enforce obedience to his order was unauthorized by law and void.—*A. A.*, 1868, §§ 11, 12, 14 *Stat.*, 77; *Lyles v. McClure*, 1 *Bail.*, 7; *A. A.*, 1785, 7 *Stat.*, 211; *A. A.*, 1811, 5 *Stat.*, 642; *State v. Hunt*, 4 *Strob.*, 322; *Ex parte Thurmond*, 1 *Bail.*

It follows that habeas corpus was the proper remedy of the prisoner.—*Mitchell v. Mitcheson*, 1 *Barn. and Cress.*, 513; *Bushel's case*, *Vaughan*, 155; *Wood's case*, 3 *Wils.*, 172; *Bennac v. The People*, 4 *Barb.*, *Sup. Ct.*, 31; 3 *Hill, N. Y. Rep.*, 661, note; *People v. Cassels*, 5 *Hill, N. Y.*, 165; *People v. Tompkins*, 1 *Park*, 224; *A. A.*, 1868, § 21, p. 78; *Fac. Ab. Habeas Corpus B.*, Vol. 4, *Phila. Edit.*, 1846, p. 572; 3 *Hill, N. Y. Rep.*, 652, note.

July 6, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. The power of the Judge of Probate to grant relief to sureties of administrators who may conceive themselves in danger of injury for such suretyship, is neither derived specifically from the Act of 21st September, 1868, "to define the jurisdiction and regulate the practice of Probate

Courts," (14 *Stat. at Large*, 76,) or from the Code adopted on the 1st of March, 1870. The 39th Section of the said Act declares of force "all laws and parts of laws of the late Provisional Government of South Carolina relative to the powers, duties and course of procedure of the Courts of Ordinary and Equity, so far as the jurisdiction of the said Courts is herein conferred on the Courts of Probate, not inconsistent with the Constitution and this Act, or supplied by it." This leaves of force the Act of 1789, (5 *Stat. at Large*, 111,) which provides for relief to sureties for administrators who conceive themselves in danger of being injured by such suretyship, by authorizing them "to petition the Court to whom they stand bound for relief, which Court shall summon the administrator to appear, and thereupon make such order or decree as shall be sufficient to give relief to the petitioner."

The Act of 1839 (11 *Stat. at Large*, 43,) is

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to the same effect, and *adds, in positive terms, a direction that the order for the relief of the petitioner shall "not impair or affect the rights of the parties interested in the estate." This restriction was implied by the Act of 1789, as the order or decree, by which it intended to afford the means to relieve the surety from the obligation which the bond imposed, could not operate to affect or impair liabilities already incurred by the default of the administrator. The Ordinary, on such application, had no discretionary power.

The right of the surety to be relieved from future liability on his own motion, and without proof of any danger, was secured by the Act.—*McKay v. Donald*, 8 *Rich.*, 331. The administrator is necessarily a party to the proceeding, for the order or decree of the Court is to operate upon him. As a mere matter of prudence, it might not be improper for the Ordinary to take the accounts of the administrator, if he is willing to submit them, but entirely unnecessary, so far as the distributees are concerned, for they, not being parties, will not be bound by the result. If, on a proceeding against the administrator by the distributees for an account, it should appear that he was indebted, at the time of the discharge of the surety, in an amount exceeding that found by the Probate Judge, the surety could not set up the account first found in bar of the excess which the administrator on such proceedings might be decreed to owe to the parties interested in the estate. The relief can be granted by a revocation of the letters of administration, and a grant of administration "de bonis non," or the administrator could be required to give a new bond, with new sureties.—*Ordinary v. Bigham and Hudson*, 2 *Hill*, 515; *Owens v. Walker*, 2 *Strob. Eq.*, 292. Under the Acts of 1789 and 1839, and the practice which has been adopted to carry out the relief they proposed, it

was not necessary that any account should be taken, or a money decree established against the surety.

The Probate Judge here went, however, still further, and required the administrator to pay the amount so found due into the hands of the Court. What disposition, on receiving it, could he make of it? Had the debts all been paid, so that partition of it could be ordered between the distributees? and, if so, from what source would the Probate Judge derive his power to make it? Were the distributees bound by the account? or was the surety, in whose favor relief was prayed, discharged from all liability to them by an ex parte decree finding the amount due?

It is not necessary to inquire, if the fund

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paid to the Probate Judge had been wasted by him, or lost by his default, whether the surety would have been discharged either as to the creditors or the distributees of the intestate?

The 20th Section of the declaration of rights in the State Constitution provides "that no person shall be imprisoned for debt, except in case of fraud." If the mere non-payment of a sum of money is to be construed as fraud, within the language of the Constitution, the humane and liberal provisions which it made against imprisonment for debt would have been not only senseless and unmeaning, but delusive.

If the Section of the Code referred to in the argument for the motion, had directly authorized the Probate Courts to imprison a party for failure to comply with its orders directing the payment of money, it would have been void and nugatory, because in violation of the Constitution.

No inference, however, can be properly drawn from that Section to justify the conclusion that the Legislature intended to do that which the Constitution in such express terms had prohibited.

The true construction of the said Section is, that imprisonment is allowed in those cases to be directed by Probate Courts to carry out their "orders, sentences and decrees," where it is conformable to the law regulating their procedure in matters (other than the payment of money) where arrest is allowed by positive enactment as the means of compelling obedience to their orders, as, for example, to compel the attendance of witnesses, or deliver a last will and testament wrongfully withheld. We do not think the appellant derives much aid from the case of *Hosack & Blunt, Executors, v. Rogers et al.*, 11 Paige, 603, to which his counsel referred in his argument. The point there, and as to which even the Court doubted, arose under a reservation of the 2d Section of the non-

imprisonment Act of the State of New York.

The language of our Constitution, where debt is the foundation of the imprisonment, is without exception, save as to fraud.

It is objected against the order of the Circuit Judge, "that this being a purely civil proceeding, the remedy against any error in the judgment was by appeal and not by habeas corpus."

We do not know of any statute by which the Judges of the Supreme Court are prohibited from exercising the common law jurisdiction in regard to the writ of habeas corpus. The high prerogative writ of habeas corpus applies "to all manner of illegal confinement." A party committed for a contempt, adjudged

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by a Court of competent jurisdiction, will not be discharged under it. If, however, the alleged contempt is for disobedience of an order in which the Court, in the matter before it, was without jurisdiction, the Court having the right to grant the writ may inquire into the legality of the caption and detention. The Probate Court had authority to extend the relief prayed for in the petition of the surety; but all the relief it could grant was to revoke the letters of administration and grant them anew.

Its power there terminated. The order to pay into Court what was supposed to be due by the administrator was without authority, null and void, and the process to arrest was founded on the order.

The power of one Court to enquire into the sufficiency of an arrest on the process of another, has been fully considered in *James v. Smith*, (ante, p. 183.) In a matter clearly within its jurisdiction, the action of one Court is beyond the control of that of any other, save by way of appeal, where that mode of revision is provided by law.

Where, however, a Court, in so important a matter as that which affects personal liberty, oversteps the limits of its authority, and endeavors to enforce obedience to its unauthorized acts, it would be a reflection on the administration of public justice if there was no jurisdiction to which the imprisoned citizen could resort for enlargement. If the order of the Probate Judge was without jurisdiction it is at least doubtful whether the Circuit Court could entertain an appeal from it, for the 21st Section of the Act of 1868, (already referred to,) gives "appellate jurisdiction to the Circuit Court where the matters were originally within the jurisdiction of the Probate Court."

It is ordered and adjudged that the order of the Circuit Judge be affirmed and the motion dismissed.

WILLARD, A. J., concurred.

MOSES, C. J., absent at argument.

2 S. C. *452

***J. J. BLACKWOOD and Another v. W. L. CLAWSON.**

(Columbia. April Term, 1871.)

[*Appeal and Error* ⇐974.]

The Supreme Court will not reverse an order of the Circuit Court directing an issue to be made up, and submitted to a jury, to determine whether a judgment is satisfied, it being discretionary with the Circuit Judge whether, in such a case, he will order an issue to be made up, or decide the facts himself.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3859; Dec. Dig. ⇐974.]

Before Thomas, J., at York, March Term, 1870.

Appeal from an order of the Circuit Judge, directing an issue to be made up, and submitted to a jury, to determine whether the judgment in this case was satisfied.

It appeared by the affidavit of Clawson that the judgment of Blackwood, and another, against him, was recovered on a sealed note given by L. P. Sadler & Co., principals, and Clawson and others, sureties; that after the judgment was recovered, some creditors of L. P. Sadler & Co. instituted proceedings in equity against the firm, to subject certain real estate to their claims, alleging it to be partnership property; that the creditors of the firm were called in, and the sealed note proved as one of the debts of the firm; that a decree was made, in or about the year 1861, declaring the real estate to be partnership property, and ordering it to be sold by the Commissioner, and the proceeds applied to the payment of the partnership debts that had been proved; that it was sold by the Commissioner, and the proceeds paid to him in "State bills and Confederate Treasury notes," and that the proceeds were sufficient, "or nearly so," to satisfy the debts of the partnership.

The owner of the judgment made an affidavit, in which he stated that an appeal was taken from the decree in equity; that said appeal was pending in the Court of Appeals until the close of the late war, and that it operated to prevent the Commissioner from paying out the proceeds of the sale of the real estate. Other facts were also stated in the affidavit.

Clawson, the actor in the motion, contended that the Commissioner of the Court of Equity was the agent of the creditors who proved their claims, and that payment of the proceeds of the sale to him operated pro tanto as satisfaction of their claims. In behalf of the owner of the judgment this position was controverted, and it was further submitted that the receipt by the Commissioner of Confederate States Treasury notes could in no view operate as payment.

His Honor made a written order, in which he stated the points in dispute between the parties, both of law and fact, and concluded

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as *follows: "Having some doubts upon these various points, which might be more clearly set forth upon an investigation of the cause, it is ordered that an issue be made up, in which W. L. Clawson shall be the actor, and John M. Ross, surviving Executor of John Blair, deceased, the defendant, to try the question as to whether the judgment, and fi. fa. in this case has been satisfied; and if not wholly satisfied, what balance should yet be paid by W. L. Clawson.

The owner of the judgment appealed, and now moved this Court to reverse the order of the Circuit Judge, on several grounds, in which supposed errors, both of law and fact, were stated.

Wilson & Moore, for appellant.
Smith, Hart, contra.

July 6, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. An enquiry into the propriety of the order granted by the Circuit Judge, from which the appeal is taken, would involve this Court into an examination of all the facts on which the satisfaction of the judgment is averred on the one side and denied on the other. We are without jurisdiction on questions of fact, and even if we were invested with it, we have, in the matter in hand, no mode by which we could bring the facts before us on which to form a judgment.

The Circuit Judge, himself, without resorting to the course which he pursued, could only have heard the return to the rule, when controverted by affidavits on the respective sides; and this would have been a most unsatisfactory mode of adjusting matters which, being affirmed before him, meets with a direct denial.

It is not improbable that, finding a difficulty in arriving at a conclusion in his own mind free from doubt, he desires to have the issues of fact settled by a jury, so that he could apply the legal principles by which, in his judgment, the motion should be governed. The grounds on which the appeal is based aver error or misunderstanding, on the part of the Judge, of the facts stated in his order, and it is chiefly by reason of them that we are asked to reverse it.

Is it expected that this Court will hear an argument on the facts to be developed through an examination of the Equity cases in which it is said the payment of the judgment was provided for, or do that which the Circuit Court has directed to be done by a jury, and then decide the question of pay-

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ment, which the Circuit Judge has *refused to do, until aided by the verdict of a jury? Suppose we set aside the order which he has made, then the question of satisfaction still

remains undecided, and the Circuit Judge would be compelled to decide it upon the facts set forth in the motion for the rule, and the return to it, when, by the order, he has said that he has "doubts upon these various points which might be more clearly and distinctly set forth upon an investigation of the cause."

It might be that, in our judgment, there was enough before him to have justified a decision on the points presented by the rule, and answered by the return. If the proposition had simply been the obligation of the plaintiff in the judgment to have accepted payment of his debt in Confederate States Treasury notes, and that the Commissioner in Equity was the agent of the appellant, who was a creditor brought before the Court of Equity by an order to establish his demand, it is possible that, as mere questions of law, this court would not have had much difficulty in their solution. We cannot, however, say that the Circuit Judge was wrong in not abstracting them from all the facts submitted by both sides, and resting his judgment alone on them. The order is to be viewed as an admission by him that he was in too much doubt to act more without the aid of a jury.

Under the Act of 1817, 6 Stat. at Large, 61, he had the right to submit the matter to a jury.

It was purely an exercise of discretionary authority; and how can this Court, when the statute confers on him the power to decide the question of payment, or refer it to a jury, limit the discretion by saying that, without a jury, he shall decide it himself.

Nor do we see how the respondent will be prejudiced by the course adopted. The issue will be tried before the same Judge who ordered it; and if he errs in his instructions to the jury, in the law which they are to apply to the facts, it will be competent for either party, through proper exceptions, to have access to this Court.

WILLARD, A. J., concurred.

MOSES, C. J., absent at argument.

2 S. C. *455

*CHARLES R. BREWSTER v. HENRY WILLIAMS.

(Columbia. April Term, 1871.)

[*Bills and Notes* ⚭132.]

Action on a promissory note for \$500, dated Charleston, 17th January, 1865, and payable in specie or its equivalent "six months after peace is declared between the United States and the Confederate States of America," with interest "from the day that peace, as aforesaid, is declared." The Circuit Judge instructed the jury that the intent of the parties was that the money should be paid six months after peace declared between the two belligerents, each acting as a separate and subsisting power,

and as that period had not arrived, no cause of action had accrued: *Held*, That in this there was error.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 321; Dec. Dig. ⚭132.]

[*Slaves* ⚭24.]

A note given for the price of slaves purchased in January, 1865, is valid—semble.

[Ed. Note.—Cited in *Blease & Baxter v. Pratt*, 3 S. C. 515; *Darby v. Stribling*, 22 S. C. 246; *Sloan v. Hunter*, 56 S. C. 388, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

For other cases, see *Slaves*, Cent. Dig. § 113; Dec. Dig. ⚭24.]

Before Carpenter, J., at Charleston, March Term, 1870.

Action on a promissory note for \$500, dated 17th January, 1865. The declaration contained special counts upon the consideration, alleging that the plaintiff sold to the defendant two slaves on the day of the date of the note, at the price and on the terms stated therein. The note is as follows:

"\$500. Charleston, 17th January, 1865.

"Six months after peace is declared between the United States and the Confederate States of America, I promise to pay to C. R. Brewster, or his order, Five Hundred Dollars in specie or its equivalent, with interest on the same from the day that peace, as aforesaid, is declared, for value received.

"H. Williams."

"Witness,

"P. W. Alexander."

The presiding Judge instructed the jury that the construction of the instrument belonged to the Court; that the Court construed the paper to mean that the money was to be paid six months after peace between the United States and the Confederate States of America should be declared by those belligerents, each acting in such declaration, and as a separate and subsisting power; that this period had not arrived, and so no cause of action had accrued to the plaintiff.

The plaintiff excepted to the instructions, and a verdict having been rendered for the defendant and judgment entered thereon, he appealed to this Court.

Spratt, for appellant, contended that the instructions were erroneous: that the true construction of the contract was that the money should be paid six months after the close of the war.

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*Lord, contra, submitted that the terms of the note were plain and unambiguous, and that the meaning and intent was as stated in the instructions. That if they were ambiguous, then, construing them with reference to the consideration, and in the light of the surrounding circumstances, any other construction than that adopted by the Circuit Judge would be unreasonable. The consideration was slaves sold in January, 1865, and the parties knew that with the fall of the Confederacy slaves would cease to be proper-

ty. Is it reasonable to suppose that one would purchase slaves at that time and agree to pay for them in specie unless the Confederate States should succeed in their effort to establish an independent government?

July 6, 1871. The opinion of the Court was delivered by

WRIGHT, A. J. The defendant, on the 17th of January, 1865, for a valuable consideration, made a note to plaintiff or order, for the sum of five hundred dollars, which amount he agreed to pay in specie, or its equivalent, six months after peace was declared between the United States and the Confederate States of America.

On the said note plaintiff brought action to recover the amount and interest from date; and, to maintain such action, the note referred to was put in evidence. His Honor the presiding Judge instructed the jury: "That the construction of the said written instrument belonged to the Court, and that the Court construed the paper to mean that the money was to be paid six months after peace between the United States and the Confederate States of America should be declared by those belligerents, each acting in such declaration, and as a separate and subsisting power; that that period had not arrived, and so no cause of action had accrued to the plaintiff."

Those whose business it is to administer the law as to the true construction and meaning of a statute, should always consider the time in which it was made, the condition of the country at that time, the reasonableness of the statute, and, as far as possible, the intent of those making the statute. The same rule should be applied to the construction of contracts.

The construction should be: 1st. Reasonable; 2d. Liberal. And in all cases aim to meet the real intent of the parties making them.

In *Chitty on Contracts*, p. 76, he says:

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"The object, then, which *is to be aimed at in construing a contract, is to discover and give effect to the intention of the parties—intentioni debent inservire.

This rule is just, reasonable, and should receive the sanction of all Courts of justice. All parties to a contract, at the time of making it, mean something, or, in other words, have some object in view; and the general object is understood by such parties, and it should be the object of all Courts, having jurisdiction of contracts, to enforce them in the sense in which they were made, and thereby give effect to the real intent of the parties. In the case of *Seddon v. Senate*, 13 East, 51, Lord Ellenborough said: "The same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in an instrument not

under seal; for the same intention must be collected from the same words of a contract in writing, whether with or without seal."

It is to be supposed that all contracts are made in good faith, and parties should be held to what reason and common sense and justice would regard as their evident intent, and words alone should not be permitted to govern and destroy the design and intent, and thereby defeat the ends of justice; for to encourage such a state of things is only to foster duplicity and encourage dishonesty. In the treatise by Vattel on the Law of Nations, page 284, it is said: "Words are only designed to express the thoughts; thus the true signification of an expression in common use is the idea which custom has affixed to the expression. It is then a gross quibble to fix a particular sense to words, in order to elude the true sense of the entire expression."

Again, on the same page of the same book, after citing several examples, shewing the duplicity of persons taking advantage of the words to carry out their evil designs, it is said: "All these pitiful subtilities are overthrown by this unerring rule—when we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning. The intent sufficiently known furnishes the true matter of the convention."

A portion of the States of this Union confederated together in order to set up and maintain a separate and independent government; and the result of such a movement was a powerful and bloody war. All who were engaged on the side of the Confederate States, and those who were loyal to the United States Government, were looking with anxious eyes for the time when peace should exist between the two sections of our common country.

During the time the great struggle was go-

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ing on, many contracts *were made, the condition of which was to pay after the war had ceased. It certainly was a very reasonable way of making them during such a state of affairs, as many of the contracting parties were liable, at any hour, to be called upon to leave their homes and go upon the field of battle; so the better and safer way was, for all parties making contracts, to make them payable after the clash of arms had ceased, and peace existed and was recognized between those States known as the "Confederate States of America," and the Government of the United States.

The Confederate States not being a government de jure, neither being recognized by any government on earth, it is not possible that the promisor or promisee of the note in question contemplated in any event to have any such construction given to it as was placed upon it by the Court below.

As to the question raised by counsel concerning the consideration of the note, this Court has already passed upon it.

It is ordered and adjudged that the judgment below be reversed and a new trial ordered.

MOSES, C. J., and WILLARD, A. J., concurred.

2 S. C. 458

JAMES J. WORKMAN and Others v.
LOUISA C. BOLLING.

(Columbia. April Term, 1871.)

[*Executors and Administrators* ⇨103.]

In April, 1863, a decree for money was made by the Ordinary in favor of legatees, some of whom were adults and some minors, against the executor of the will. The executor offered to pay the guardian of the minors their shares in Confederate money, and he having refused to receive payment in that currency, he, the executor, invested, in August, 1863, the amount of the decree, and nearly the whole of the interest that had accrued in a Confederate States bond, for the benefit of the legatees: *Held*, That the investment did not discharge the executor, and that his executrix—he having died—was liable to the legatees for the amount of the decree.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 421; Dec. Dig. ⇨103.]

[*Executors and Administrators* ⇨508.]

When a decree for money is rendered against an executor in favor of legatees, the fiduciary relation of the parties ceases, and the executor can discharge himself only by payment, or by some other recognized legal mode of satisfying judgment debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2192-2198; Dec. Dig. ⇨508.]

Before Orr, J., at Greenville, December, 1870.

Appeal from the decree of the Circuit Court.

The case was heard in the Circuit Court on exceptions to the report of a Referee, which states the facts, and is as follows:

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*“The Clerk, to whom it was referred to ascertain and report upon the actings of T. C. Bolling, deceased, who was the executor of the last will and testament of Mrs. Mary A. Bolling, and to state the accounts between the estate of said executor and the estate of his testatrix, begs leave respectfully to submit the following report:

“Upon a reference before him, it appears that, on the 15th day of January, 1853, Mrs. Mary A. Bolling made and executed her last will and testament, and some years thereafter departed this life, leaving the same in full force and virtue. The testatrix, after first providing for the payment of her debts, directs her executor to sell all her estate, real and personal, and to divide the proceeds of said sale into four equal parts—said legacies to be held in trust by her executor for

her four daughters; and that the interest of said legacies should be paid to her daughters annually by the executor; and upon the death of either or all of said daughters, their share should be then paid by the executor to the child or children which said daughters should leave surviving. She appointed T. C. Bolling executor of said will. It also appears that Major Bolling qualified as executor of said will, and proceeded to carry out the provisions of the same by taking charge of the estate, paying the debts, and selling the personal and real estate.

“Mrs. Sarah S. Sullivan, one of the daughters of testatrix, had departed this life previously to her mother's death, and the condition of the will, as to Mrs. Sullivan's share, was fulfilled immediately upon the death of the testatrix; and the children of Mrs. Sullivan, who are the complainants in this bill, were entitled to have their mother's share equally divided amongst themselves, as the will directed.

“It also appears that, soon after the death of the testatrix, Mary A. Sullivan, one of the legatees of this fourth interest, and a complainant, filed her petition with Robert McKay, Esq., the then Ordinary of Greenville District, to appoint a day for a settlement, and cite the executor to an accounting, and to compel him to pay over to herself and brothers and sisters the share to which their mother was entitled under the will of their grandmother, the said Mary A. Bolling. Upon this petition, the Ordinary made the following endorsement: “The executor being absent in Florida, ordered that he be cited on his return to show cause forthwith.” This was the 3d October, 1861. On the 31st day of January, 1862, the executor filed a petition with the Ordinary for a final settlement of the estate; and on the 20th March the

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Ordinary issued his citations. *and appointed the 14th April following as the day for the final settlement. On that day it appears that the parties being all properly represented before the Ordinary, the Ordinary proceeded to sum up the estate and there was found due by the executor the sum of eleven thousand and forty dollars and forty-five cents (\$11,040.45,) and there was found due each one of the four legatees the sum of two thousand seven hundred and sixty dollars and eleven and one-quarter cents, (\$2,760.11¼,) and this last named amount the Ordinary ordered, adjudged and decreed should be paid by the executor to the children of Mrs. Sarah S. Sullivan, equally, and their receipts for the same produced by the executor.

“The present action is brought by the complainants, who are the children of Mrs. Sullivan, to recover from the defendant, as executrix of Major Bolling, who was the executor, this amount of two thousand seven hun-

dred and sixty dollars and eleven and one-quarter cents, and also any amount which may have come into the hands of the executor, or his executrix, since the rendition of the decree of the Ordinary. The defence set up is, that the executor, Major Bolling, invested this amount claimed by the complainants in the bonds of the Confederate States, and that the defendant, as his executrix, is not liable to account for the same. What is the proof?

"It appears that the estate consisted, at the time of the decree by the Ordinary, in a great part, of notes, which were held by the executor for the estate, and most, if not all of them, notes taken by the executor at the sale of the property. According to the testimony of Dr. J. M. Sullivan, the executor offered, on the day of settlement, to pay over to him, as guardian of his children, the share to which they were entitled in these notes, which he refused. Mr. McKay, the then Ordinary, thinks he offered to pay either notes or money, and, if money, it was Confederate money. Mr. Beattie testifies that the executor deposited Confederate money with him for Dr. Sullivan, on the 22d June, 1863, of which deposit he advised the Doctor by letter. Mr. L. H. Shumate testifies that the executor requested him to take the money to Dr. Sullivan. This he refused to do, but advised that it be deposited with Mr. Beattie. He advised the Doctor of the deposit; he refused to take it, saying he would take it from any one else, but would not from Bolling. Shumate informed Bolling of this refusal, and, thereupon, Bolling invested the same in the seven per cent. bonds of the Confederate States, for the benefit of Mrs. Sarah

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S. Sullivan's children, under *the will of Mary A. Bolling. On the other side, it appears, from the testimony of Jno. W. Stokes, Esq., that about the 20th June, 1862, Major Bolling refused to take Confederate money from him on notes belonging to this estate, alleging, as a reason for his refusal, that it would not be right to pay the interest to the parties in Confederate money. John J. Cooley, another witness for the complainants, testifies that in the summer or fall of 1863, Major Bolling refused to take Confederate money from him on a debt due this estate, saying it belonged to the legatees, and mentioned Sullivan and others.

"There is no allegation in the bill that the investment was made by the executor with a view to defraud the complainants; nor is there any proof that the same was done with a fraudulent intent. The allegation of the complainants is, that there was no authority from them for the investment. The presumption is, that it was done in good faith, and the Clerk, following the light of the decision made by the Supreme Court in 1867 and 1868, sustaining investments made in good faith,

would respectfully recommend that the investment of the legacy of the complainants by the executor in the bonds of the Confederate States be sustained by this honorable Court; and that the defendant, as executrix of Major Bolling, shall not be required to account for, nor to pay over, to the complainants the sum of two thousand seven hundred and sixty dollars and eleven cents, the amount decreed by the Ordinary as due the children of Mrs. Sarah S. Sullivan, under the will of Mary A. Bolling, deceased. It appears, from the testimony of Mrs. Bolling, the executrix of the executor, that since the 14th April, A. D. 1862, the date of the decree of the Ordinary, she has sold some lands in Florida, belonging to the estate of Mrs. Mary A. Bolling, and the proceeds of said sale were not accounted for in said settlement, and in which the complainants are entitled to one-fourth. The Clerk would recommend that she be required to account before the Judge of Probate for this County for the moneys arising from said sales, and pay over to the complainants their distributive share of the same forthwith."

The complainants excepted to the report on the grounds:

1. Because so much of complainants' demand as was founded on the decree of the Ordinary in their favor against T. C. Bolling, as executor of Mary A. Bolling, deceased, was fully and irrevocably established by said decree, for so much money to be paid to them by said executor, divested of all trust, and

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they had no further interest *in the choses in action of said Mary A. Bolling's estate to that extent, as they became then the individual property of the executor, and he had no power or authority, whatever, to make any investment for them or any of them; and that, in fact, the pretended investment for them was not of the funds of the estate, but his own, and without collecting the notes and other choses in action he held as executor.

2. Because there was no proof that said investment was made of the funds of complainants; but, on the contrary, the testimony showed that the executor did so with his own means, to get rid of his Confederate money and shift it off upon them, when the funds he held for them were not funds for investment, but to be paid over directly to them, and at once, as he was required to do by their judgment obtained against him before the Ordinary as aforesaid.

3. Because the report, so far as complainants are entitled to their share of the proceeds of the land sold since the Ordinary's decree, recommending that they be turned over to the Probate Court for that, is in violation of law and justice, when they are plainly entitled to relief in this Court.

4. Because if said executor had really and in fact invested complainants' funds, as alleged, it was an act done in aid of the late

rebellion against the United States, and illegal and void.

Orr, J. This case has been heard upon the evidence taken in writing, the report of the Clerk, exceptions thereto, and the argument of counsel, and the Court is of opinion and so adjudges, that Louisa C. Bolling, as executrix of Thaddeus C. Bolling, deceased, is liable to the complainants that were of legal age on 19th August, 1863, and not to those who were minors at that time, to the extent of fifty cents in the dollar on their interest in the estate of their grandmother, Mary C. Bolling, deceased. But as the Court is not informed how many of the complainants were of legal age at the date before specified, it is ordered that it be referred to the Clerk to inquire and report thereon, and, also, to report the amount due such complainants as were of legal age at the period referred to. All other matters reserved until the coming in and confirmation of said report.

Under this order the Referee submitted a second report, as follows:

"He has examined Dr. James M. Sullivan, and reports that two of Dr. Sullivan's children were of age at the time of the investment, to wit: On the 19th August, 1863, viz.:

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Mary Ann Sulli*van, now Mary Ann Workman, and Frances M. Sullivan, now Frances M. McDavid.

"He further reports, that they were each entitled to one-seventh of two thousand seven hundred and sixty dollars and eleven cents, the amount decreed by the Ordinary, on the 14th April, 1862, as due the children of Mrs. Sarah S. Sullivan. The one-seventh is three hundred and ninety-four 30-100 dollars; and interest on same, from 14th April, 1862, to December 8th, 1870, is two hundred and thirty-eight 43-100 dollars, making, principal and interest, \$632.73. One-half would be \$316.36½.

"The Clerk therefore, reports three hundred and sixteen 36-100 dollars as the amount due to Mrs. Mary Ann Workman and Mrs. Frances M. McDavid, each, on the 8th December, 1870, under the instructions from your Honor.

"The Clerk further reports, that the complainants are entitled to the one-fourth of twelve hundred dollars, the amount for which the Florida lands were sold by the executrix of T. C. Bolling, since the war. The one-fourth, three hundred dollars, (\$300.) with interest from the 23d May, 1867, the date of the filing of the defendant's answer, will amount, on December 8th, 1870, to three hundred and seventy-four 37-100 dollars. The complainants, Mrs. Workman and Mrs. McDavid, are each entitled to one-seventh of this amount, which is fifty-three 48-100 dollars; this added to three hundred and sixteen 36-100 dollars, makes three hundred and sixty-nine 84-100 dollars, (\$369.84.) due Mrs. Workman and Mrs. McDavid, on the 8th December, 1870.

His Honor the presiding Judge then made a second decree, as follows:

Orr, J. On hearing the report above, it is ordered by the Court that the same be confirmed and made the judgment of the Court.

The complainants appealed on the same grounds taken in the exceptions except the third; and, also, on the ground:

4. Because His Honor erred in his said decree, in not allowing such of the complainants as he held were entitled to recover, more than fifty cents in the dollar.

Sullivan, for appellants, made the following points:

1. That the claim of complainants against the executrix of T. C. Bolling was a debt established against her testator by the decree of the Court of Ordinary, so far as the personal estate of Mary A. Bolling, his testatrix,

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was concerned, and irrevocable *and not a fund for investment either under the will of Mary A. Bolling, deceased, or said decree; but a fund to be paid over at once.

Maxwell v. Conner, 1 Hill Ch., 14. Where the payee of a promissory note, by contract with the principal maker, extends the time of payment without the consent of the surety, the latter is discharged, and he may avail himself of this defense in a Court of law; but having failed to do so, he cannot afterwards obtain relief in equity—the matter is *res judicata*.

McClure v. Miller, Bail. Eq. Report, 110. That which has been once adjudicated is final and conclusive between the same parties. The rule goes further. In the *case* of Leguen v. Gouverneur & Kemble, 1 Johns. Ch. R., 436, the rule was held to be, that what the parties have once had an opportunity of litigating in the course of a judicial proceeding, they shall not bring into question again.

Manigault v. Deas, Bail. Eq. Rep., 293. It may be laid down, as a general rule, that a direct final judgment of a Court of competent jurisdiction, on the same subject-matter, between the same parties and privies in law or estate, is conclusive, and cannot be re-examined in a subsequent original action in the same or any other Court.

Snelling v. McCreary, 14 Rich. Eq., 291. By a decree made in 1859, a trustee was ordered to invest certain moneys in slaves, if, in his judgment, said investment can be made on advantageous terms, and that until said investment be made, he do pay the annual interest accruing on said trust fund to his *cestui que trust*. The trustee made no investment in slaves, but retained the trust funds in his own hands, paying the interest for several years to his *cestui que trust*, until 1863, when he invested it in *C. inf. & rates* 7 per cent. bonds, having first, on his own petition, and without notice to his *cestui que trust*, obtained an order for leave to make

the investment. Held that the trustee was not justified in making the investment in Confederate bonds, and he was ordered to account for the fund to his cestui que trust.—Act of Assembly, 1861. Pamphlet of Acts of 1861, page 87, applies only to trustees holding funds in trust for investment, and is not applicable to this case.

2. If said executor had really, and in fact, invested complainants' funds as alleged, it was an act done in aid of the late rebellion against the United States, and illegal and void. *Shortridge et al. v. Macon*, American Law Times Report, volume 1, page 35. The war against the United States, held by Chief

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Justice Chase to be a rebellion; and payment of a debt due plaintiffs of Pennsylvania, under a judgment of sequestration to Confederate Receiver, no release or satisfaction of plaintiffs' demand, either for principal or interest.

Head et al. v. Talley, Administrator, Law Times United States Court Reports, Vol. 3, January No., 1870. Funds invested in Confederate bonds illegal and void.

Hall & Hall v. Hall et al., American Law Times Report, Vol. 2, page 33 of July No., 1869. A guardian will not be excused from accounting for his wards' money, which was received by him in this State during the year 1861, in specie or current bank notes, and afterwards converted by him, without an order of the proper Court, into Confederate Treasury notes, or Confederate interest-bearing bonds, and which estate was thereby finally lost and destroyed.

Also, *Hoffman*, by *Guardian*, v. *Boon & Booth*, administrators, at same page, per *Peck*, Chief Justice. The Act of 9th November, 1861, (of Alabama,) entitled "An Act to authorize executors, administrators, guardians and trustees to make loans to the Confederate States, and to purchase and receive, in payment of debts due them, bonds and Treasury notes of the Confederate States, or of the State of Alabama, and coupons which are due on bonds of the Confederate States, and of said State, is in violation of both the Constitution and the public policy of the United States, and is, therefore, null and void. Its purpose was to give encouragement to the rebellion then existing, and aid and comfort to the public enemy of the United States.

3. His Honor the presiding Judge had no power or authority to reduce the claim of complainants, or any of them, to fifty cents in the dollar, on a debt existing before the late war.

Carwyle v. Harvey, 15 Rich., 314. In an action on bond, where no evidence is given by defendant, a verdict for only one-fourth of the debt is in violation of law, and a new trial will be ordered.

Perry, contra.

July 7, 1871. The opinion of the Court was delivered by

MOSES, C. J. The answer of the defendant, *Louisa C. Bolling*, admits the decree of the Ordinary, made on the 14th day of April, 1862, as alleged in the bill. She does not aver against it error in fact or in law, but asks to avoid the relief which is sought from it, as the judgment of a Court, with compe-

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tent jurisdiction, by subsequent circumstances, none of them amounting to such an independent transaction as can, in any way, supersede the rights which it confers.

The decree is conclusive as to all matters which arose prior to its date.—*Chambers v. Patton*, 1 Bail., 130. Even a discount which would have been cognizable before the Ordinary, if it had been submitted, will not be entertained in an action on the decree.—*Ordinary v. McClure*, 1 Bail., 7 [19 Am. Dec. 648].

Owing to the anomalous character of the proceeding under our practice in regard to a decree operating as a judgment, which cannot be enforced by the tribunal which renders it, the Courts have somewhat modified the rule which for a long time prevailed, and allow matters in discharge, which have arisen subsequently to the last return of the executor or administrator, though prior to the decree, to be plead against it.—*Simkins v. Cobb*, 2 Bail., 60. The decree, however, is still held conclusive as to the fact of the citation, and the items which compose the account. The defendant here does not complain of any irregularity or defect in the proceeding, which it must be remembered was on the petition of her testator, nor does she charge error in the account on which the decree was founded.

Taking together her answer, the report of the Referee and the decree of the Circuit Court, we are to infer that the claim of the appellants is resisted on the ground that, on the refusal of *James M. Sullivan*, the guardian of the children interested in the decree, of the Ordinary, to accept in payment of their portion thereof, Confederate Treasury notes, the said *T. C. Bolling*, on the 19th of August, 1863, invested the same in a Confederate States bond for \$3,000, bearing interest at 7 per cent., redeemable after July 1, 1868, which proved valueless, and that he is, therefore, discharged of all liability to answer for the amount found due on the legacy under the will of his testatrix, *Mary A. Bolling*, to the children of the said *Sarah S. Sullivan*.

The bond was issued to "*T. C. Bolling*, in trust for *Sarah Sullivan's* children, under the will of *Mary A. Bolling*, deceased."

The Circuit decree does not set forth why the amount due the adult children was reduced by it to one-half the sum which the executor was found by the Ordinary to be indebted to them, nor does it give the reason which induced a discrimination against the

minors; and a conjecture might not lead us to the proper considerations which operated to extend relief to the children of age to the extent of one-half the sum which they claim-

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ed by their bill, and to deny *all relief to the minors, both standing under the will on an equal footing.

The case was heard on the report of the Referee. The exceptions of the appellants deny the power and authority of the executor to make any investment for them of the amount so found by the Ordinary to be due, and further deny that the pretended investment for them was of the funds of the estate.

When the decree was pronounced by the Ordinary, it established a debt against the said T. C. Bolling in favor of the legatees under the will, of which he was the executor, which could only be satisfied by payment. It was the direct and final judgment of a Court of competent jurisdiction on the accounts of the executor up to the day of its date.

If to that period the executor occupied a fiduciary relation to the legatees, he then became their debtor, and he had no control or power of disposition of the amount so found due. He appeared to have proper conception of the rights which it established against him, when he offered to make payment, though the currency through which he proposed satisfaction was one which the parties or their guardian were not bound to accept. If he undertook to invest the amount, with a view to future payment, in a security which proved worthless, as the risk was his so must be the loss. As well might any other debtor say to his creditor: I offered you payment in a currency which was not a legal tender, you refused to receive it, I have invested the amount in funds which are now without value, and the consequences of the loss must be borne by you. It is to be noticed, too, that the Confederate bond which he caused to be issued to himself on the 19th August, 1863, was not the full amount of principal and interest of the decree, in favor of the Sullivan children.

There is no evidence that after the decree he made any offer to pay such of them as were of age the proportion of it due them. As to the infant children, if he had made an admitted legal tender to their guardian, his refusal to accept would only have subjected him to a loss of the interest; yet having offered that which the other party, it is conceded, was not bound by law to take, the Circuit decree deprives the infant children of the whole amount of the decree rendered in their favor by the proceeding before the Ordinary.

The debt was established by the judgment of a Court of competent jurisdiction against

the executor. He admitted its correctness by not prosecuting an appeal to which, by the

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statute, he was entitled. It is conceded he has not satisfied it; and yet it is claimed that he is discharged, because, looking at the transaction in the light most favorable to him, he invested the amount he owed in a fund which has failed. Is he or the creditor to bear the loss?

If it were necessary, the question might be put with some pertinence—as the decree established a debt subject to immediate payment—how was the amount which was to meet that debt to be with certainty presently realized by a bond which was not to be due for over five years from the time of the decree?

It is ordered and adjudged that the decree in favor of the adult children of Jane C. Sullivan be modified in conformity with the views herein expressed, and as against the minors that it be reversed.

It is further ordered that the said Louisa C. Bolling, as executrix of the said Thaddeus C. Bolling, do pay to Mary Ann Workman, Fanny M. McDavid, J. Mims Sullivan, Harriet E. Sullivan, Joseph W. Sullivan and Jane K. Sullivan, each, one-seventh of twenty-seven hundred and sixty dollars and eleven cents, with interest from the 14th day of April, 1862, until satisfaction shall be therefor made, and also to each of the said named parties the one-seventh of three hundred dollars, with interest from May 23, 1867, until satisfaction shall be therefor made—this last being their share of proceeds of sale of Florida land, referred to in the report—and that the said Louisa C. Bolling do, as executrix as aforesaid, pay to the said Micajah B. Harrison one-third of one-seventh of twenty-six hundred and sixty dollars and eleven cents, with interest from the 14th day of April, 1862, until fully paid; and to the said Sally Harrison the remaining two-thirds of said seventh, with like interest, until fully paid; and that she do also pay to the said Micajah B. Harrison one-third of one-seventh of three hundred dollars, with interest from May 23, 1867, until paid; and to the said Sally Harrison the remaining two-thirds of said seventh, with like interest—this last being also of proceeds of sale of Florida land. The costs to be paid by the said Louisa C. Bolling out of the estate of the said Thaddeus C. Bolling.

The plaintiffs to be at liberty to move the Circuit Court for orders as to further account since date of Ordinary's decree, excluding from it the sale of Florida land already herein provided for.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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*Ex parte WHITE, in re JESUP, v. THE WILMINGTON & MANCHESTER RAILROAD COMPANY.

(Columbia. April Term, 1871.)

[Railroads \hookrightarrow 153.]

A railroad corporation being indebted to three classes of bondholders, secured by a first, second and third mortgage, made an arrangement with most of the bondholders under which a new bonded debt was to be created, secured by a new mortgage. A large majority of the bondholders, W, who held bonds secured by the second and third mortgages, being one of them, came in under this arrangement, and exchanged their old for the new bonds. The mortgaged premises were afterwards sold under a decree to foreclose the new mortgage, and the proceeds, after paying off the creditors under the first, second and third mortgages who had not come into the arrangement, were insufficient to satisfy the bonds of a class, which, by the terms of the new mortgage, had precedence over those of the class to which W's new bonds belonged, nor would the proceeds of the sale have been sufficient to satisfy the bonds secured by the first mortgage, if no exchanges had been made. W then intervened by petition, and alleging that he had exchanged his old for new bonds under a separate agreement, that if all the old bondholders did not come into the arrangement, his old bonds should be returned to him, and he be restored to all his rights thereunder, he prayed that his old bonds be returned, and that he be paid out of the proceeds of the sale as a creditor under the second and third mortgages: *Held*, That W, assuming his allegations to be true, had no equity to the relief he asked as against purchasers of the new bonds without notice of his equity.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 471; Dec. Dig. \hookrightarrow 153.]

Before Rutland, J., at Marion, October Term, 1870.

Before the mortgage to Jesup, hereinafter mentioned, was given, the Wilmington and Manchester Railroad Company executed three mortgages as follows:

No. 1. A mortgage to Edward Sandford, dated May 1, 1851, to secure bonds to the amount of \$600,000.

No. 2. A mortgage to Edward Sandford, dated March 1, 1853, to secure bonds to the amount of \$200,000.

No. 3. A mortgage to George W. Dargan, dated April 12, 1855, to secure bonds to the amount of \$200,000.

For principal and interest on the above mentioned bonds, and a debt of about \$88,000 secured by a pledge of stock, the company was indebted, on May 8, 1866, in the sum of \$1,300,000 and upwards. For the purpose of retiring this indebtedness, with the consent of the creditors, which it hoped to obtain, and providing means to rebuild and equip its road, the company, on that day, executed a new mortgage to M. K. Jesup in the sum of \$2,000,000, to secure bonds divided into three classes of preferences as follows:

First preference bonds, to the amount of \$800,000, to be exchanged for the bonds and coupons outstanding, secured by mortgage No. 1.

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*Second preference bonds, to the amount of \$650,000, to be used in rebuilding and equipping the road.

Third preference bonds, to the amount of \$550,000, to be used in funding and retiring the bonds secured by mortgages Nos. 2 and 3, and the debt secured by a pledge of stock.

The terms of the new mortgage were agreed to by most of the creditors. Of the old bonds, all were exchanged except a few of the No. 1 bonds, amounting to about \$34,000, and of the Nos. 2 and 3 bonds, amounting to about \$30,000.

The Company having failed to pay interest on the bonds issued under the new mortgage, and thereupon the principal debt, by the terms of the mortgage, having become due and payable, on the 1st February, 1868, M. K. Jesup, the mortgagee, filed this bill against the company for foreclosure and sale of the mortgaged premises. The bill was afterwards amended, and B. F. Newcomer, who held outstanding bonds under mortgage No. 1, and a large amount of the first preference bonds under the new mortgage, of which he was the purchaser, and others, were made parties defendant.

Under a decree for foreclosure and sale, the mortgaged premises were sold by a Referee, on January 5, 1870, for \$250,000. Of this sum about \$64,000 were applied to the payment of the outstanding bonds, under mortgages Nos. 1, 2 and 3, leaving about \$186,000 to be applied to the first preference bonds under the new mortgage.

A report of the sale, and of the payment of the outstanding bonds under the three older mortgages, was made and confirmed, and, at the same time, it was ordered that the Referee advertise for creditors having claims on the fund in Court, to come in and prove the same, within ninety days.

At this stage of the proceedings, and before the ninety days had expired, A. J. White, on May 7, 1870, filed his petition in the cause, wherein he stated that, in August, 1866, he was the owner of five bonds, each for \$1,000, secured by mortgage No. 2, and ten bonds, each for \$1,000, secured by mortgage No. 3; that, at the time mentioned, he exchanged these bonds, amounting, with interest, to \$17,000, with J. W. Cameron, an agent of the company, for third preference bonds, under the new mortgage; that the exchange was made on the condition that all the old creditors should come into the new arrangement, and that it was expressly understood and agreed, between the petitioner and the agent, that, if any of the holders of the old bonds declined to exchange their bonds for new ones, whereby the scheme of retiring the old bonds

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and consoli*dating the entire debt of the company, under the mortgage to Jesup, should be defeated, the old bonds of the peti-

tioner should be returned, on his giving up the new ones. The prayer of the petitioner was, that he be allowed to intervene; that, on his depositing the new bonds, received from the agent, with the proper officer of the Court, his old bonds be returned to him, and that he be paid the amount due him out of the fund in Court.

It was referred to the Referee to take evidence under the petition and report the same, and he did so, reporting evidence which tended to establish the allegations of the petition; but there was no evidence that B. F. Newcomer, when he became the purchaser of the first preference bonds held by him under the new mortgage, had notice of the petitioner's equity.

On the petition coming up for final hearing on the report of the Referee, His Honor held that the claim for restoration of the old bonds was inadmissible as against the holders of the first preference bonds under the new mortgage, and he made a decree dismissing the petition.

The petitioner appealed, and now moved this Court to reverse the decree, on the grounds:

1. That the petitioner did not surrender his old bonds, so as to release the lien of the mortgages under which he held, as against the other bondholders.

2. That he only delivered his original bonds under certain conditions, which have not and cannot be fulfilled, and that, by the very terms of the arrangement which he made, he is entitled to have his original bonds, with their security unimpaired, returned to him.

Melver, for appellant:

White claims the redelivery of his bonds according to the contract with the agent of M. K. Jesup and of the Wilmington and Manchester Railroad Company.

This arrangement being within the scope of Cameron's agency, as appears by the testimony and terms of circular, his principals would be bound thereby, even though fraud or improper or unlawful conduct be imputed to the agent.

"A principal is liable for the conduct of his agent, even where he acts improperly and unlawfully, but within the scope of his agency." *Parkerson v. Wightman*, 4 Stro. 366.

"A party is bound civiliter by the fraud

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of his agent; he will not be permitted to retain advantages gained through that fraud." —*Johnson v. S. W. Railroad Bank*, 3 Stro. Eq. 263.

Cameron was the agent of Jesup, and he the trustee of the bondholders under his mortgage, of whom Newcomer, the rival claimant here, is one. Cameron was really the agent of Newcomer, and a contract made with Cameron is binding on Newcomer. Again, as to question of notice, we allege:

1st. That Newcomer had actual notice: 1. Because notice to the agent is notice to the

principal, (*Story on Bills*, Sec. 305, p. 369, supported by *Smith v. Thatcher*, 4 Barn. & Ald., 200,) and Cameron certainly had notice. 2. The terms of Newcomer's own petition to intervene shows notice. 3. The terms of the Jesup mortgage.

2d. If Newcomer did not have actual notice at the time of the purchase of the Jesup bonds, the terms of those bonds were sufficient to put him upon inquiry.—*Jones v. Smith*, 1 Hare Rep., 43, cited in a note to 1 *Story's Eq. Jur.*, §§ 399, 400.

The Jesup bonds, under which Newcomer claims, by their very terms disclosed the existence of the Jesup mortgage, and that referred, in express terms, to outstanding, unsatisfied mortgages. Was not this notice to Newcomer?

Again, Newcomer proved some of the bonds belonging to the very class in which White claims to stand. There is no evidence to show that Newcomer ever applied to the Railroad Company or to Jesup, the trustee, to ascertain whether all the old bonds had been surrendered.

The only evidence looking that way would tend to show that there was some collusion between Jesup and Newcomer.

If Newcomer had no notice of any kind, this would be no defense. 2 *Redfield on Railways*, 527, fourth edition, where the following language is used: "Where the debentures or mortgage securities of a railway company had been issued by the company to a party, under a contract, which amounted to a fraud upon the shareholders, and they were transferred by such party in the market to bona fide purchasers, it was held that such purchasers took the securities subject to all equities existing between the prior parties."

But suppose Newcomer should be able to put himself in the position of a bona fide purchaser without notice, he would then encounter the rule laid down in 2 *Story Eq. Jur.*, § 1502, as follows: "Even the purchaser of an equity is bound to take notice of, and is bound by a prior equity; and, between equities, the established rule is that he who has the prior equity, in point of time, is entitled

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*to like priority in point of right."—*Willoughby v. Willoughby*, 1 T. R., 763.

Here White certainly had the prior equity to Newcomer.

Another ground of resistance to the claim of White is that the same equity set up by him would set up all the other old mortgage bonds. To this we answer:

1st. The Court is hearing a case made before it, and not considering cases that may hereafter possibly arise.

2d. The time limited by the order for creditors to come in has long since passed, and no one but White has come in. Who has any right to say any other will come in? How is the Court to know that any other can make the proof made by White?

3d. Must White fail to obtain relief from a fraud, whereby he lost possession of his bonds, for fear some one else may come in and claim relief from a similar fraud?

Again, all, or at least nearly all, of the Jesup bonds of the first and second preference (and it is useless to speak of the third preference) have passed into the hands of a purchaser, who has proved them in this cause, and, by so doing, has put it beyond his power to assume our position. He was not a holder at the time of exchange, but a subsequent purchaser.

Newcomer cannot complain of fraud in the setting up of White's bonds, as he does in his answer, on the ground that it will defeat the payment of the convertible bonds, issued for the repair of the road, because it is conceded by his substitute, Walters, and shown by the Referee's report, that not a dollar of these convertible bonds will be paid in any event.

Newcomer has proved second Sanford mortgage bonds, (in which class White claims five bonds,) \$12,306.90; and has also proved a judgment obtained on coupons of the Dargan mortgage bonds, to the amount of \$2,310, for which he has been paid in full, while he says it would be a fraud to allow White to prove bonds of the same classes, and adds that, even if White were to be allowed to set up his original bonds, he would get nothing, because the proceeds of the sale of the road was not sufficient to reach either of these classes. If this position of Newcomer is entitled to any weight at all, it leads to the inevitable conclusion that Newcomer has got money which he ought not to have.

Newcomer claims, that after having been paid the full amount of the bonds held by him, of the same classes as those which White claims, that the balance in the hands

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of the Referees shall be paid *to him, in utter disregard of White's rights, as the real holder, in equity and good conscience, of the old bonds, and that, too, after Newcomer has, by his own petition, asked that protection may be given to the holders of the old bonds, and after he has been admitted as a party to this cause on that prayer and for that purpose. White was really brought into this cause by the petition of B. F. Newcomer, and by him were the old mortgages set up.

By the order of the 4th November, 1869, special provision was made for one occupying White's position, by declaring that, at the sale of the road, "the same ratable proportion of cash (as was allowed to be paid in bonds by the purchaser, if a bondholder,) should be paid in by him for the other bonds of the same grade of priority not in his hands," and then, by the order of 19th January, 1870, all the creditors of the company were called in to prove their demands, and, under this order, White comes and simply asks their delivery of his bonds, which were taken from him and are now held by the com-

plainant Jesup, in utter disregard of the conditions upon which they were delivered, in order that he may prove them under said order.

Laches has been imputed to White.

The record shows the contrary; when the bill was filed in Charleston, he imported himself into that case, and rested on the order of injunction.

Finding that this order was evaded by proceedings in the Court at Marion, he asked to be allowed to intervene before the time limited for the creditors to come in had elapsed, in order that he might regain possession of his bonds, which were illegally withheld from him, for the purpose of proving the same under said order. The fact that White received interest on the Jesup bonds, and sold some of the scrip, is also relied on as a ground of resistance to his claim. The answer to this is, the company owed White a certain sum of money, on which the interest, was payable semi-annually. He had a right to receive this interest and to acknowledge the receipt thereof; whether he did this by a formal receipt to that effect, or by the surrender of certain papers, called coupons or scrip, can make no difference. It will be observed, also, that the company were still engaged in making the proposed exchange of bonds, when this interest was received and when the scrip was sold.

Memminger, for respondents:

Mr. White claims to rescind his surrender

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of the bonds formerly *held by him, and to have them restored and set up under the original mortgages No. 2 and No. 3.

Mr. Newcomer, in opposition, claims that he is purchaser for value of the bonds No. 1 and No. 2 of the Jesup mortgage without notice of any such equity as that now set up by Mr. White, and that, as Mr. White actually accepted and held for several years the bonds delivered him in exchange, under the Jesup mortgage, his claim to supersede Mr. Newcomer cannot be allowed.

That if allowed, inasmuch as most of the bonds under the No. 1, oldest mortgage to Sanford, came in under the Jesup mortgage, Mr. White's bonds, under the Nos. 2 and 3 original mortgages would supersede the No. 1, and he would be in a better condition than he was originally; and that, as the road did not sell for enough to pay these No. 1 bonds, no damage is suffered by Mr. White by the surrender of his bonds.

There are two aspects in which the case naturally presents itself:

1. As between White and the Wilmington and Manchester Railroad Company.

2. As between White and the bona fide purchasers without notice, represented by Newcomer.

It might be that White could have a good claim against the Wilmington and Manchester Railroad Company, and none whatever

against the purchaser. But it is clear that if he has no claim, which this Court will enforce, against the Wilmington and Manchester Railroad Company, he cannot possibly have any against Newcomer.

Let us consider the first:

I. Had White any claim against the Wilmington and Manchester Railroad Company?

He sets up an agreement made with their agent, Cameron, and his petition is a claim for its specific performance.

It is necessary, then, first to ascertain what this agreement is:

From the evidence, it would seem to be an agreement that if the Jesup mortgage arrangement could not be carried out, then White's bond should be returned, and he should be replaced in statu quo.

This would have been a perfectly fair agreement, but Mr. White now sets up a different one, and claims that his individual bonds shall stand on a different footing from all others, and that if there should only be a partial compliance with the Jesup mortgage, those who came in should be held to

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their surrender, and he should be released from his, that is, that he should gain a precedence which he did not have before.

This, if true, would be a most unrighteous and fraudulent agreement, and is a mere afterthought, never intended by either party.

The intention was that the surrender should hold good, if a sufficient number of bondholders came in to make a substantial compliance. It would have been absurd to insist that all should come in; some would be dead, absent, covert, minors, etc.

White's own conduct proves that he considered the agreement, as then understood, to have been substantially complied with, otherwise he never would have presented again and again the coupons on the Jesup bonds and received payment of them; neither would he have accepted the scrip for the difference; neither would he have delayed making his claim until the commencement of this suit. These three facts, together with the implied acknowledgment of all the facts stated in the Jesup mortgage, by his acceptance of its bonds, are conclusive to show that the agreement merely looked to a substantial acceptance by most of the bondholders, and that that agreement was considered as having been executed. If, however, the agreement is the one now set up by White, then we submit that both the agreement in itself, and Mr. White's conduct in now setting it up, are such as will induce the Court to refuse any aid to its execution.

Batten on Spec. Perf., 256. To entitle a party to a decree there must be perfect good faith, and his conduct must be beyond reproach.

The granting relief is matter of discretion to be judged of in each case.—City of London v. Nash, 1 Ves., Sen., 12.

And in the case of Willard v. Taylor, 18

Wallace, 566, the Court shows that it requires not only a fair agreement, but the fairest kind of dealing.—Moore v. Blake, 1 Ball and Beatty, 69; and to the same effect are many other cases which might be cited.

Now, what kind of fairness would there be in such an agreement as that now set up by White, to wit: that he and Cameron, the agent of the Wilmington and Manchester Railroad Company, had a secret understanding by which to decoy the previous bondholders and new purchasers into an arrangement which would permit so undue an advantage?

And then take White's subsequent conduct in holding back for so many years, making no claim, and actually receiving payment. No Court could aid in executing such a fraudulent agreement.

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*II. But how stands the case with the bona fide purchaser of the new bonds without notice? He reads the Jesup mortgage under which White has ostensibly come in; finds that he has surrendered his old bonds and released his lien. As against these parties, then, it is not only a proposal: 1. To rescind an executed agreement; but, 2. To set up a secret equity against purchasers, for value, of a negotiable security before due, and without notice.

1. Upon the point of rescinding, the Court requires a much stronger case for the plaintiff than for specific performance of an executory agreement. Here, as far as Newcomer is concerned, everything was executed. White's old bonds were surrendered and his lien gone.

The proposal now is to rescind the surrender and restore the lien.

In Seymour v. Delaney, 3 Cowan, 518, Savage, C. J., says there is a wide difference between enforcing an executory contract and setting aside a contract deliberately executed, and the two subjects admit of very different views and considerations.

Osgood v. Franklin, 2 Johns. Ch., 23. There is a very important distinction which runs through the cases, between ordering a contract to be rescinded and decreeing a specific performance.

And the Court will imply an agreement from the acts as well as the words of a party.

Mr. Sugden, Law of Vendors, 522, says: "If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right."

In Nevin v. Belknap, 2 Johns. R., 573, it was held that a mortgagor allowing the mortgagee to sell the fee, and represent himself an absolute owner, cannot afterwards set up his equity of redemption, but is barred by his silence.

But when bona fide purchasers are concerned, the law is still more strict, and will not decree against them what it might have decreed between the original parties.

Thus, in *Hemphill v. Stone*, 5 Johns. Ch., 193, defendant, after having entered into agreement with plaintiff for sale of a lot of land, sold the same to a third person for valuable consideration, without notice of the agreement, held that specific performance could not be decreed, and that plaintiff must seek his remedy at law for breach of the agreement.

So in *Waters v. Travis*, on Appeal. 9

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Johns., 450, specific performance of a contract of sale will not be enforced to the prejudice of a bona fide purchaser for a valuable consideration, without notice of the previous contract of sale.

And in *Featherstonhaugh v. Fenwick*, 17 Ves., 313, the Lord Ch. says: The interest which a third party may have against the specific performance of an agreement may preclude the execution of it, as even between the cestui que trust and trustee, as in a case where an insolvent tenant made over his lease to another, who treated for a renewal, under a secret agreement, in trust for the original tenant. Equity would not execute the agreement against the landlord, and even the principle that a trustee shall derive no benefit from his trust, shall fail, rather than such agreement be decreed to be performed against the landlord, though, except as to his interest, it would have been executed as between the other parties.

All these cases were only for specific performance of an executory agreement, in which the Court refused even to order performance. How much stronger would the case be, if the Court were asked to rescind an executed agreement, upon faith of which the purchaser had acted.

Hadlock v. Bulfinch, 31 Maine, 246, cited with approbation by *Hillard on Mortgages*, 1 Vol., 334. If the mortgagee takes, for the amount due on the mortgage, the note of an assignee of the mortgagor, and gives up to the assignee the mortgagor's notes, this is not a mere renewal, but the substitution of a new security, and discharges the mortgage.

III. But a still more conclusive answer to White's case is that Newcomer's bonds are negotiable paper, purchased by him for value before due, and no previous agreement between the parties can affect their validity.

In *Story on Prom. Notes*, § 191, the law is thus stated: "The partial or total failure of consideration, or even fraud between the antecedent parties, will be no bar to the title of a bona fide holder of a note for a valuable consideration, at or before it becomes due, without notice of any infirmity therein."

Mr. Story on Bills, § 15, says it has become a general rule to hold bills of exchange (and, consequently, all negotiable paper) as in some sort sacred instruments in favor of bona fide holders for a valuable consideration without notice, and, § 188, he says: "Hence it is that a bona fide holder for value without

notice is entitled to recover upon any negotiable instrument which he has received before it has become due, notwithstanding any

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defect or infirmity of the title of the *person from whom he derived it: as, for example, even though such person may have acquired it by fraud, or even by theft or robbery."

In *White v. Vermont and Mass. R. R. Co.*, 21 Howard, 575, it is decided for the whole United States that coupon bonds, issued by railroad companies, are negotiable securities. And this decision has been approved by various decisions up to the case of *Gelpeke v. City of Dubuque*, 1 Wall., 176.

And in the case of *Commissioners Knox County v. Aspinwall*, 21 Howard, 539, it was held that the particulars set forth in the bond was all that the purchaser need look to, and if they imported a compliance with any conditions required by law, the purchaser need look no further.

Now, the Jesup bonds and mortgages expressly declared that the several preferences were fixed as therein set forth, and White accepted his bonds under the third preference, and Newcomer purchased under the first and second. No change, then, can now be made.

IV. But there is still a further difficulty in White's way. He has waived all claim, if he ever had one:

1. By delay in asserting it.

2. By accepting payment of his coupons on new bonds.

3. By accepting new scrip for difference between old and new bonds.

1. Delay in asserting a claim to set aside or have performed an agreement, is construed into acquiescence.

In *Lloyd v. Collett*, 4 Bro. C. C., 469, a delay of seven months was held fatal.

In *Walker v. Jeffreys*, 1 Hare, 348, V. C. Wigram holds the doctrine of delay being construed acquiescence as very useful, and affirms it.

In *Watson v. Reid*, 1 Russ. & Milne, 236, one year's delay was held unreasonable.

Now Jesup's mortgage is dated 7th May, 1866, and this petition is filed 29th April 1870.

2. But then the acceptance of payment of the coupons was express acquiescence.

Now, in 2 *Hillard on Mortgages*, 301, it is laid down that a mortgage may be extinguished by acts or declarations of the mortgagee, showing a waiver of his rights under it.

3. The acceptance of the new scrip is a still more definite acquiescence.

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*V. But, lastly, Mr. White has suffered no damage from the arrangement, and if restored to the statu quo, could get nothing.

If he is to be restored, every one else should be restored, and the proceeds applied accordingly; and from Referee's report, they cannot reach him. The proceeds of sale would not pay the original first mortgage bonds which were exchanged for the No. 1.

under the Jesup mortgage, and which are still outstanding.

If the agreement made by the original bondholders with the Wilmington and Manchester Railroad Company could be set aside in favor of White, it would follow that it should be set aside in favor of all the bondholders. In that case, the original mortgages would be restored, and all the No. 1 Jesup preference bonds would rank first under the original No. 1 mortgage to Sanford. These, according to the Referee's report, would absorb much more than the proceeds of sale, and consequently there would be nothing left for Mr. White, or any subsequent mortgage bond.

To hold that White had a private understanding with the company, which would entice the previous liens to surrender their claims, and leave him to come in before them, would be such a breach of faith that no Court could sustain it. He also cited Story on Ag., 148, 149; *Welsh v. Parker*, 1 Hill, 155; *Bank v. Johnson*, 3 Rich., 42; 1 Story Eq., §§ 378, 379.

Aug. 5, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The appellant, A. J. White, seeks to reverse an order refusing the prayer of a petitioner, presented to the Circuit Court by way of intervention under a decree in the suit of *M. K. Jesup v. The Wilmington and Manchester Railroad Company* and others, pending in that Court. The suit was for the foreclosure of a mortgage made by the company to M. K. Jesup, trustee. Prior to the filing of appellant's petition the property and franchises mortgaged had been sold under the order of the Court for the sum of \$250,000, and a portion of the purchase money remained in Court for distribution. The petitioner set up a claim to part of this purchase money, but did not seek to disturb the decree of sale, nor the sale actually made thereunder.

In 1866, the company being indebted, and its property mortgaged to secure such indebtedness, under an arrangement with the principal part of its creditors, under which a new bonded debt, secured by mortgage to M. K. Jesup, trustee, was to be created and applied, in part, to discharge the then exist-

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ing indebtedness of the company, *and, in part, to furnish the means of improving the practical condition of their road. A portion of the old indebtedness was held by the appellant, consisting of bonds—part of two several issues, having different priorities, that will be noticed hereafter. Appellant alleges that he parted with his securities to an agent of the company upon the agreement that, if the contemplated change of securities was not assented to by all the creditors, they should be returned to him; that such change did not receive such assent, and that his se-

curities have not been returned. It appears that White received, in exchange for such securities, bonds and scrip, under the Jesup mortgage. He now tenders a return of the last named securities, and demands the restitution of those originally held by him, in order that he may be let in to share the fund in Court, on the footing of a mortgage creditor holding under a lien prior to that upon which the foreclosure and sale took place.

Assuming the fact to be as set forth by the appellant, yet he is not entitled to the relief demanded by his petition, unless it is made to appear that the existence of a state of facts such as he alleges will entitle him to a claim upon the fund in Court, or some portion thereof. This depends upon the question whether, in the event the appellant should succeed in establishing his right to the original securities held by him, he would be permitted to hold these securities as of their original priority, as against other original holders of securities of the same, or a still higher class who have also exchanged them under the Jesup mortgage. In other words, if all the original bondholders who have consented to the exchange are to be held to the strict legal consequences of such exchange, and the appellant's alone is to be permitted to stand on the rank due to the priority of lien originally enjoyed, then it is probable that he may establish a claim to a portion of the fund in Court; but if, on the other hand, the effect of establishing his petition will be to let in all the original bondholders according to their respective priorities as among themselves, then the whole fund will be absorbed before it can by possibility reach the demand of the appellant.

The original debt consisted of three classes of bonds, secured respectively by first, second and third mortgages. The appellant was originally a holder of bonds belonging to the second and third classes. The proceeds of the sale of the road do not equal the amount embraced in the first class. If, therefore, the original first mortgage bondholders are to be

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admitted on as good a footing as *appellant to the benefits of any decretal order that may result from his petition, the fund will be absorbed, and no part of it can, by possibility, reach him.

The appellant seeks the aid of equity. He does not occupy, as to the present question, the position of a judgment or mortgage creditor, having fixed legal right to a fund in the hands of a Court of Equity for distribution, and demanding it on the ground of such legal right. He brings into Court securities which, upon their face, cannot be paid out of the fund, but claims that certain extinguished securities should be set up in their place. He demands that, so far as he is concerned, the fund should be distributed on equitable principles.

The arrangement between the company

and the several creditors, for the exchange of their securities, is regarded in equity as a single contract, for the reason that both the relations of all these creditors with the company and their relations with each other entered into its consideration. The equity of the contract is, therefore, commensurate with both of these classes of rights. If, then, the rights of the parties are to be constructed upon the equity of the contract, instead of upon its present legal form, it follows that the equities among creditors must be satisfied to make the remedy perfect.

If the appellant has a right to disturb the arrangement which has received the assent of the great majority of the original bondholders, there is an appropriate remedy; but as his only claim, recognizable here, is to participate in the distribution of the assets, it is an answer to his petition that the question of the right to the assets does not depend on the issue of fact raised by his allegations and the answer thereto. It is the distribution of the fund in Court, and not the settlement of general rights and equities between the parties, that is the only matter in hand in the present stage of this case.

It will be unnecessary to pass upon the other questions that have been raised, as the view taken is decisive of the whole case.

The appeal must be dismissed, and the order affirmed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*KINSLER v. HOLMES.

(Columbia. April Term, 1871.)

[Wills \hookrightarrow 832.]

Three devisees of a tract of land, who were, also, named as the executors of the will, and two of whom had qualified as executors, established a ferry on the devised tract, under a charter granted to them by the State, at a place where a river formed one of the boundaries of the tract. There were unsatisfied judgments against the testator, to a considerable amount, besides other debts, and his estate proved to be insolvent. On bill to marshal the assets: *Held*, That the executors were not bound to account to creditors for the profits of the ferry.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2141; Dec. Dig. \hookrightarrow 832.]

[Wills \hookrightarrow 728.]

Devisees of an insolvent testator are not liable to creditors of the estate for rents and profits during their possession before sale.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1759-1780; Dec. Dig. \hookrightarrow 728.]

[Judgment \hookrightarrow 876.]

Lapse of twenty years, with other circumstances: *Held*, To raise the presumption that a judgment was satisfied, although during five of the twenty years the stay law was of force and war existed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1649; Dec. Dig. \hookrightarrow 876.]

[Executors and Administrators \hookrightarrow 415.]

Under a bill to marshal the assets of an insolvent estate, a debt contracted by the executors, cannot be proved as a claim against the estate (a.)

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1630-1645; Dec. Dig. \hookrightarrow 415.]

[Executors and Administrators \hookrightarrow 415.]

A sum paid by executors to a watchman for guarding real estate of the testator, under a contract with the executors, will not be allowed as a disbursement against judgment creditors of the testator—semble.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1630-1645; Dec. Dig. \hookrightarrow 415.]

Before Hon. James H. Rion, Special Judge, at Columbia, January, 1871.

John J. Kinsler died in January, 1865, leaving a last will and testament, of which his three brothers, Edward Kinsler, Henry O. Kinsler and William Kinsler, were nominated executors. The two former proved the will and qualified as executors. The testator left very little, if any, personal estate, but a considerable amount of real estate, consisting of about twenty lots in the city of Columbia, other lands in Richland County, including a tract near Columbia, on the east bank of the Congaree River, known as the Brick Yard, and lands in Lexington County, among them a tract known as the Percival land. The will contained a residuary clause, by which the testator devised the residue of his real estate to his three brothers above named, and under this clause they became seized, as tenants in common, of the brick yard tract.

At the fire which destroyed the principal part of Columbia, in February, 1865, when General Sherman's army occupied the city, the buildings of the testator, on his lots, were burned.

In December, 1865, the three residuary devisees petitioned the Legislature of the State to grant them a charter for a ferry over the Congaree, at the brick yard, stating, as one of the grounds of their application, their ownership of the soil on the east bank of the

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*river, where the landing on that side would be. The Legislature granted them the charter, and the ferry was established and went into operation.

The bill, in this case, was afterwards exhibited by the two qualified executors against Mary Holmes, a judgment debtor of the testator, and William Kinsler and other his devisees. The bill was for administration of the estate. It alleged the insolvency of the testator, and prayed the usual decree for sales of the real estate, and for calling in creditors to prove their debts.

(a.) A person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate.—*Farhall v. Farhall*, (Nov. 18, 1871) Law Rep., 7 Ch. Ap., 123. R.

Under a decree in the cause, the real estate was all sold in December, 1868, and April and June, 1869. The proceeds of all the sales, except that of the Percival land, amounted to \$54,111.16. The Percival land was sold to William Kinsler, for \$2,403.35, and his bid was paid by crediting the same on his mortgage, hereinafter more particularly mentioned.

By an order made in June, 1867, it was referred to a Referee, to call in creditors, and report on their claims, and to take and state the accounts of the executors. Eleven judgments and four tax executions against the testator, dating from February, 1849, to October, 1861, and amounting, in the aggregate, to a large sum, were proved before the Referee. Two mortgages, one in favor of William Kinsler, on the Percival land, and one in favor of George Kaigler, for \$6,000, on a lot called the Jordon lot, besides specialty and simple contract debts, were also proved. The only disputed matters were the three to be now mentioned:

1. It was contended, on behalf of some of the creditors, that the devisees of the brick yard took the charter of the ferry, which was granted to them by the State because they were the legal owners of the soil, as trustees, for the benefit of the creditors, and that the executors were liable to account for the rents and profits. This position was sustained by the Referee, and he recommended that the franchise of the ferry "be sold, and that the executors be required to account for the rents and profits, as assets to which the creditors were entitled."

2. William Kinsler presented a claim against the estate for \$1,846.65, being the balance alleged to be due to him on a bond of the testator for \$8,000, conditioned for the payment of \$4,000, to secure which the mortgage above mentioned of the Percival land had been given. The bond and mortgage bore date the 27th September, 1848, and, as already intimated, the claim, so far as the mortgage was concerned, was not disputed.

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and he had received *the benefit of his mortgage lien by his purchase of the Percival land. What he now claimed was that he was entitled to rank as a judgment creditor for the balance of his debt. Under the original order made in the case, the time allowed creditors to present their claims expired on the 1st January, 1868, and this claim to rank as a judgment creditor was not presented until the 20th October, 1868, after an order to extend the time had been made on the application of this claimant.

To establish this claim, it was proved that the records of the office of the Clerk of the Court of Common Pleas for Richland were burned in February, 1865, and a certificate of the Clerk of said Court was produced and received in evidence, which stated as follows: "Abstract of judgment in the case of

John Bryce and Catharine McFie, administrators of J. McFie v. John J. Kinsler, to wit: Judgment for plaintiffs, Fall Term, 1848, for \$2,500; interest on \$2,500 from 1st January, 1849; date of substitution, November 16, 1868; fi. fa. issued 20th November, 1868, as of the — day of October, 1848."

William Kinsler testified that the indebtedness of John J. Kinsler to him arose in the following manner: That Daniel Kinsler, as principal, with the witness and John J. Kinsler as sureties, was indebted to the administrators of McFie by bond, in the sum of \$5,000; that the bond was put in suit, and he (the witness) then paid one-half the debt, with the accrued interest, in cash, and the other half, \$2,500, by giving his bond, with Frost and Shuler as sureties; that he afterwards paid this last mentioned bond; that the payment to the administrators of McFie was made before their judgment was recovered; that the judgment was for \$2,500, and was against himself and John J. Kinsler; that the mortgage of the Percival land was given to secure witness against his liability on the bond to the administrators of McFie; did not know why it was given for \$4,000.

It appeared by a return of the administrators of McFie, filed in the Ordinary's office, February 9th, 1849, that the bond of Daniel Kinsler, John J. Kinsler and Wm. Kinsler, for \$5,000, had been paid as follows:

1848.

July 1. By 20 shares Bank of Ham-	
burg, \$50	\$1,000 00
By cash	1,608 00
By bond of William Kinsler,	
J. D. Frost, J. Shuler....	2,500 00
By J. J. Kinsler's note, en-	
dorsed by J. D. Frost....	180 57
	<hr/>
	\$5,288 57

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*Principal of bond.....	\$5,000 00	
Interest to time of pay-		
ment	288 57	\$5,288 57

It was admitted that Wm. Kinsler had been in possession of the Percival land for nineteen years, and the balance claimed by him was ascertained as follows:

Debt	\$2,500 00	
Interest for 20 years....	3,500 00—	\$6,000 00
Deduct rent of Percival		
land	1,750 00	
Bid for Percival land....	2,403 35—	4,153 35
	<hr/>	
Balance		\$1,846 65

The Referee rejected the claim of Wm. Kinsler to rank for this balance as a judgment creditor, on the grounds: 1. That the evidence was insufficient to establish the fact that the alleged judgment was recovered; and 2. That, if it was recovered, it must be presumed to be satisfied.

3. J. B. Gibson presented a claim against the estate as follows:

Edward and Henry O. Kinsler, Executors of John J. Kinsler, deceased, to J. B. Gibson, Dr.

1868.

October 21. To service as guard and watchman over the property of the estate of John J. Kinsler, deceased, commencing July 13, 1866, making to this date 831 days, at \$2 per day, by contract \$1,662 00

Cr.

By cash of executors at sundry times 177 50

Balance \$1,484 50

To sustain this claim the following witnesses were examined:

Edward Kinsler sworn, says:

As one of the executors of the estate of J. J. Kinsler, I employed Mr. James B. Gibson to act as a guard over the property of the estate; we saw that bricks were being stolen in Columbia, fences burnt and iron stolen, and wood being cut on the property of the estate, and as the executors lived five

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or six miles in Lexington Dis*trict, it was thought expedient to employ a watchman to protect the property. The wood was mainly cut from the brick yard property in Richland District, and in the sand hills in Richland. My brother, the other executor, also lived with me in Lexington. He agreed to give Mr. Gibson \$2 per day for his services. Could not get reliable men to do the same duty for less. Mr. Gibson commenced his duties in the summer of 1866, and continues to be so employed up to the present time; no more depredations (that I am aware of) were committed after we employed Mr. Gibson; was not often in Columbia myself.

James B. Gibson sworn, says:

Was employed by the executors to act as guard on 13th July, 1866; I then entered upon my duties; I made it my business to attend to the business and nothing else; I had at least twenty pieces of property in Columbia to look after; the kind of property which was being lost or stolen was wood, iron and brick on the burnt premises, and at the brick yard; there are now loose brick on the burnt premises; all the old iron has been gathered up and sold; I went over the property, or some of it, every day, sometimes in Lexington, sometimes at brick yard, sometimes in the sand hills of Richland District; have detected persons committing depredations; I continue to act as guard at the present time; no depredations have been committed very lately; have devoted my time to nothing else but looking after the property since I took charge of it; I was to get \$2 per day; I rented out some few cottages; I got \$177.50 in payment, from rent of some cottages, received from negroes.

Cross-Examined.—The wood was taken

from a tract known as Palmyra, in the Richland sand hills; several parties were engaged in hauling; some few lots had pine trees on them from which wood was cut; some was also cut from the brick yard, mostly by negroes; some wood was also cut in Lexington.

The credit of \$177.50 was claimed by the executors as a payment to be allowed them on their accounts, and the balance, \$1,484.50, was claimed by Gibson against the estate as a preferred debt.

The Referee rejected both claims.

The case came before the Circuit Court on exceptions to the report of the Referee, and His Honor made the following decree.

On hearing the report of the Special Referee, and on motion of J. P. Carroll, representing certain of the parties, it is:

Ordered, That the said report be confirmed,

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and do stand as the *judgment of the Court, except in so far as it is hereby overruled in the following particulars, that is to say:

That so much of said report as relates to the judgment of the administrators of McFie, claimed by William Kinsler, be overruled.

That so much of said report as relates to the ferry, and its rents and profits, be overruled.

The executors appealed from so much of the decree as disallowed the credits for payments made to, and amount yet due to J. B. Gibson, on the grounds:

1. That, under the peculiar circumstances, the daily employment of a watchman was necessary for the protection of the property of the estate, and the creditors have derived the benefit of the services so rendered.

2. That the amount agreed to be paid for said services was reasonable.

David B. Lewis, one of the defendants, also appealed from the decree, on the grounds:

1st. Because His Honor erred in overruling the position taken by the Referee, in his report with regard to the ferry and its rents and profits.

2d. Because His Honor erred in overruling so much of the report as is adverse to the judgment claimed by William Kinsler by subrogation to the rights of the administrators of McFie, original plaintiffs, against his co-surety, John J. Kinsler.

Barnwell & Monteith, Talley, Bachman & Waties, Lesesne & Miles, Pressley, Lord & Inglesby, for creditors.

Carroll, for grantees of the ferry:

1. In December, 1865, when the grantees obtained the grant of the franchise now in controversy, the residuary devisees had the right to enter upon the lands devised to them, and to receive and appropriate to themselves the rents and profits, with every casual benefit and advantage incident to the legal ownership of the same.—Co. Lit., 111, a.; Gibson v. Farley, 16 Mass. R., 285;

Schwartz's Estate, 14 Pennsylv., 2 Harris, 42; 2 Story's Eq. Jurisp., § 1017; Wilson Ex parte, 2 V. & B. 251; 4 Kent, 156, 157.

2. The residuary devise was not absolutely void, but voidable only by the testator's creditors, and even in respect of them it continued valid and effectual until the lands

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devised were sold, and the *possession of the residuary devisees divested, or at least until the decree was pronounced for sale of the premises to satisfy the testator's debts.—Fripp v. Talbird, 1 Hill Ch., 142, and cases there cited; Statute 3 and 4, W. and M., 2 Stat., 533, 534.

3. The Ferry franchise was not parcel of the land on the eastern bank of the river, nor in any wise an appurtenance or appendage of the same. It was essentially a privilege of a public nature, which might lawfully have been granted without regard to the ownership of the landing places; and although it has been the public policy, in making such grants, to prefer the owners of the landings, if otherwise unobjectionable, yet the General Assembly have never recognized, as having any claims upon their favor in that regard, mere creditors having no property in the land, and only entitled to have such land subjected to the payment of their debts.—Young & Calhoun v. Harrison, 6 Geo. R., 130; Boynton v. Peterb. & Shirley R. R. Co., 4 Cush., 467; Gourdin v. Davis & Lehre, 1 Bail., 469.

Pope and Haskell, for the grantees of the ferry franchise, submitted the following points in support of the decree:

1. a. That the ferry franchise never belonged to John J. Kinsler, the testator.—3 Kent, 458; 2 Black., 37.

b. And therefore could not be subject to the claims of his creditors.—Williams on Ex'ors, p. 1408.

2. That the charge made by the Referee that the grantees of the ferry franchise obtained the grant from the Legislature by false suggestion of ownership of the landing on one of the banks of the river, is not true in fact; and, if true, is irrelevant and of no legal force in support of the Referee's report.—Stark ads. McGowan, 1 N. & McC., 387, 397, note; Stark v. McGowan, 1 N. & McC., 399; Rutherford v. McGowan, 1 N. & McC., 17; Gourdin v. Davis and Lehre, 1 Bail., 469.

3. That the grantees of the ferry franchise do not, in that character, stand in a fiduciary relation to the estate of the testator, or, as holders of the franchise, bear any relation whatsoever to the estate, but are parties in a contract with the State of South Carolina, and cannot, according to the facts as presented by the Referee, be "construed to be trustees for the creditors in regard to said ferry and its rents and profits."

Constructive trust arises only when the ex-

ecutor derives profit from "an act which is within the scope of his authority."—Story Eq., §§ 1,211 and 1,261.

A franchise does not come within the

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scope, unless, by renewal, *the trustee or executor gets in his own name that which had been vested in testator.—Williams on Ex'ors, 1408; Lewin on Trusts, 203, 220. So in case Hunsan v. Wallace, 1 Rich. Eq., 1; Keech v. Sandford, 2 Eq. C. Ab., 741; Tastor v. Marriott, Amb., 668; Rawe v. Chichester, Amb., 715.

Rule.—"If trustees, mortgagees and persons interested, obtain renewal, the new lease is always subject to the trusts and limitations of the old."—Owen v. Williams, Amb., 734; James v. Dean, 11 Vesey, 383; 15 Vesey, 236.

4. That the creditors of the testator—not as creditors, but as individuals—had as much right as the executors to apply to the Legislature for the ferry franchise. That the grantees of the ferry franchise did not apply as executors; and that the conclusion of the Referee that they have injured the creditors is illusory, and was properly overruled as being subversive of the absolute rights of the parties grantees.—3 Kent, 458—Nature of a Franchise; Gourdin v. Davis and Lehre—cited above; Rutherford v. McGowan—cited above.

Carroll & Melton, in support of the right of executors to be allowed the expense incurred in the services of J. B. Gibson as a watchman. This point covers the item of \$177.50, paid by the executors to Gibson, which the Commissioner disallows, as also the remainder of the claim.

1. An executor must manage the estate as a discreet and prudent man would manage his own affairs. If he fail to protect the property of the estate from avoidable injury and loss, he will be held responsible for such neglect.

2. An executor must himself determine what is necessary to this end in any given case. He needs not to have the direction of the Court to authorize an expenditure which he may think necessary.—Hill on Trustees, *570.

3. An executor is to be allowed all reasonable and necessary expenses incurred in the discharge of his trust.—2 Wms. on Executors, *1315; Hill on Trustees, *570.

4. Under the peculiar circumstances of this estate, the employment of a watchman was necessary to the protection and preservation of the property pending this litigation. Prima facie any expense incurred by an executor for that purpose is a necessary expenditure. The onus is upon those who impeach it to show that it was unnecessary, improper and unreasonable. No testimony is offered contradictory of that offered by

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the executors. The charge *of \$2 per day

is not an unreasonable charge for the services rendered.

5. The expenditure was incurred for the protection and preservation of the very property from which this fund arises. The creditors have received the benefit of the services rendered.

Statement of facts omitted in brief—John J. Kinsler died in January, 1865. Letters testamentary were granted to the complainant the same year. This bill was filed March 13, 1867.

In support of the equity of Wm. Kinsler to be subrogated to the rights of plaintiffs in the judgment of administrators of McFie v. Wm. and John J. Kinsler:

1. According to the testimony of Wm. Kinsler—which is not contradicted by any other testimony—this judgment was obtained against Wm. and John J. Kinsler, as sureties of Daniel Kinsler. After suit brought, and before judgment, Wm. Kinsler paid his moiety of the debt. The judgment went against both for the moiety of John J. Kinsler; which judgment Wm. Kinsler afterwards paid.

2. As between these two sureties this judgment was exclusively the debt of John J. Kinsler; and for its payment, Wm. Kinsler was the surety of John. It was so recognized by John, who assumed it, and executed to William a mortgage of the Percival land for his security.—*Stokes v. Hodges*, 11 Rich. Eq., 149. The right of Wm. Kinsler to be subrogated, (the mortgage having failed fully to indemnify him,) rests, in this view of the case, not alone upon general principles of equity, but upon the very terms of the Act of 1849.—11 Stat., 556.

3. Upon general principles of equity, independently of any special recognition by John of his liability to William, the latter as a co-surety and co-defendant in the judgment would have an equity to be subrogated.—*Barrows v. McWhann*, 1 DeS., *409; 1 Leading Cases in Equity, 160. (3d Am. Edition, notes to *Doring v. Winchelsea*;) *Cuyler v. Ensworth*, 6 Paige, 32.

4. The rule in *Burrows v. McWhann* is not in terms overruled in *Bank v. Adger*, 2 Hill Ch., 267. The principle upon which the latter case was decided, to wit: that a surety who pays the debt stands as a simple contract creditor for money paid, is subsequently ruled otherwise in *Smith v. Swain*, 7 Rich. Eq., 112, and in *Stokes v. Hodges*, 11 Rich. Eq., 149. See comments on *Copis v. Middleton* in *King v. Aughtry*, 3 Strob. Eq., p. 156.

5. By the law of this State, the liability

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between co-sureties to contribute, is absolute and unqualified. It is not requisite that a surety who pays the debt shall exhaust the principal debtor before he can go upon his co-surety for contribution.—*Lucas v. Curry's Ex'rs.*, 2 Bail., 403. This is not the case of

a creditor who has two funds against which he can proceed.

6. Presumption of payment from lapse of time is rebutted by the testimony, as also by the continued existence of the mortgage. The same presumption would apply with nearly equal force to many of the other judgments. The records of all have been destroyed, and all of the creditors stand upon judgments substituted under the Act of 1865.

Aug. 8, 1871. The opinion of the Court was delivered by

MOSES, C. J. John J. Kinsler died in January, 1865, leaving a last will and testament, of which his brothers, the plaintiffs, with another brother, William Kinsler, were appointed executors. The plaintiffs alone qualified. The brief does not furnish us with a copy of the will, and the only disposition which it contains that has been brought to our notice, is that which makes the three brothers the residuary devisees, and as such entitled to a certain piece of land known as the brick yard tract, situated on the eastern bank of the Congaree River, "near the old Columbia Ferry." In December, 1865, they applied to the Legislature for a charter of a ferry across the said river, at a point indicated in their petition, which was granted with such rights and privileges as pertain to franchises of the like character.—13 Stat., 53. A bill was filed by the plaintiffs to marshal the estate, and by the usual order creditors were required to present their demands. On the examination of the accounts of the executors, it was claimed they held the ferry for the benefit of the estate, and that the creditors had a right to the rents and profits which accrued from it. The Referee sustained the claim, which being taken by exception to the special Judge (sitting by regular appointment in the place of the Judge of the Fifth Circuit) was overruled, and an appeal from his judgment brings the question to this Court.

It is contended on the part of the creditors that the grantees of the ferry, two of them the qualified executors under the will, and the other named executor, but never qualifying, stood in relation to the estate as trustees, and, occupying that fiduciary position, they must be regarded as holding the ferry and its rents and profits for the benefit of the creditors. The argument pro-

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ceeds upon the ground that *when the petition was submitted to the Legislature and the charter granted, the land in fact "belonged to the estate," and that, as the Legislature granted the charter on "account of the pretended ownership, all benefits arising therefrom should belong to the creditors."

There was no charge of fraud or improper dealing, on the part of the petitioners, in the mode or manner by which the grant was obtained, and the appellants must rest on the

naked principle of equity, which they contend entitles them to the relief they seek.

In December, 1865, the right and title to the land, of which, in their petition, they averred ownership, was in them, not in either of them as executors, but in all of them as devisees. It was subject to the lien of judgments which existed against the testator at the time of his death, but still the fee was in them, subject to their control until divested by a sale under the judgments. They had a right of entry with all the incidents which a legal title conferred.

A distinction is to be borne in mind between the right of an executor and that of a devisee to enter upon the land and enjoy the profits. It is clear that a mere executor, having no title in the land himself, would be bound for the rents and profits to the devisees or creditors if he received them. The executor derives from the will no title to the real estate, as he does to the personal property. When the character of executor and devisee combine in the same person, there, on entry, the presumption is that it is made as devisee, and not as executor, because the act will not only be referred to the right but the greater interest, on the general principles which usually govern the motives and influences of human action. Here, however, the executors made public declaration that they held as devisees, for they aver, in their petition to the Legislature, that they were the owners of the soil.

"The rents and profits of the real estate of one who has died insolvent belong to the heirs, and not to the executors or administrators, until such real estate be sold for the debts of the insolvent, or by order of a competent Court."—Bac. Ab., Ex'ors. & Adm'rs., II., p. 3.

In *Gibson et al. v. Farley et. al.*, 16 Mass., 285, it was held that the heirs of a deceased insolvent are entitled to the rents and profits of the real estate of the deceased, until it is sold for the payment of debts.

An analogy is there drawn to the case of an estate mortgaged. "So long as the creditor permits the heirs of the mortgagor to re-

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*tain the possession, the rents and profits are taken by the heirs." No distinction prevails between the rights of the heir and the devisee to the enjoyment of the real estate, until deprived of their title to it by a sale for the payment of debts.

In *Jewell v. Jewell*, 11 Rich. Eq., 296, it was held "that where an administrator received the rents of the real estate of the intestate, he is liable to account to heirs for the rents thus received."

Chancellor Harper said in *Fripp v. Talbird*, 1 Hill's Eq., 144, "In a case, decided by myself as Chancellor, at Columbia, I held, after very full consideration, that an heir-at-law in possession was not accountable for rents and profits."

In *Hull v. Hull*, 3 Rich. Eq., 91, it is said of real estate, "The title does not vest in the personal representative, nor has he any control of such property, except what may result from the provisions of the will. If it is devised, unless devised to the executors, or power is given him to dispose of it, he has no power to interfere with it, and the devisee takes it without his assent."

The general principle of the common law, as to the right of the heir, or devisee to enter on, and enjoy the land, is affirmed by the Act of 1789, 5 Stat., 111, which excludes such right where the party in possession, engaged in making a crop with slaves, dies after the first of March: the growing crop is declared assets in the hands of the personal representative for payment of debts, &c., and the emblements of the land, before the last day of December following, are also like assets, but all after that period severed shall pass with the lands.

The residuary devise, under the will of J. J. Kinsler, was not absolutely void. It vested the title to the real estate upon which it operated in the devisees named. Until they were deprived of it by a sale under some proper proceeding for the payment of the debts of the testator, there was no paramount title in any other person, nor was it affected by any trust as to the rents and profits. In *Fripp v. Talbird*, 1 Hill Eq., 143, it is said, "that even where a deed is void as against creditors, until seizure of the property, the party in possession is not bound to account for the rents and profits."

The Legislature, however, had the power to grant a charter for a ferry at the place designated without any regard to the ownership of the landings. We are bound to presume that all the formalities of the law were complied with, which are required on applications for franchises of this character. The right to establish a ferry is an incident of sovereignty, and an individual can be lawfully deprive-

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ed *of his land where it is necessary for the purpose.—*Stark v. McGowen*, 1 N. & McCord, 387. The chartered interest in the ferry does not depend on the fee-simple right of the soil, and the owner thereof, in consequence of such original right, could not prevent the use of the ferry.—*Gourdine v. Davis & Lehre*, 1 Bail., 472.

The case of *Huson v. Wallace*, 1 Rich. Eq., 1, presented an entirely different question from the case now before the Court. There the intestate had contracted for the purchase of land with the unexpired term of a ferry. It was presumed, as it was the duty of the administratrix to complete the purchase and take a conveyance, that she had so done. Still continuing administratrix, she obtained a re-charter of the ferry in her own name. Chancellor Harper, in his Circuit decree, held her responsible for the rents and profits. The decision was rested on the analogy to

the doctrine of renewals of leases by trustees or tenants, the general principle which governs it being, "that if trustees, mortgagees and persons interested obtain renewal, the new lease is always subject to the trusts and limitations of the old." There is another circumstance in that case which distinguishes it from the one before us. There the possession of the administratrix was as a tenant in common with her children, and she was, therefore, a trustee to preserve the estate for the rest.

In relation to the claim of William Kinsler under the McFie judgment, there is much confusion as to the parties against whom it is supposed to have been obtained. From the report of the Referee it would seem that the plaintiffs in it were the administrators of McFie, and the defendants, Daniel Kinsler, J. J. Kinsler and William Kinsler, the two latter sureties.

William Kinsler, in his testimony, says that the debt was a bond for \$5,000; that it was put in suit, and before judgment he paid \$2,500 and the accrued interest in cash; that the judgment was against him and J. J. Kinsler; that he also paid the last \$2,500 on his bond with Frost and Shuler, which he had given when he made the cash payment. The argument of the counsel, in support of the equity of William Kinsler to be subrogated to the rights of the plaintiffs in the McFie judgment, treats it as one against William and J. J. Kinsler. We have, therefore, to consider the claim as under a judgment against them.

If we felt at liberty to look behind the certificate of the Clerk of the Court of Common Pleas, which contains an abstract of a judgment of administrators of McFie v. William and J. J. Kinsler, Fall Term, 1848, \$2,500, in-

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terest from 1st of January, 1849, date of substitution, November 6, 1868, we would be obliged, from the proof before us, to conclude that no such judgment was then obtained.

In the first place, the copy of the return of Mr. Bryce, the administrator of McFie, made to the Ordinary in 1849, introduced by William Kinsler, shows not only the full payment of the bond, on July 1, 1848, on which the judgment is averred to have been founded, but contains the items of the settlement. William Kinsler paid the first \$2,500 in cash, and yet the return, which, in fact, is equivalent to a receipt and discharge to the obligees, shews that the cash paid was only \$1,608, the balance of the principal and interest having been paid and settled in Hamburg Bank stock, the bond of William Kinsler, Frost, and Shuler, and the note of J. J. Kinsler, endorsed by Frost. If the debt was then admitted by the plaintiffs to have been paid, how, or why, did the defendants allow the suit to proceed to judgment? There was no evidence of any stipulation, at the request of William Kinsler, that, notwithstanding the

full settlement of it, Bryce should still pursue it to judgment, not only against J. J. Kinsler, but against himself. If the purpose of the latter was, through the plaintiffs in the action, to get the benefit of a lien on the property of J. J. Kinsler, the object could have been accomplished through a judgment against him alone. The bond to McFie must have been joint, or joint and several. How, then, could one judgment have been obtained on it only against two of the three obligees? The amount of the judgment, as claimed, seems to be inexplicable, when tested by the course of the Common Pleas, either in regard to verdicts or assessments. If the debt was \$2,500, and the judgment obtained at October Term, 1848, why was it that it carried interest only from the following January?

Giving, however, full effect to the abstract certified to by the Clerk, as shewing the existence of such a judgment, we cannot, in the face of the circumstances in proof, hold it as still unsatisfied against the said J. J. Kinsler. Full twenty years had elapsed from its rendition before the said William Kinsler took any step for its collection, and, although the stay law may have been regarded as operative for five years of that period, yet, conceding this supposed suspension, together with the fact of war, and the general distress which followed as a consequence, we think the lapse of fifteen years, with the attendant circumstances, raise a presumption of the fact of payment too strong to be resisted.

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*William Kinsler was a party defendant in the cause. At June Term, 1867, an order was passed which required creditors to come in and prove their demands against the estate of J. J. Kinsler, on or before 1st January, 1868. Within the prescribed time he presented his claim under his mortgage of September, 1848. Although having an interest as devisee and creditor, he allowed an order pro confesso to be entered against him for default of answer, and never preferred his demand under the judgment until the 20th of October, 1868, over nine months after the period first limited, and then on his petition the time was extended. It would have been more satisfactory if a copy of the mortgage had appeared in the brief.

It is averred, however, by Wm. Kinsler, to have been executed to protect him against a liability as surety on the McFie debt, and yet it is in the penal sum of \$8,000 to secure \$4,000. If the mortgage was for the alleged purpose, why was it given only for \$4,000, when the whole liability was for \$5,000; and if only given as indemnity against his co-surety, then why was it taken for \$4,000 instead of \$2,500, one-half of the whole debt? If the judgment was unsatisfied at the death of the testator, being the oldest against him, and binding the whole of his real and personal estate, why did he not seek the collection of his debt through the source by which the

full amount of his debt could have been realized, instead of resorting to the mortgage, which only had a specific lien? J. J. Kinsler owned, at his death, besides personal property, real estate of large value, which brought, at public sale, under this cause, (excluding the mortgaged tract,) \$54,111.16. The mortgaged piece was bid off for \$2,403.35. Can a conceivable reason be suggested why the creditor, having a general and a specific lien for the same debt, refrained from availing himself of that process through which full payment was the most likely to be obtained?

It is not usual for a mortgagee of real estate to enter into possession, and yet here he not only entered, but retained possession for nineteen years. At the death of the testator, his real estate must have largely exceeded in value the price at which it was sold in 1868 and '69, for it is in proof that, besides his land in Lexington County, it consisted of at least twenty parcels in the city of Columbia, on the most, if not all, of which, the buildings were destroyed on the invasion of the Federal army in February, 1865. How long he had owned the various city lots does not appear, but it certainly is not improbable that a man of such large possessions could, at any time, for years before his death, have

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met the comparatively small *sum of \$2,500; it surely could have been realized by the enforcement of the judgment.

We have no reason to doubt that William Kinsler testified according to the best of his belief. Human memory, however, is fallible, and it is not strange that the account which he gives of the several transactions, some of them dating back to twenty years, does not produce conviction, when it is opposed by facts and circumstances so strong that they must lead to a different conclusion.

We have not had the benefit of the views which the special Judge took of the claim under the judgment, but as he overruled so much of the report of the Referee as related to it, we are to presume that he differed from him in his conclusion of the presumption of payment on the proof made.

We concur with the Referee in the conviction that at the death of the testator, no such judgment existed against him open and unsatisfied.

The claim remaining to be considered is that of James B. Gibson, who was employed by the executors on the 13th of July, 1866, to act as watchman over the real estate, to prevent the cutting of wood by trespassers, and the taking and carrying away of the bricks of the buildings which had been destroyed. It will be remembered that this was no demand against the testator at his death, and the fund to be administered by the Court consists of the proceeds of his real estate, against all of which liens then existed.

In *Rutledge v. Hazlehurst*, 1 McC. Eq., 467, it was held that legal assets must be distributed under the Act of 1789, (5 Stat., 111,) after satisfying all liens existing at the death of the debtor. (See also *Keckley v. Keckley*, 2 Hill Eq., 256.) Although, under the said Act, debts due to the public are to be paid next in order to funeral expenses, yet it was held in *Commissioners of Public Accounts v. Greenwood et al.*, 1 Dess., 450, that the State had no prerogative to be paid out of the effects of the debtor in preference to any of the citizens who have judgments, mortgages, or other liens.

The opinion of the Court of Appeals in *Haynsworth v. Frierson*, 11 Rich., 478, recognizes the principles involved in the prior decisions, which limit the order for the payment of debts as directed by the Act to such assets as remain after satisfaction of liens existing at the death of the testator or intestate. Here the debt was contracted by the executor, and the fund which is derived from property bound by judgments and a

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mortgage cannot be diminished against the creditors who held them to satisfy a claim, however meritorious it may be, which did not exist at the death of the testator, and for payment of which the holder must look to the party with whom he contracted.

It is ordered and adjudged that so much of the Circuit decree as relates to the claim of the said Gibson, and to the ferry and its rights and incidents, be affirmed, and so much thereof as relates to the judgment of the administrators of McFie, claimed by William Kinsler, be reversed. It is also ordered that the case be remanded to the Circuit Court, that the proper orders may be taken to carry out the directions of this Court as expressed in its opinion.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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THE STATE ex rel. HIBERNIAN SOCIETY, OF CHARLESTON, Respondents, v. GEORGE ADDISON, City Sheriff, Appellant.

THE STATE ex rel. THE GRAND LODGE OF ANCIENT FREE MASONS OF SOUTH CAROLINA, Respondents, v. GEORGE ADDISON, City Sheriff, Appellant.

(Columbia. April Term, 1871.)

An Ordinance of the City Council of Charleston, passed in June, 1793, exempted "all and every * * * charitable society from payment of any City taxes now due, or to become due." The Hibernian Society, of Charleston, and the Grand Lodge of Ancient Free Masons, the Relators, became bodies corporate—the first named in 1805, and the last named in 1818—and their real estate consisted of the buildings

and premises where they held their meetings. The annual Tax Ordinances from 1844 to 1851, inclusive, expressly exempted from taxation such buildings and premises of charitable societies but not the buildings on such lands held by individuals under a lease for a term of five years. After the year 1851, and until the year 1869, inclusive, the annual tax ordinances did not, in express terms, exempt such buildings and premises, but imposed taxes on every house, building, &c., "including every building and improvement on lands under a lease for a term of five or more years, from a * * * charitable society." The buildings and premises of the relators were never assessed for taxation until the year 1868, when, for the first time, they were so assessed.

[*Municipal Corporations* 967.]

Held, That payment of taxes for the year 1868 could not be enforced; that the City authorities, by excluding the property of the relators from taxation for so long a period of time, had themselves construed the Ordinance of 1793 as including the relators within its terms, as charitable societies; and that it was too late for such authorities now to contend against their own construction, as evinced by long usage—the ordinance still remaining of force.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2067; Dec. Dig. 967.]

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[*Municipal Corporations* 957.]

Held, further, That the State Constitution of April, 1868, having declared the property of all societies, with certain exceptions which do not include the relators, subject to municipal taxation, it became the duty of the City Council to impose taxes on the relators, and, therefore, that the Ordinance of 1869, though identical in its terms with that of 1868, must be construed as authorizing the imposition of taxes upon the relators, which had also been assessed upon their property for that year.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2019; Dec. Dig. 957.]

[This case is also cited in *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 214, 58 S. E. 811, as an instance of the use of writ of prohibition to enjoin the collection of taxes.]

Before Melton, J., at Chambers, Columbia, July and November, 1870.

These were suggestions for writs of prohibition to restrain the City Sheriff of Charleston from enforcing certain tax executions against the relators for taxes assessed for the years 1868, 1869 and 1870.

The facts are stated in the judgment of the Circuit Judge, below given, and the opinion of the Supreme Court delivered by the Chief Justice.

The case in which the Grand Lodge of Ancient Free Masons were the relators was heard in July, 1870, and His Honor ordered a writ to issue prohibiting the defendant, the City Sheriff of Charleston, from enforcing the executions against the relators for the taxes charged for the years 1868 and 1869.

The case in which the Hibernian Society was the relator was heard in November, 1870, and His Honor the Circuit Judge filed his judgment, as follows:

Melton, J. The office of Circuit Judge for

the First Circuit being vacant, this case was brought before me on the 22d of August last, by suggestion, praying for a writ prohibiting the defendant from collecting taxes charged against the relator by the City Council of Charleston for the years 1868, 1869 and 1870. A rule was thereupon issued against the defendant, returnable on the 13th of October, requiring him to show cause before me why the prayer should not be granted. The return was made accordingly, and the cause submitted without argument.

The facts, as made out by the depositions filed with the suggestion, are these: That the Hibernian Society was originally founded in 1801, and on the 17th of March of that year a constitution and by-laws for the government of its members was adopted. The primary and chief object of the organization, as declared in the constitution, was to aid distressed emigrants from Ireland, and to relieve decayed members and the distressed widows and orphans of members; that the society was incorporated on the 19th day of

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December, 1805, and its charter has been from time to time renewed; that from its foundation to the present time, the society has been employed in doing works of charity, extending the sphere of its benevolence beyond the limits of the constitution, appropriating all its revenues in fulfillment of the objects of its foundation. The property of the society consists of a hall and grounds on Meeting street, in the City of Charleston, purchased with a fund raised by donations from members, which hall has been rented out from time to time, and the rents expended in works of charity and benevolence. This property has always been exempt from taxation, and no attempt was ever made, either by State or other authority, to impose a tax upon it until the 17th of June, 1868, when the society was called upon and forced to make a return of this specific property, which was done under protest.

By an Ordinance, passed on the 29th of June, 1793, the City Council of Charleston exempted the South Carolina Society, and all other religious and charitable societies, from any tax "heretofore due, or that may be due to the City." (See Digest City Ordinances from 1783 to 1844, p. 234.) This ordinance was continued in full force, year after year, until repealed by the ordinance of March, 1870; and under its operation the Hibernian Society was exempt from taxation. The first clause in all the ordinances to raise supplies passed by the city from 1800 to 1870, is precisely the same in the classification and enumeration of the subjects of taxation. The first Section of the ordinance of 1868 reads in these words:

"That a tax for the sums, and in the manner hereinafter mentioned, shall be raised and paid into the treasury of the city, for

the use and service thereof; that is to say, two dollars in every one hundred dollars of the value of every house, building lot, wharf, or other landed estate, including every building and improvement on lands, under a lease for a term of five or more years, from a religious, charitable or literary society, or under any building lease."

The same words, with the exception of a change in the numerals, are used in the ordinance of 1844, and in every other previous ordinance that has been found. The ordinance of 1869 reads in the same way.

I do not regard the terms of this enactment to be in conflict with the ordinance of 1793, but, on the contrary, they are rather confirmatory of the exemptions therein declared. The inclusion of every building and improvement on land under a lease, for a term of five or more years, from a charitable

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society, *excludes the property of such society not under such lease, and preserves the exemption of what belongs to the society proper. The maxim *expressio unius est exclusio alterius* applies here. It was brought to my attention, in the investigation of the case, that the ordinance of 1868, which was passed under the administration of the Hon. P. C. Gaillard, Mayor, was not enforced in this particular until after he and a majority of the Council were removed by military orders, and his place filled, first by General Burns, and a few days later by Major Cogswell. It must have been under, and by the direction of this officer, acting as Mayor, that the City Assessor included in his assessment the property of this and other charitable societies. It was so included in error, and the tax cannot be maintained upon a proper legal interpretation of the ordinance.

It was in a similar way that the City Assessor, under the ordinance of 1869, earnestly attempted to subject the property of this society to taxation. Neither of these ordinances gave to the City Assessor the legal right to levy a tax on the property exempted by the ordinance of 1793; the ordinances of 1868 and 1869, instead of repealing the exemption of 1793, extended and confirmed it. The Constitution of 1868 did not of itself render the property liable to taxation, or repeal any existing exemption. It simply declared as the fundamental law the principle which should govern legislation on the subject of taxation. The provisions are all prospective. Section 1, of Article 9, reads: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation." Section 5 of the same Article reads: "It shall be the duty of the General Assembly to enact laws for the exemption from taxation of any public schools, etc., but property of associations and societies, although connected with charitable objects, shall not be exempt from State, County or Municipal taxation." In Section 8, Article 9,

it is provided that "the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property, except that heretofore exempted within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law."

In 1868 the General Assembly passed an Act providing for the assessment and taxation of property, applying however, solely to State taxation, and containing no provisions

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for municipal taxation. *The authority to provide for a uniform and equal rate of taxation by municipal bodies was unquestionably given to the General Assembly by the Constitution, but it was an authority which the General Assembly did not exercise until 1870, and in the absence of any law regulating the subject, the general municipal bodies continued to act under the ordinances existing at the adoption of the Constitution.

"The instrumentality of the Judiciary can be invoked by the Government only to give effect to its laws, civil or criminal, but the judicial power cannot precede that of legislation." (6th McLean, 523.)

The Constitution of the United States gives to Congress the power to establish uniform laws on the subject of bankruptcy, but, as was said by Chief Justice Marshall, in *Sturges v. Crowninshield*, 4th Wheaton, 196 [4 L. Ed. 529], "it is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States." It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States. Until, therefore, the Legislature did establish a uniform tax law for municipal bodies, there was nothing incompatible with the exercise of the taxing power by the municipal bodies. This seems to have been the opinion of the Legislature, for, in the "Act to enforce a uniform system of assessment and taxation by municipal bodies," approved March 1, 1870, the preamble recites the various clauses of the Constitution, giving the power and making it the duty of the Legislature to enact a uniform system of assessment and taxation by municipal bodies, and, in pursuance thereof, enacts that "all municipal corporations are hereby authorized and required to assess all property at its actual value, and lay all taxes thereon at a uniform and equal rate: Provided, That all property, and no other, exempted from taxation by the third Section of the Act of the 15th of September, 1868, shall be exempted from taxation by municipal corporations."

It is a cardinal principle of interpretation that, in the construction of a statute, we

must regard the old law the evil and the remedy. It is equally clear that we are not permitted, except on the very strongest reasoning, to regard an Act of the Legislature as entirely superfluous and unnecessary. The application of these two rules relieves the case from doubt. If, as is contended, the City Council of Charleston had the power to assess and collect the tax complained of under the Constitution, then the Act of the Leg-

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islature that "all municipal corporations are hereby authorized," etc., was superfluous and nugatory; but we are not permitted so to hold; and the converse of the proposition is true, so that the authority to tax grows out of, and depends upon, the Act of March 1, 1870. For all taxes laid since the passage of this Act, I think the relators are liable, but I do not think them liable for the taxes for the years 1868 and 1869; and I, therefore, order that a writ issue prohibiting the City Sheriff of Charleston from enforcing the execution against the relators for the taxes charged for the years 1868 and 1869.

The defendant appealed, in both cases, to the Supreme Court, upon the following grounds:

First. The Court erred in holding that the plaintiff was not liable for the taxes for the year 1868.

Second. For error in holding that the plaintiff is not liable for taxes for 1869.

Corbin, City Attorney, for appellant.

O'Comer, Connor, for respondents.

[Printed arguments were filed by the counsel on both sides, but as the cases were decided upon the construction of the city ordinances it is deemed unnecessary to report them.]

Aug. 8, 1871. The opinion of the Court was delivered by

MOSES, C. J. The right of the City Council of Charleston to exercise the power of taxation to the fullest extent conferred by its charter is not questioned in either of the cases.

It is competent for a municipal corporation to repeal or limit any grant which it has made, not in the nature of a contract, but while it exists the discretion of those entrusted with the authority is beyond the control of the Courts. They may at any time relinquish, repeal or suspend a tax which they have imposed, without question of their authority again to enjoin it, for their acts are not irrevocable.

"No Legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them."—Cooley on Constitutional Limitations, 206; *East Hartford v. Hartford Bridge Company*, 10 How., 535 [13 L. Ed. 518].

In the limit within which municipal bodies are competent to legislate their rights and ob-

ligations are identical with those of a State Legislature. It will not, however, be assumed

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that either such a corporation or Legislature will deprive itself of its power of taxation, or, in the exercise of it, embarrass itself with stipulations or conditions unless it is clearly shown that the act having that tendency amounts to a contract.

The relators, conceding the effect of these principles, do not claim that their real estate, referred to in the suggestion, was not within the taxing power of the City Council of Charleston, but contend that the said Council, by clear and unambiguous terms, have exempted such property from the general operations of their Acts to raise supplies, so that they are not brought within the provisions of the ordinances of 1868 and 1869, under which the taxes about to be enforced were assessed.

The Hibernian Society of Charleston was incorporated on the 19th day of December, 1805, and the General Lodge of Ancient Free Masons of South Carolina, on the 16th of the same month, in 1818. By an ordinance of the City Council, ratified on 29th of June, 1793, (Comp., 235.) "all and every religious and charitable society was exempted from payment of any city taxes now due or to become due." Neither of the societies before the Court have been assessed for taxes or required to pay them until the proceedings instituted against them, respectively, now sought to be prohibited, were commenced. Their claim is, that under the said ordinance, and the subsequent action of the City Council, their said real estate is exempted from taxation.

It is first objected that these societies are not "charitable societies," and, therefore, not within the terms of the ordinance. This exception proceeds upon the ground that the word "charitable," as therein used, is only to be applied to such institutions as are eleemosynary, and that neither of them has any claim to that character. A civil private corporation may, however, be established for purposes of general charity, and, as such, might be recognized as a charitable society, although the administration of its funds might not be confined to a hospital for the relief of the poor and sick, or a college or academy for the promotion of science and learning.

Nor is the use of the word to be understood in the ordinance, and our Acts of the General Assembly, as defined in *Jones v. Williams*, Amb., 651, with reference to the statute of charitable uses, "as a gift to a general public use, which extends to the rich as well as the poor;" nor is its sense to be restricted to those charities which, by the power which created them, are intended for public benefit without any discrimination as to the persons

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who are to participate in their enjoyment.

"Charity," as Sir William Grant said in *Morice v. Bishop of Durham*, 9 Ves., 399, "in its widest sense, denotes all the good affections men ought to bear to each other; in its most restricted sense, relief of the poor. Here its signification is derived chiefly from the Statute of Elizabeth." The judicial acceptance in which the term "charitable" is to be taken, when applied to bequests of that nature, is not to determine the interpretation which is to be given to the word in its use by the ordinance. We must look to the sense in which it was intended to be applied. At the time of its passage, with the exception of the "Orphan House," there was not, in the City of Charleston, an institution in its incidents and elements at all approaching that of an eleemosynary kind. In fact, there were then few societies even in the State whose formation was for charitable purposes. Having already intimated that we do not consider it as essential for any society claiming exemption under the ordinance of 1793, to shew that the charities which it administers are purely for public purposes, we think the relators are to be held within it, because the City Council, from the period when the societies first owned real estate in Charleston to 1868, have given a construction to it which it was too late to disregard or change while it was of force. It is true, as it was not in the nature of a contract, they could have repealed it at their pleasure; but while operative, their action in regard to it for so long a time must be received as the interpretation of their own enactment.

"Where the words of a statute are doubtful, general usage may be called in to explain them, for *optimus legum est consuetudo*."—Dwarris, 702; *King v. Hobb*, 1 T. R. 178. For three quarters of a century the Council have accepted the ordinance as excepting from city taxes all and every charitable association, and has included these societies among those upon whom it was to act. In good faith, and trusting to the exemption with which they supposed themselves favored, relying on the said ordinance, they might have purchased real estate to a large amount, and appropriated the proceeds in aid of the design of their formation, and after this long acquiescence on the part of the Council, they are now met with the objection that they were never included in the terms of it. It is too late to make such an objection available.

Holding, then, that the relators were among those included in the ordinance of 1793, it remains to be considered whether they are subject to the tax imposed by the ordinance of January 28, 1868, and of January 26, 1869.—3 City Ordinances, 43, 61.

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*First, as to that of 1868. The ordinances from 1844 to 1851, inclusive (except for the year 1850,) in express words exempt from taxation, "buildings and premises actually

occupied as places of meeting by religious, charitable or literary societies: provided that no exemption herein contained shall be construed to extend to the house and buildings and improvements on such land owned, erected or held by any individual or individuals under a lease for a term of five or more years from either of such societies." After the year 1851, the ordinances to raise supplies omitted this express exemption, and, save as to the amount of the tax assessed, were in the words of that of 1868, which is as follows: "Two dollars on every hundred dollars of the value of every house, building, lot, wharf or landed estate, including every building and improvement on lands under a lease for a term of five or more years, from a religious, charitable or literary society, or under any building lease."

The argument on the part of the appellants assumes that the right of these societies to the exemption sought is placed by them on a grant in the nature of a contract. That, however, is not the true view in which their proposition is to be regarded. If it was contended that the City Council had surrendered its right to tax these corporations, then, in the language of *Ch. J. Taney*, in *Ohio Life Ins. and Trust Company v. Debolt*, 16 How., 435 [14 L. Ed. 997], "neither the right of taxation, nor any other power of sovereignty which the country have an interest in preserving undiminished, will be held by the Court to be surrendered, unless the intention is manifested by words too plain to be mistaken." No relinquishment of the right of taxation is pretended on the part of these societies to have been made by the Council in their behalf. Their right to withdraw the benefit conferred by the ordinance of 1793 is recognized; the ordinance was not a surrender or relinquishment of the power to tax, but only a suspension of it. Its repeal depended on their own pleasure and discretion. That it has been directly repealed is not pretended. The appellant, however, refers its repeal by implication or inference to the direct exemption of charitable societies by the ordinances from 1844 to 1851, and its omission in the subsequent ordinances. This view might have been entitled to some consideration but for the fact that while the ordinances from 1844 to 1851 exempt the buildings and premises actually occupied as places of meeting by religious, charitable and literary societies, and the lands held by them, and except "the houses, buildings and improvements on such lands erected or held by any indi-

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vidual or individuals under a lease *for a term of five years or more from either of such societies," those from 1852 to 1869, not repeating the general exemption, still include in the subjects of taxation, buildings, &c., on lands under a lease "from a religious, charitable or literary society." What societies can be thus referred to, other than those

included in the ordinances of 1844 to 1851? Why was an assessment to be made for improvements on lands held under leases from them, while improvements on lands leased from individuals or other societies (not religious, charitable or literary), were entirely free from the imposition? Were institutions which not only the action of Council had recognized as entitled to favor, but which commend themselves to the respect and gratitude of the public, to be in a worse position and liable to a greater tax than individuals and corporations designed for less laudable purposes? It is no answer that the persons leasing such lands were to meet the tax on the improvements made; for the effect of this would abate the value of the rent, and to that extent reduce it, thus shifting the tax, in fact, on the proprietor.

The inclusion, in the ordinance of 1868, of the improvements on such leased land, shews a clear intent on the part of the Council, that the real property of such corporations, not under lease, is protected by the ordinance of 1793.

While we concur with the Judge below in his construction of the ordinance of 1868, we think that a different rule applies to that of 1869.

The Constitution of the State was adopted in April, 1868, and the said ordinance passed on the twenty-sixth of January, 1869.

The second Section of twelfth Article of the Constitution provides that "the property of corporations now existing, or hereafter created, shall be subject to taxation, except in cases otherwise provided for in this Constitution." The fifth Section of Article ninth specifies the cases, and confines them to "all public schools, colleges and institutions of learning, all charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons, all public libraries, churches, and burying grounds," and further declares that "property of associations and societies shall not be exempt from State, County, and municipal taxation," and provides "that this exemption shall not extend beyond the buildings and premises actually occupied by such schools, &c., although connected with charitable objects."

If these relators are within the said fifth Section, then the premises which they actually occupy are not liable to the city tax for 1869.

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*The Section, however, restricts whatever meaning may have been heretofore given to the term, and defines the nature of the institutions which are to be comprehended in it. Neither the Grand Lodge of Ancient Free Masons of South Carolina, nor the Hibernian Society of Charleston, can be claimed to be embraced within it. The corporations, other than those protected by the said Ar-

ticle, are, therefore, by the Constitution, subject to municipal taxation, and the ordinance of 1869 must be held to apply only to such exemptions as the City Council under it had the power to make. The convention had the right, with the consent of the people, to change and modify all the municipal charters which the State had granted. When the Constitution, therefore, declared that corporations other than those which it excepted shall be subject to taxation, the ordinance of 1793, on which these relators found their right, must be regarded as repealed, and that of 1869 became operative against them.

It is ordered and adjudged that so much of the order of the Circuit Judge as grants the writ of prohibition, for the taxes of 1869, be reversed, and to that extent the motion is granted.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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HEYWARD v. HASELL.

(Columbia. April Term, 1871.)

[Wills \hookrightarrow 497.]

Testator devised to each of his sons, R and J, for life, with remainders to their "children" and "grandchildren," and with cross-remainders between them; but, if both should die, leaving no such "lineal descendant" of either, then over, "to be equally divided among all such of my grandchildren, begotten or to be begotten, of my daughters, as may be alive at the time of the death of the survivor of my sons, to be divided, share and share alike, among such of my grandchildren by my daughters," their heirs and assigns, forever. The testator had four daughters, and, at the time of the death of the survivor of R and J, they had fifty-nine descendants then living, seven of whom were grandchildren, and the rest great grandchildren and great great grandchildren of the testator. The limitation over having taken effect, held that the grand children were entitled, in exclusion of the other issue of the daughters.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2117-2124; Dec. Dig. \hookrightarrow 497.]

[Wills \hookrightarrow 497.]

Grandchildren, in its primary and ordinary sense, includes only the children of children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1081; Dec. Dig. \hookrightarrow 497.]

[This case is also cited in *Gambrell v. Gambrell*, 82 S. C. 210, 64 S. E. 1135, as to the construction of wills.]

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*Before Carpenter, J., at Charleston, May Term, 1870.

The facts of the case are stated in the Circuit decree, which is as follows:

Carpenter, J. The only question submitted to me, is one of the construction of that part of the will of John Ashe which relates to the limitation over of certain real estate, after the death of the survivor of his sons, to the grandchildren of testator, to be equally divided among them, share and share

alike. The testator gave a portion of his real estate to each of his sons, Richard and John, for life; and from and after the death of such sons, to and among all and singular the children of said son whom he may leave living at his death, and, if there be but one child, then the whole to that one. But, if it so happen that, at the death of his son, any of his children should previously have died, leaving living any grandchild, or grandchildren of said son, then such grandchild or grandchildren to stand in the place of his or their deceased parent, and take the parent's share. After a cross limitation over to the sons in the same terms, the will proceeds: "But if it should so happen that, at the time of the death of both my said sons, there should be no lawful lineal descendant of either, to take the estates, according to the foregoing limitations, then, and in that case, I give and devise all and singular the lands, tenements and hereditaments, which are so as aforesaid devised, to be equally divided among all such of my grandchildren begotten, or to be begotten of my daughters, as may be alive at the time of the death of the survivor of my sons, to be divided, share and share alike, among such of my grandchildren by my daughters, and to their several and respective heirs and assigns forever; excepting, nevertheless, the share or shares which may be allotted to the children of my daughter, Eliza Livingston, wife of Philip P. Livingston, of New York, which shall be subject to the restrictions, limitations and trusts hereinafter fully set forth and specified in relation thereto." The testator had six children living at his death, to wit: two sons, Richard and John S., and four daughters, Miss Harriet Ashe, Mrs. Hannah Hasell, Mrs. Mary Gadsden and Mrs. Eliza Livingston. Richard and John S. both died unmarried, and without issue; and, at the death of the survivor John S., in 1868, there were surviving him seven grandchildren of John Ashe, the children of two of his daughters, (Mrs. Hasell and Mrs. Livingston,) twenty-four great grandchildren, and twenty-eight great great grandchildren; and the question is,

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whether the seven *grandchildren are entitled to the estate under the provisions of the will, to the exclusion of the great grandchildren and the great great grandchildren, or whether all must be admitted to a participation in the division thereof.

After careful consideration and full argument, I am of opinion that the grandchildren are entitled, to the exclusion of all the others. It is a settled rule in the construction of wills that words are to be taken in their ordinary and natural sense, unless the testator has clearly indicated otherwise. It is plain to my mind that the testator used in this will the simplest words, and intended them to be understood in the popular sense; he avoids, as much as possible, the use of

technical phrases, such as "issue of the body," "heirs of the body," etc. The words that he employs over and over again are "child," "children," "grandchild," "grandchildren." These words must be construed according to their primary acceptation, if there be any persons to answer the description. In this case there are "grandchildren" to take under the limitation over. They not only answer the description and compose the class designated, but they are the only persons who do so. It is true that the word "children" sometimes embraces "grandchildren;" but this is only under particular circumstances, as, for example, where there are no persons to answer the description of "children," or "grandchildren," in the primary sense, or where there could not be any such at the time, or in the event contemplated. This condition does not exist in the present case, and the reason for enlarging the ordinary sense of the words does not apply. If there had been no grandchildren, then, under this rule, great-grandchildren might have taken, to prevent intestacy and give effect to the will. Another case, and the only other case in which the natural meaning of these words may be extended, is where the testator has clearly shown, by the use of other words, that he has used the words children, or grandchildren, as synonymous with issue, or descendants generally. It is earnestly contended that the testator, by the use of the words, "if there should be no lawful lineal descendants of either of my sons, to take the estate, according to the foregoing limitations," has clearly manifested an intention to use the word grandchildren and lineal descendants as convertible terms, and to extend the meaning of the former word indefinitely.

But I cannot bring my mind to that conclusion. The idea of extension of the literal meaning of words rests on an implication, and the implication, to create or enlarge an

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estate, must be a necessary *one, apparent on the face of the will. If the words, "without lineal descendants," had been unqualified, there might have been some room for doubt, but they are limited and explained by the words "to take according to the foregoing limitations." What are those limitations? Clearly, to children and grandchildren. In the case of *Horsepool v. Watson*, 3 Ves., 383, it was held that the words issue (or descendants) did not necessarily import generality, but might be limited and controlled by other words. Here the preceding clear designation of children and grandchildren fixes beyond all reasonable question what was meant by the lineal descendants who were to take according to the foregoing limitations. Besides, it appears to me that the whole scheme of the will favors the interpretation in favor of testator's grandchildren, whom, in one part of the will, he describes as "lawfully begotten or to be begotten of his daughters,"

and still, in another part, as the "children of his daughters." In these instances he meant the same thing, and I cannot resist the conclusion that in all of them he meant to describe his grandchildren, the immediate offspring of his daughters. Let us look at the scheme of the will. The testator gives direct devises to his sons and daughters, their children and grandchildren, and in default of such children and grandchildren he gives the share of any one so dying, whether son or daughter, to his grandchildren by his daughters in equal parts. In these direct devises he makes each child the head of a new line of descent, and extends the estate, upon the death of the life tenant, to his or her children and grandchildren, upon the failure of any one or more of these devises to first takers without child or grandchildren living at his or her death, he gives the share of the one so dying to such of his grandchildren by his daughters as shall be living at the time of such death. Two things are here to be observed: First, that grandchildren seem to be the ultimate objects for whom he is disposed to make provision. In the direct devises to his sons and daughters, he looks to their grandchildren, and no further. When, upon failure of any of these devises, the estate reverts to him, he makes a final disposition of it by giving it to his own grandchildren, the offspring of his daughters, and he does not give to grandchildren generally, but only to such as shall be alive at the time contemplated. Second, in every one of these direct devises, whether to son or daughter, there is an express provision for children taking by representation the share of a deceased parent. When the testator intended this to be done he knew how to ef-

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fect it, and he did not leave it to implication, but made express provision for it. But he has made no such provision in the limitations over to his grandchildren. Now the claim of the complainants and of those who stand in the same category with him, rests on the idea that they are entitled to stand in the place of their parents. The answer to this claim is, that where the testator intended this right of representation, or substitution, to take effect, he expressly so directed, and not having directed it in these limitations over, the conclusion is irresistible that he did not desire it to operate. Nor is there anything unreasonable in this. A man may do as he pleases with his own, and the generality of people are apt to regard with more favor the grandchildren, whom they see around them, than great grandchildren, or great great grandchildren, whom they never expect to see, and in whom they have no living interest. There are other parts of the will that confirm the construction which my mind favored at its first reading, and which has only been confirmed by the argument. I have not thought it necessary to introduce

them here in aid of my conclusions, nor to add anything to the length of this opinion by citation of the numerous cases discussed in the argument. It is enough to say that, in my judgment, they thoroughly sustain the construction which results from the natural reading of the will. In the judgment of the Court, the estates devised to Richard and John S. Ashe, on the death of John S., the survivor, vested in the grandchildren of the testator, the children of his daughters, who were living at the time of the death of the said John, and they take per capita, with exclusion of the great grandchildren and great great grandchildren of the testator. And it is so ordered and decreed. The case is ordered to remain upon the docket for such other orders therein as may be necessary from time to time. The question of costs is reserved.

The complainant, and those defendants holding the same position as himself, appealed from the decree, upon the grounds:

1. That His Honor erred in holding that the word "grandchildren" must be construed according to its primary acceptation, if there be any persons to answer the description: the construction of a will depending on the intention of the testator, and not being bound by so narrow and inflexible a rule.

2. That His Honor erred in holding that the words "children" and "grandchildren" cannot embrace more remote lineal descendants, when there are persons to answer the

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description of children or *grandchildren in the primary sense, at the time, or in the event contemplated: this being practically to make the construction of a will depend upon and vary with events subsequent to its execution.

3. That His Honor concedes, in his opinion, that the terms children or grandchildren, in the first part of the clause of the will in question, are equivalent to the term "lawful lineal descendants," in the same clause, and vice versa; and it is, therefore, submitted that the larger interpretation should be given, in order to prevent the exclusion of the testator's lawful lineal descendants—"a construction which the Court will not adopt without necessity."

4. That the terms "lawful lineal descendants" occur and are used for the purpose of preventing the executory clause over taking effect, and must be construed, in accordance with all authorities, in its largest sense "issue."

5. That it is respectfully submitted that the will is to be construed according to the state of the testator's family at the time of making the will, or, at farthest, at the time of his death; and can, upon no authority, depend upon that condition at the death of the first taker, unless expressly so provided for.

6. That His Honor erred in holding that

by this will all the issue of the testator, except the grandchildren, are excluded from its benefits; it being necessary to construe grandchildren in this will as synonymous with issue:

1st. In order to effectuate the intention of the testator, which is manifestly to provide for his issue to the farthest time possible.

2d. In order to avoid the "absurdities, improbabilities and inconsistencies which may arise," (Lord Eldon.) from holding that the testator intended, even in what the respondents designate the direct devise, to deprive his issue of the provisions made for each stock, in case the child of the testator had died leaving only great grandchildren surviving him or her. In other words, inflicting the heavy penalty of disinheritance on those great grandchildren who should have had the misfortune of losing their parent and grandparent.

3d. In order to prevent intestacy, or any probability of intestacy, in case all the grandchildren had died previously to the death of the first taker.

4th. Inasmuch as the testator, by the use of the words, "lawful lineal descendants," as synonymous with the words "children and grandchildren," has affixed his own mean-

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ing to these latter *words, and construed them to mean lawful lineal descendants or issue.

Young, McCrady & Son, Campbell & Seabrook, Magrath & Lowndes, Whaley, Wilkins, Rutledge, for appellants.

Porter & Connor, Hunckel, contra.

August 9, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The only question raised by the present appeal involves the construction of the following clause of the will of John Ashe: "But if it should so happen that, at the time of the death of both my said sons, there should be no lawful lineal descendant of either to take the estate, according to the foregoing limitations, then, and in that case, I give and devise all and singular the lands, tenements and hereditaments which are so, as aforesaid, devised, to be equally divided among all such of my grandchildren begotten, or to be begotten of my daughters, as may be alive at the time of the death of the survivor of my sons, to be divided, share and share alike, among such of my grandchildren by my daughters, and to their several and respective heirs and assigns forever."

The contingency expressed in this devise happened, namely, the decease of both of the sons of the testator, having no lineal descendant of either to take the estate, according to the limitations that preceded in the will the devise in question. Accordingly, the limitation over to grandchildren begot-

ten of his daughters living at the death of the surviving son took effect. At this time there were living persons answering accurately the description, namely, grandchildren of the testator begotten of his daughters. There were also living, at that time, children whose parents answered that description, and who, accordingly, were great grandchildren of the testator, and grandchildren of his daughters. Of these great grandchildren of the testator there were two classes, namely, those whose parents had deceased prior to the death of the surviving son, and those whose parents survived that event. A claim is made under this devise in behalf of each of the last named classes. It is claimed that the term grandchild, as employed in the devise, must be taken in an enlarged sense, that would include great grandchildren. The consequence of allowing this term in an enlarged sense has been discussed in a two-fold aspect. According to one of these theories, grandchildren and great grandchildren take indifferently together, as a class, share and share alike, or,

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in other words, a *great grandchild, living at the death of the surviving tenant for life, takes the same share with the grandchild, and this, without regard to whether the parent of such great grandchild survived the tenant for life, so as to take under the devise, or died before him. The other theory excludes great grandchildren whose parents survived the life tenant and are still living. The first and most comprehensive of these theories is based broadly on the idea that great grandchildren are described within the term grandchildren, and take as purchasers under that description, and that all persons living at the death of the surviving life tenant, answering either to the description of grandchildren or of great grandchildren, take together, share and share alike. The last and narrower theory appears to be designed to meet a criticism to which the more comprehensive one is exposed. The ground of this criticism may be simply illustrated. A testator devises an estate by way of remainder to his children, A, B and C, living at a certain event that must happen subsequent to his death, share and share alike. At the happening of that event, A is living, having no children; B is living, having four children; C is dead, leaving four children living. Now, if the grandchildren are equally described with children under the term "children," then, at the vesting of the estate in remainder, there are living ten persons answering that description, namely, A, B and his four children, and C's four children; now, B and his children would take five out of the ten shares, C's children would take four of the remaining five, leaving to A but one share of the ten. Such a disposition could not flow from the motives that ordinarily influence parental conduct, for it negatives the

idea of the force of preference and natural precedence. We would expect to find such an intent clothed in expressions of a somewhat peculiar character, and such as would not ordinarily be employed when dispositions in consonance with the ordinary parental feeling are intended. The fact that grandchildren are under the scheme of the present devise, the ultimate objects of the testator's bounty, instead of children, would not divest the foregoing illustration of force, in its application to the case in hand, for grandchildren are not descendants of so remote a character as to preclude the idea that preference and natural precedence influenced the intention of the testator towards them. It may well be said, then, that if this is the effect of giving the enlarged sense claimed for the term "grandchild," instead of enforcing the presumed intent of the testator, it will tend to engraft upon it consequences that, if contemplated by the testator, would

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*doubtless have been guarded against. In view of the obvious force of these considerations, an attempt has been made to retain the enlarged sense of the term "grandchild," without letting in great grandchildren to take, as purchasers per capita, with grandchildren.

It has been argued that all the children of a grandchild, deceased, at the death of the surviving tenant for life, take a grandchild's share—that is, taken together, they are, as a class, a grandchild within the meaning of the devise. Not that they take as representing their parent, for the parent, dying before the happening of the contingency on which the estate vested, had no transmissible interest. If the first mentioned theory impaired the presumed intent of the testator, for the sake of satisfying the sense of the words, the latter assumes to trace that intent beyond the limits of the expressions employed to convey it. The testator understood the force and effect of allowing the children of a deceased object of his bounty to take, as a class, their parents' share, and knew how to express such an intent in appropriate language, for such a provision is made in that portion of the will that creates the estates precedent to that limited by the devise in question. The unanswerable argument against implying such an intent from the devise in question is that the testator has undertaken to distinguish the cases in which the principle of representation should be employed in ascertaining the objects of his bounty, and has excluded the devise in question from that category. If, therefore, we are to read the term grandchild, according to the intent and understanding of the testator, as embracing great grandchildren, we must conclude that all who take under that designation, whether grand or great grandchildren, take as purchasers, share and share alike, a child taking an equal share with a

living parent—brothers and sisters taking shares diminished according to the extent of the respective families.

The general rule is, that the language of the testator should be construed according to its primary and ordinary meaning, unless he has manifested his intention in the will itself to give a more extended signification. —Howe v. Van Schaick, 3 N. Y., 538, per Gardner, J.

So long as there are persons in being to take according to the description, the foregoing statement of the rule is complete. Such is the present case.

The questions are: First. What is the primary and ordinary import of the term grandchild, in reference to its including or exclud-

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*ing great grandchildren? Second. Does the will manifest an intent to use that term in a sense more extended than its primary and ordinary sense, so as to include great grandchildren?

What, then, is the primary and ordinary import of the term grandchild? But for the expressions in *Hussey v. Berkley*, it would be unnecessary to bestow much attention to the discussion of this question. A grandchild is certainly understood by all who use the English language as one in the degree of relationship in the second step. Lord Northington says, however, that "grandchild," without explanation, comprehends great grandchild, for, says he, "in common parlance," * * * "the word grandchildren is used rather in opposition and exclusion of children than as confined to the next of descent, the children of children, and must, I think, have the effect of comprehending both, unless the intention appear to the contrary." Had that case distinctly ruled that proposition, and been followed to the present time, it might be difficult to free ourselves from the force of precedent and to determine the point in reference to the sense of the term prevailing at the present day. But such was not the case, as the decision of the Court finally rested on the fact that the testator had included a great grandchild by name and special designation in the class of grandchildren, the objects of the devise. Nor does it appear that any later case has authoritatively ruled the point. All we have to consider, then, is the sufficiency of its reasons. It may be just to conclude that where the testator is looking to "children," and says "grandchildren," he means something in opposition to and exclusive of children. But the same reasoning would lead us to conclude that when, as is claimed in the present case, he is looking to great grandchildren, and says "grandchildren," he means something in opposition to and exclusive of great grandchildren.

A contrary doctrine to that stated by Lord Northington was applied in *Earl of Oxford v. Churchill*, (3 Ves. & B., 59.) Chancellor

Walworth, in *Howe v. Van Schaick*, (3 Barb. Ch., 488,) says: "Nor does the term grandchildren, without something further to extend its natural signification, include great grandchildren." Again, he says: "Such is not the natural sense of the term grandchildren."

As this is clearly an open question, so far as the Courts of this State are concerned, we must look to the sense of the term as commonly employed at this day. In this point of view we find no difficulty in arriving at the conclusion that, in its primary and ordi-

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nary *signification, the term grandchild is applicable strictly to the degree of relationship in the second step from the ancestor.

The second question then arises, does the will manifest an intent to use that term in a sense more extended than its primary and ordinary sense, so as to include great grandchildren?

In construing an instrument, resulting from the concurrence of two or more minds, we are compelled to refer the terms and expressions employed to a common standard; but as a bequest or devise stands on the purpose of the testator solely, which is ambulatory until finally executed, a large latitude is allowed, and the testator may make his own vocabulary, if his intention to do so is clearly made out. In such an inquiry, we may resort to the rules of interpretation to fix the sense intended to be applied to the terms and expressions employed, and to construction to test the appropriateness of the assumed sense by the general and particular objects and intents disclosed. Before departing from the ordinary sense, we must find a reasonable necessity for so doing in the text of the will, or the designs of the testator, as therein set forth.

If the testator has given his own definitions, or has used terms convertibly, or has employed a term in two or more relations, so as to characterize its intended sense, we have certain rules to go by.

Looking, then, into the devise before the Court, the question arises, whether a reasonable necessity appears for departing from the ordinary sense of the term "grandchild," as employed by the testator.

The testator has not, in any part of the will, supplied the definition of the term "grandchild," but clearly assumes that his intention will be understood without such particular definition. Nor has he, anywhere, used the term "grandchild" as convertible with any other terms, such as "great grandchild," "issue," or "descendants." It was argued that such an instance occurred in the respective devises to sons of the testator, but the expressions referred to have a different import. After limiting an estate over, on the death of his respective sons, to their children surviving them, and to the children of a child dying before that event, he says:

"But if it should so happen that, at the time of the death of both of my said sons, there should be no "lawful lineal descendant" to take the estate "according to the foregoing limitations," then a further limitation is to take effect. It is said that the term, "lawful lineal descendant," describes the persons to take. If that view be correct, still, primarily, it would be regarded as an expres-

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sion convertible with *the previous expressions designating the persons to take under that particular devise, viz: grandchildren of the testator, children of his sons, together with great grandchildren, their children, in the case of a grandchild dying before the end of the life estate. To hold that the testator employed the term lineal descendant, in a particular sense, as convertible with grandchild and great grandchild standing together, would not be sufficient ground for holding it convertible with "grandchild" standing alone in a devise where great grandchildren are not named. But the construction put upon this expression by the Circuit Judge is more perfectly consonant with the true sense. It is not an instance of using terms convertibly; the term "lawful lineal descendant" refers to, and is limited by, the proper terms of description which includes children of a son, and the child of such child. We find that the testator has uniformly, throughout his will, employed terms of particular import to characterize the objects of his bounty, such as children, children's children, grandchildren and grandchildren's children, and, by means of such expressions, has clearly indicated the persons intended to take to a degree as low as that of his great grandchildren.

It is equally true that, apart from any attempt to construct the terms by the ultimate intention of the testator, grandchild is nowhere put in any relation suggestive that it is not employed in its ordinary and primary sense.

It is noticeable, also, that grandchildren by his daughters take by a double description; first, as testator's grandchildren; second, as "begotten or to be begotten of my daughters," and again, as children "by my daughters." Both branches of this description ought to be satisfied, and if, on the one hand, they take as grandchildren, on the other hand, they take as children. Taking them in the character of "children," under a very exact description of that relation, the case is governed by *Ruff v. Rutherford*, Bail. Eq., 7, and *Snoddy v. Snoddy*, 1 Strob., Eq. 84, cases in consonance with the current of decisions, and with other similar cases, settling the law of this State, that grandchildren cannot take under the description of children in the primary and ordinary sense of that term.

It only remains to consider whether the ultimate intention of the testator, as manifested

by the whole will and all its parts, taken together, creates any reasonable necessity for taking the term in question beyond its ordinary sense.

It has been argued that it was the inten-

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tion of the testator to *exhaust the whole line of succession under such devise in fee before the limitation should take effect. The argument supporting this view must mainly depend upon the reasonableness of such a disposition, as it has little foundation in the text of the will. The Courts do not undertake, in construing wills, to satisfy the general conviction as to what is a reasonable devise. The testator has, clearly, a right to make an unreasonable disposition of his estate, so far as this test is concerned, and if he has done so the Courts cannot interfere. The testator has interposed a limit to his bounty in the direction of the succession of his descendants. In the case of sons and their descendants, the limit is his own great grandchildren; in the case of daughters, it is his grandchildren. The clue to the reason of this distinction is afforded by the argument in behalf of the succession of great grandchildren, namely, that the line may be longest preserved in the direction in which the name of the testator would be associated with his estate.

We are not at liberty to assume an intention opposite to these formal limits given in particular language by the testator himself, evidently aided by sagacious legal counsel. The contingency of the death of a grandchild leaving children was before testator's mind. Twice he referred in terms to it, and made provision in case of such an event. Where, therefore, he does not so provide, such omission was intentional.

The decree of the Circuit Judge must be affirmed and the appeal dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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*SCOTT, WILLIAMS & CO., Respondents, v. JOSEPH CREWS, Appellant.

(Columbia. April Term, 1871.)

[*Pledges* ⇨28.]

Ordinary diligence is all that the law exacts of the bailee in a case of pawn or pledge.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. §§ 69-73; Dec. Dig. ⇨28.]

[*Bailment* ⇨11.]

Ordinary diligence, in the law of bailments, is a relative term, and signifies that care which men of common prudence generally take of like articles of their own, at the time and in the place where the question arises.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 33-36; Dec. Dig. ⇨11.]

[*Pledges* ⇨28.]

The question being, whether bankers in Columbia, who had received on deposit certain collaterals, as security for money loaned by them to the bailor, were responsible to the latter for the loss of the collaterals from their banking house by robbery, the Circuit Judge declined, at the request of the bailor, to instruct the jury "that the bailees cannot be said to have exercised ordinary care, unless it be found that they have availed themselves of all the means for securing their deposits that art and mechanical skill could afford; and it is a proper inquiry for the jury to say whether proper efforts were made by the plaintiffs to ascertain and secure those mechanical implements of the age, which, without extraordinary diligence, could have been secured." *Held*, That in this there was no error.

[Ed. Note.—Cited in *Reynolds v. Witte*, 13 S. C. 17, 36 Am. Rep. 678.

For other cases, see *Pledges*, Cent. Dig. § 69; Dec. Dig. ⇨28.]

[*Pledges* ⇨28.]

The Circuit Judge instructed the jury "that the Court could not prescribe any absolute rule or measure of diligence; and that whether ordinary care devolved it upon the bailees, bankers in Columbia, to employ all the means of security known to art, and applicable to their business, was exclusively a question of fact for the jury." The verdict was for the bailees; and on appeal by the bailor: *Held*, That in this instruction there was error, and a new trial was granted.

[Ed. Note.—Cited in *Ramberg v. South Carolina R. Co.*, 9 S. C. 63, 30 Am. Rep. 13; *Wilson & Co. v. Atlanta & C. A. Ry. Co.*, 16 S. C. 592.

For other cases, see *Pledges*, Cent. Dig. §§ 69-73; Dec. Dig. ⇨28.]

Before Melton, J., at Columbia, February Term, 1871.

This was an action on two sealed notes given by the defendant to the plaintiffs, one for \$753.60, and the other for \$3,000, both dated at Columbia, S. C., February 18, 1870, and due at sixty days.

The defendant, by his answer, alleged a counter claim as follows:

First Cause for Counter Claim.

1. That on the eighteenth day of February, 1870, at Columbia, when the defendant made, executed and delivered to the plaintiffs his note, under seal, for seven hundred and fifty-three dollars and sixty cents, (\$753.60), enumerated as the first cause of action in their complaint, he deposited with them twelve hundred and fifty-six dollars, (\$1,256), Bank of the State old bills, as a pledge for the payment of said note; that said Bank of the State old bills were then, and are now, worth to the defendant one hundred cents on the dollar; that on the 20th day of April, 1870, inst., when said notes became due, the defendant went to the banking office of the plaintiffs, and made them a proper and legal tender for the payment of said note, upon the return to him of his pledge; that the

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plaintiffs *informed him that said pledge had been stolen from them; that such theft could only have occurred through such gross

and palpable negligence, on the part of the plaintiffs, as to make them, as bailees, liable to the defendant for the full value to him of the said pledge.

2. That neither said pledge, nor any part thereof, has been returned to the defendant by the plaintiffs.

Second Cause.

1. That on the eighteenth day of February, 1870, at Columbia, when the defendant made, executed and delivered to the plaintiffs his note, under seal, for three thousand dollars, (\$3,000), enumerated as the second cause of action, in their complaint, he deposited with them five thousand dollars, (\$5,000), Bank of State old bills, as a pledge for payment of said note; that said Bank of State old bills were then, and are now, worth to the defendant one hundred cents on the dollar; that on the 20th day of April, instant, when said note became due, the defendant went to the banking office of the plaintiffs, and made them a proper and legal tender for the payment of said note, upon the return to him of his pledges; that the plaintiffs informed him that his pledge was stolen from them; that such theft could only have occurred through such gross and palpable negligence, on the part of the plaintiffs, as to make them, as bailees, liable to the defendant for the full value to him of said pledge.

2. That neither said pledge, nor any part thereof, has been returned to the defendant by the plaintiffs.

That the defendant now is, and always has been, ready and willing to pay to the plaintiffs the amount of the aforesaid two notes, upon the return to him by them of his said pledges.

Wherefore, the defendant claims to recoup said sum of three thousand seven hundred and fifty-three dollars and sixty cents, (\$3,753.60), by way of counter-claim to the plaintiffs' demand, to the extent of the amount claimed by the plaintiffs, and asks judgment for the excess, two thousand five hundred and two dollars and forty cents, (\$2,502.40), with interest thereon, from the twentieth day of April, 1870, and for his costs in this action.

The plaintiffs replied to the counter claim as follows:

To the first cause of counter claim:

1. That they admit the deposit, in the vault of their banking house, of twelve hundred and fifty-six dollars, Bank of State bills, at a valuation of about sixty cents to the dollar, the same being a special deposit in a special package, put up by the defend-

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ant himself, and marked in his name, which deposit was made to secure to the plaintiffs (in the absence of personal security,) the payment of the sealed note for seven hundred and fifty-three 60-100 dollars, enumerated as the first cause of action in their complaint.

2. They allege that the package of bills so specially deposited was taken by force and violence, in the night time, by robbers, from the well-secured vault of the equally well-secured banking house of the plaintiffs, in the city of Columbia, where it was deposited by the defendant himself, as a security for the payment of the sealed note aforesaid; and the package of bank bills so specially deposited by defendant, by reason thereof, have not been available to the defendant (without fraud or default on the part of the plaintiffs,) to discharge the debt by the said sealed note, due by the defendant to the plaintiffs.

3. The plaintiffs deny that such loss to the defendant of his said special deposit "occurred through such gross and palpable negligence on the part of the plaintiffs, so to make them liable, as bailees, to the defendant, for the full value to him of said pledge;" nor in such other manner whatsoever as to enable the defendant, in law, to recoup, by way of counter-claim, the said sum due to the plaintiffs, or any part thereof. On the contrary, the plaintiffs allege that the special deposit made by the defendant was kept and secured with diligence in the safe and well constructed vault of the plaintiffs, in the same manner, and with the same diligence as the money and valuable papers of the plaintiffs were kept and secured, and, further than this, the plaintiffs are not liable in law.

To the second cause of counter-claim:

1. That they admit the deposit in the vault of their banking house of five thousand dollars, Bank of State old bills, at a valuation of about sixty cents to the dollar, the same being a special deposit, in a separate package, put up by the defendant himself, and marked in his name, which deposit was made to secure to the plaintiffs (in the absence of personal security,) the payment of the sealed note for three thousand dollars, enumerated as the second cause of action in their complaint.

2. They allege that the package of bills so lost, specially deposited, was taken by force and violence, in the night time, by robbers, from the well secured vault of the equally well secured banking house of the plaintiffs, in the city of Columbia, where it was deposited by the defendant himself, as a security for the payment of the sealed

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note, lost as aforesaid; and the package of bank bills, so specially deposited by defendant, by reason thereof, have not been available to the defendant, (without fraud or default on the part of the plaintiffs,) to discharge the debt by the said last mentioned sealed note due by the defendant to the plaintiffs.

3. The plaintiffs deny that such loss to the defendant of his last mentioned special deposit "occurred through such gross and pal-

pable negligence, on the part of the plaintiffs, as to make them liable, as bailees, to the defendant, for the full value to him of the said pledge," nor in such other manner whatsoever as to enable the defendant, in law, to recoup, by way of counter claim, the said sum, in the last mentioned sealed note due to the plaintiffs, or any part thereof. On the contrary, the plaintiffs allege that the special deposit last mentioned, made by defendant, was kept and secured with diligence, in the safe and well constructed vault of the plaintiffs, in the same manner, and with the same diligence as the money and valuable papers of the plaintiffs were kept and secured; and, further than this, the plaintiffs are not liable in law.

Wherefore, the plaintiffs, denying the right of the defendant to recoup the claim of the plaintiffs, by way of counter claim, and to ask judgment for the excess of such counter claim, in the sum of two thousand five hundred and two 40-100 dollars, with interest thereon, pray judgment as heretofore prayed in their complaint.

At the trial, after the evidence had been heard, and the cause argued before the jury by the counsel for the respective parties, the counsel for the defendant requested His Honor to charge the jury as follows:

"That the plaintiffs cannot be said to have exercised ordinary care, unless it be found that they have availed themselves of all the means for securing their deposits that art and mechanical skill could afford; and it is a proper inquiry for the jury to say whether proper efforts were made by the plaintiffs to ascertain and procure those mechanical improvements of the age which, without extraordinary diligence, could have been secured."

His Honor declined to charge this instruction as presented; as to the first portion, holding, that "the Court could not prescribe any absolute rule or measure of diligence; and that it was a question exclusively for the jury to find whether, in the language of the instruction, 'proper efforts were made by the plaintiffs to ascertain those mechanical improvements of the age which, without extraordinary diligence, could have been se-

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cured;' in other words, 'whether *ordinary care devolved it upon the plaintiffs, bankers in Columbia, to employ all the means of security known to art, and applicable to their business, was exclusively a question of fact for the jury.'

To which the defendant excepted.

The jury found for the plaintiffs the full amount of their claim, and the defendant appealed to this Court from the above judgment of the Circuit Court, upon the following grounds:

1. Because His Honor erred in declining to charge the jury as requested in the instruction asked for by the defendant.

2. Because His Honor erred in ruling that the question "whether ordinary care devolved it upon the plaintiffs, bankers in Columbia, to employ all the means of security known to art, and applicable to their business, was exclusively a question of fact for the jury."

Chamberlain, Seabrook & Dunbar, for appellant, admitted that the question in the case was one of ordinary negligence, and that this was a question of fact to be determined by the jury, under instructions as to what in law constitutes ordinary negligence. They then said:

The question here is solely in regard to the law which should have been given to the jury as their guide in reaching a verdict.

The appellant asked the Court below to charge the jury, in effect, that one of the rules applicable to this question was whether the respondents, in the care taken of the collaterals, had availed themselves of the mechanical improvements of the age, which were in ordinary use, and could have been secured without extraordinary diligence.

The Court refused to give this rule to the jury, holding, instead, that the question whether ordinary care required the respondents to keep up with the mechanical improvements of the age was a question of fact for the jury.

Our claim is that it is a pure and simple question of law—a rule to be taken and used by the jury in determining the final verdict of negligence or no negligence.

Our two positions, therefore, are:

1st. That the law does require of a person who is bound to use ordinary diligence in discharging a duty, that he should avail himself of the ordinary modes and appliances for discharging that duty which modern science and mechanical art have placed in common use.

2d. That this is a matter of law, which should have been given to the jury by the Court.

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*It is readily admitted that no absolute and unvarying standard of ordinary diligence can be laid down, but the general principles which are to be applied to all such questions are clear and well established.

Ordinary diligence has been the subject of definition by all the authorities, and has received definitions varying, from time to time, in some particulars, but agreeing in essential elements.—Story on Bail, § 2, 12; 2 Kent Com., 561.

It is important to attend to this consideration, not only to deduce the implied obligations of the bailee in a given case, but also to possess ourselves of the true measure by which to fix the application of the general rule.

In a recent case in the Supreme Court of Pennsylvania, (the Erie Bank v. Smith, Ran-

dolph & Co.) reported in the Legal Gazette, of January 20, 1871, we find a definition of ordinary diligence, as given by Judge Sharswood, in a case precisely similar in principle and in facts to our present case. Suit in that case was brought to recover the amount of a loan made upon collateral securities. The defendant set up as a counter-claim the value of the securities deposited with the plaintiff. Those securities had been lost by the plaintiffs by the robbery of their bank. Judge Sharswood, in charging the jury, uses the following language, laying down the rule that only ordinary diligence can be required in cases of the deposit of collateral securities for the payment of a debt or for money borrowed:

"What, then, is ordinary diligence? It has been defined, and, I think, well defined, by Judge Story, to be 'that degree of care which men of common prudence generally use in their own affairs in the age and the country in which they live?'" These last words are quite material and important in this case: "In the country and in the age in which they live." Thus, what might be ordinary diligence in one country and in one age, may, at another time, and in another country, be negligence, even gross negligence. As, for instance, to give a homely illustration, in many parts of the interior of the country where thefts are rare, it is quite usual for people to leave their barns, where horses and cattle are kept, without being locked at night; and, indeed, it is not an uncommon thing for the dwelling house, in which the owner and his family and his treasure all are, to be left unlocked all night. In cities it would be deemed a great want of ordinary care to do that, although nothing might be easier than to pick the lock of a stable, or to wrench a padlock off a staple door or a barn door.

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* * * It is undoubtedly true *that in the case of a pledge of this character it is not enough to say that the pawnee took the same care of the thing pledged as he did of his own goods; nor is it any answer to the demand of the pawnor or debtor to show that his own property, to an equal or greater amount, was lost at the same time, and by the same alleged negligence. He must go further than that, and satisfy the jury that there was ordinary diligence in keeping his own property. If it appears that he was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others entrusted to him. * * * You must not misunderstand me in regard to this: I say that absence of any evidence of want of care, or loss of the bailee's goods by the same occurrence, gives rise to the presumption of ordinary care; but where there is direct evidence of the manner in which the goods were kept, it is not then a case to be determined by presumptions, which are intended only to supply

want of evidence. The jury have to decide upon the evidence whether the manner in which the property was kept did or did not evince ordinary care, without regard to whether the bailee's own goods were kept in the same manner or not. The loss of their own goods by the same theft is certainly evidence of good faith; but, in the case of a pawn, it is not enough to show that the pawnee exercised good faith. And, notwithstanding the utmost and most entire evidence of good faith, if the bailee has not used ordinary care and diligence he is liable."

These authorities are sufficient to establish the general proposition that the direct rule of law, in cases of bailment known as pledge, is that ordinary diligence is to be determined by reference to the circumstances in each case. The bailee is required to use all the precautions of safety applicable to the country, age and time in which he lives.

This general proposition abundantly covers the charge which the Court below was asked to make in this case, namely: that it was a rule of law that the plaintiffs were bound to avail themselves of all the means for securing their deposits that art and mechanical skill could afford, and that the jury were to inquire, in making up their verdict, whether proper efforts were made by the plaintiffs to ascertain and procure the mechanical improvements of the age, which, without extraordinary diligence, could have been secured.

This is plainly no more than is embraced in the general doctrine which all the authorities sustain, that ordinary diligence is to be

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*determined by the circumstances of the country, age and time in which the occurrence takes place.

Indeed, it would seem, as a matter of reason, that there was no point to which a bailee's care should more properly or naturally be directed than to the improved modes of protecting moneys and valuables such as are ordinarily in the keeping of banking institutions.

Everybody knows that appliances, such as safes, locks, vault-doors, window-fastenings, &c., which a few years ago were even regarded as ample and as complete evidence of ordinary diligence, would not now be regarded for a moment as affording any reasonable protection. Everybody is aware that great improvements are constantly taking place in the mechanical improvements and appliances for the protection of the community against robbery. The charge which was asked for, in the Court below, was simply an affirmation of the common doctrine that ordinary diligence must be measured to-day by a different standard from that which would have prevailed yesterday, or last year, or ten or twenty years ago.

It was not asked that all possible improve-

ments, which might have protected this bank, should have been obtained, but simply the usual, approved and common means which art and mechanical skill could afford, or, in the exact language of the charge, requested "the mechanical improvements of the age, which, without extraordinary diligence, could have been secured."

Our claim is, that all this is not a new doctrine, but is embraced in every approved definition of ordinary diligence, and that "the circumstances of the case" include, necessarily, a reference to the existing state of the improvements which art and mechanical skill have placed in common use.

They cited *Shear. & Red. on Neg.*, 5, 6; *Vaughn v. The Tuff Vale Railway Co.*, 5 H. & N., 678; *Blyth v. Birmingham Waterworks Co.*; *Cleveland v. Spier*, 16 C. B., (N. S.) 399; *Rood v. The N. Y. and Erie R. R. Co.*, 18 Barb., 80; *Yeiser v. The Philad. R. R. Co.*, 8 Penn., 336.

The Court will observe that this case is one, in its external circumstances, of rare occurrence. We have been unable to find more than a single case, and that of very recent date, where the circumstances and points of the case were precisely similar to the present case, although we see no difficulty in ascertaining, from numerous other cases, the general principles which should

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govern this. Fortunately, we can refer the Court to one case of precisely similar character to the present—the case to which we have already made reference upon another point—of the *Erie Bank v. Smith, Randolph & Co.*, in the Supreme Court of Pennsylvania, January, 1871. Upon the trial of this case the Court (Judge Sharswood presiding) were asked to charge the jury upon the law, as follows: "The plaintiff was bound, in the care of these securities, to avail herself of such discoveries in science, and such late mechanical and other improvements as, if used, might, in all probability, have avoided the robbery, provided these were such, as, under the circumstances, it was reasonable to require them to adopt, and could be procured without great trouble and at a moderate cost, were in known practical use in the country, approved by experienced bankers and other custodians of bonds, cash," etc.

Judge Sharswood says: "I decline to answer this point as requested, but I do answer it in this way: That, in considering whether the bank used ordinary care, the jury may and ought, in order to arrive at a standard of ordinary diligence at that time, to take into consideration all such precautions as were generally used at the time. This, of course, takes into view the state of mechanical science, and the application of that science to this point; but the bank was not bound to the highest degree of diligence, and the plaintiffs are not liable for the loss, though they might have employed some mechanical

or other improvements which might, in all probability, have avoided the robbery."

The Court will observe that the charge asked for in the present case avoided the objection which Judge Sharswood makes to the charge asked for in the *Pennsylvania* case. In the present instance our only request was that the jury should be told that the plaintiff was bound "to ascertain and procure those mechanical improvements of the age which, without extraordinary diligence, could have been secured." It was not asked, as in the *Pennsylvania* case, that any and all mechanical improvements which might probably have prevented robbery should be employed, but only such mechanical improvements of the age as could have been ascertained and procured in the exercise of ordinary diligence. The doctrine, as stated by Judge Sharswood, is, therefore, an expression of the precise rule of law which the Court below were asked to give to the jury in the present case.

Second. It will be observed that His Honor, in the Court below, after declining to charge the jury, as requested, proceeded to declare

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*that the question, "whether ordinary care devolved it upon the plaintiffs, bankers in Columbia, to employ all the means of security known to art and applicable to their business," was exclusively a question of fact for the jury.

Our second ground of appeal is, therefore, that the Court below erred in holding that such a question was exclusively a question of fact. The true instruction would have been that, whether ordinary care devolved it upon the plaintiffs to ascertain and procure the mechanical implements of the age, which, by ordinary diligence, they could have secured, was purely a question of law; and that the other question, whether, in fact, the plaintiffs did conform to this requirement of law, was exclusively a question of fact for the jury.

This is but a statement of an universal rule. Rules of law, legal principles and definitions are always to be given by the Court to the jury; and, under the instruction so given, the jury are, upon the evidence, to find their verdict. But, in the present instance, the Court held that what constitutes ordinary diligence, or whether ordinary diligence required the use of the mechanical improvements of the age, was a question exclusively of fact for the jury.

Negligence, like any other conclusion in a particular case, is one of mingled law and fact—that is, the question whether one has been negligent or not, is to be determined, first, by ascertaining the legal definition of negligence, and, second, by determining whether, according to this legal definition, upon the evidence presented, he has been guilty of negligence.

The former part is the province of the Court; the latter of the jury.

In *Shear. & Red. on Neg.*, 11, it is said: "The question, whether a party has been negligent in a particular case, is one of mingled law and fact. It includes two questions: 1, Whether a particular act has been performed or omitted; and, 2, Whether the performance or omission of this act was a breach of legal duty. The first of these is a pure question of fact, the second a pure question of law. The law imposes duties upon men according to the circumstances in which they are called to act, and, though the law defines the duty, the question whether the circumstances exist which impose that duty upon a particular person is one of fact."

In *Purvis v. Coleman*, 1 Boswell, 321, it is said: "The jury must ascertain the facts, and the Judge must instruct them as to the rule of law which they are to apply to the facts as they shall find them."

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"When the direct fact in issue is established by undisputed evidence, and such fact is decisive of the cause, a question of law is raised, and the Court should decide it. The jury have no duty to perform. The issue of negligence comes within this rule."—*Dascom v. Buffalo and State Line Railroad Company*, 27 Barb., 221; *Foot v. Wiswall*, 11 Johns. R., 304.

Pope & Haskell, for appellees, submit the following points and authorities:

1. It is admitted in the argument on both sides that the plaintiffs in the cause are chargeable only as bailees of a pawn under the defense set up by defendant in his answer.

2. That the deposit was a "pledge" for the "mutual benefit and interest of the parties," and has been defined to be "a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged," and is called, in Latin "*vadium*," and is known in the Roman law as "*pignus*," and in English as a "pawn" or "pledge."

3. That in such cases the rule of law requires "that the pawnee should use ordinary diligence in the care of the pawn, and, consequently, he is liable for ordinary negligence in keeping the pawn."

4. That "ordinary diligence" has been defined to be "that common care, in the sense of the law, which men of ordinary prudence generally exercise about their own affairs, in the age and country in which they live."

5. That the "standard of diligence is necessarily variable, with respect to the facts, although it be uniform with respect to the principle."

6. That it follows, "in every community," the degree of negligence "must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions peculiar to the age."

7. That the "difficulty" is not in the law, "but is intrinsic in the nature of the subject, which admits of an approximation only to certainty. Indeed, what is common or ordinary diligence is more a matter of fact than of law."

8. That in view of these principles and the authorities, the Court was accurately and precisely right in holding that it could not prescribe any absolute "rule or measure of diligence," but that it was a question for the jury upon the evidence to say whether proper efforts had been made by the plaintiffs, as bankers in Columbia, to ascertain the improvements of the age, and whether all the means of security known to art, and applica-

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ble to their business, were re*quired of Scott, Williams & Co., to establish a case of ordinary care.

9. That the bailees, having established the loss of the bailment by the robbery of their bank, the onus probandi was devolved upon the bailor to establish his charge of gross negligence; but waiving this right, the bailees, at the trial, assumed the burthen of proving due diligence, which evidence was submitted to the jury, under the charge of the Judge, has not been excepted to, and the finding must be conclusive.

In support of those positions, the counsel for the appellees rely upon the following authorities: *Story on Bail*, §§ 11, 12, 13, 14, 15, 17; *Jones on Bail*, 8 and 9; *Note, Story, Bail*, on p. 16 of the 7th Ed., 1863, §§ 332 to 338, inclusive, and foot note to § 334; *Coggs v. Bernard*, 6th Am. Ed., 1 Smith's L. C., 346; *Parsons on Contracts*, last Ed., 1 Vol., pp. 591, 592; *Note U. p. 592*; 2 Kent's Com., Lecture 40, on Bailments; *Doorman v. Jenkins*, 2 Adolph & Ellis, 256; *Vaughan v. Minlaw*, 3 Bingham, N. C., 468, 475.

Aug. 9, 1871. The opinion of the Court was delivered by

MOSES, C. J. It is admitted in the argument that the plaintiffs in the case are chargeable on the hypothecation of the securities of the defendant, only as bailees of a pledge or pawn, and in this species of bailment, all that can be required of the bailee is ordinary care and diligence. This follows from the mutual advantage which the parties derive from the transaction. Unlike a *mandatum*, where the benefit is exclusively for the bailor, and a *commodatum*, where the loan is only for that of the borrower, a pledge is made on a consideration which promises gain to the bailor and bailee. The one obtains the use of the money borrowed, while the other procures a security for that which he has loaned. Hence, in regard to the mutual advantage incident to this bailment, the bailee, in the preservation of the article pledged, is only liable for ordinary negligence, because nothing is required of him beyond ordinary diligence.

That the condition of the bailment in question demanded ordinary care was a principle of law, but what amounts to ordinary or common diligence, as Mr. Justice Story, in the 11th Section of his work on Bailments, says, "is more a matter of fact than of law." Diligence is a term of relative significance. As referred to the charge of a bag of corn, and valuable jewel, the care which is exacted in the two cases is of a widely different character. It is not only difficult, but almost im-

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possible to prescribe a precise and *inflexible direction, which, with any sort of propriety, could uniformly apply to the varied and changing forms in which the question may be presented. Eminent writers have endeavored to define what is meant by "ordinary diligence" in connection with this character of bailment; and yet some of the most learned among them have at the same time not refrained from remarking on the difficulty of laying down a fixed and determinate rule.

Mr. Justice Story, in the same Section of his work to which we have referred, says: "But the difficulty is intrinsic, in the nature of the subject, which admits of an approximation only to a certainty. Indeed, what is common or ordinary diligence is more a matter of fact than of law. And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions peculiar to the age. So that although it may not be possible to lay down any very exact rule applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live."

Chancellor Kent, in the 2d Vol. of his Commentaries, p. 561, says: "Diligence is a relative term, and it is evident that what would amount to the requisite diligence at one time, in one situation, and under one set of circumstances, might not amount to it in another." This care and diligence of prudent men in the management of their own affairs to which the bailee is bound, is to be measured in its exercise, under the like circumstances, and in the same situation in which he at the time is placed. The locality, too, is to be considered, for what such men do in the matter, in the country and age in which they live, is to be accepted as the result of experience in furnishing such safeguards and securities as would be most likely, having their own interest in view, to protect their property against the dangers of fire, theft and robbery. We commend the language of Mr. Justice Sharswood, in the case of the National Bank of Erie v. Smith, Randolph & Co., (Penn., January, 1871.) which has been frequently referred to in the argument of the counsel for the appellant. He says, "What, then, is usu-

ally done in a place in respect to things of a like nature (which must be considered as done in reference to the surrounding circumstances, in reference to the danger which threatens, in reference to the liability of loss,) what is generally done in a place in respect to things of a like nature, whether more or less, in point of diligence, than is

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exacted in another *place, becomes, in fact, the general measure of diligence in that place, and constitutes the standard." All the duties and obligations which the law imposes on a bailee of a pledge, we think, are here comprised in plain and perspicuous language. The ordinary diligence which attaches to the trust which such a relation creates, is not tested by the course and conduct of one or more individuals, but the standard is established from a general experience of human action under like circumstances, in the same age and country. As Mr. Justice Story says, in the 12th Section of his work already quoted, "It will thence follow that, in different times and in different countries, the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle. So that, it may happen that the same acts which, in one country or in one age, may be deemed negligent acts, may, at another time and in a different country, be justly deemed an exercise of ordinary diligence."

The exception first made in the case before us is, that the Circuit Judge refused to charge the jury "that the plaintiffs cannot be said to have exercised ordinary care, unless it be found that they have availed themselves of all the means for securing their deposits that art and mechanical skill could afford: and it is a proper enquiry for the jury to say whether proper efforts were made by the plaintiffs to ascertain and procure those mechanical improvements of the age, which, without extraordinary diligence, could have been secured."

If the law requires the bailee of a pledge to provide himself with all the mechanical improvements of the age to protect him from the consequences of a loss of the property by theft, then, instead of being bound to ordinary care, he would be held to extraordinary diligence, which is only required in a bailment for the sole benefit of the bailee. The proposition of law involved in the charge so asked for was sought to be modified by submitting an enquiry to the jury, whether proper efforts were made by the plaintiffs to ascertain and procure those improvements which, without extraordinary diligence, could have been secured. This was only complicating them with another enquiry which could not affect the material issue upon which they were to pass.

Where one holds himself out to the community as a banker the public is to assume that he has the means of protecting the prop-

erty confided to his care by the nature of his business, and that he is furnished with all that is necessary to enable him to use ordi-

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nary *diligence in the charge which he has invited. The appliances necessary to the diligence must have a relative reference to the community in which he lives. The safety of the article confided to him might possibly be better secured by watchfulness and vigilance than by bars and bolts. It is a common practice in large cities for banking houses to employ a watchman, and yet it would scarcely be contended that these plaintiffs were guilty in such omission, if not a single bank in the place in which they lived thought it necessary to avail itself of such a security. The proposition contended for by the appellant in this exception would make no difference in the application of the rule to a banking house in London or New York, both populous cities, where it is to be supposed that crime of every species prevails, and a small and quiet city like Columbia, where a burglary or stealing at night from a house rarely occurs. The "circumstances surrounding each particular case" must be considered. Prudence would demand a greater degree of care on the part of a bailee at Columbia than in Oconee, a small and quiet village, where, much to its credit, crime is seldom committed; while a still greater degree of diligence would be looked for from one in Charleston than in Columbia, because of the varied and changing character of the population of the metropolis, and of the more extensive field which it presents for the perpetration of crime. If ordinary negligence is to be inferred from the absence of the appliances which the mechanical skill of the age has invented, without regard to the place, there would be no discrimination between a loss by a bailee through theft in an extensive city or a secluded village. Can common reason or common sense justify a requirement in the law that would demand of a banker in Columbia the employment of the same security against theft, both in regard to the building and the vault, that would be demanded of one in New York or Charleston? The bailees here, as was said by Mr. Justice Sharswood in the case referred to, "were not bound to the highest degree of diligence, and the plaintiffs are not liable for the loss, though they might have employed some mechanical or other improvements which might in all probability have avoided the robbery." The instruction asked in the case before us is said to be, in effect, identical with the language of Judge Sharswood, because here it was said to be limited "to the mechanical improvements of the age, which, without extraordinary diligence, the plaintiffs could have secured." If the proposition is to be applied independent of the locality, and the caution which springs from a consciousness of danger by reason of the

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pro*ability of crime from the character of

the community, what rule would the jury prescribe for itself in determining to what extent such improvements could have been procured without extraordinary diligence?

There is no doubt that ordinary diligence must be measured, at this day, by a different standard from that which would have been applied twenty years ago, but looking to the period and the place, the jury are to determine if it was properly exercised under the surrounding circumstances.

Good faith is not involved in the consideration. An honest man may be careless and indifferent with his own, but his want of care of the property of others entrusted to him for safe keeping on a consideration, is not to be excused by proof of good intention. The answer to the question, "Did the bailee, under the circumstances, do all that could be expected of a reasonable and prudent man?" should be accepted as a determination of the issue.

In *Vaughan v. The Taffe R. R. Co.*, 5 Hurls. & Nor., 678, Willes, J., said: "The definition of negligence is the absence of care, according to the circumstances." *Sherman & Redfield* say, in their work on Negligence, at page 5: "Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do under the circumstances surrounding each particular case."

The ground of exception secondly made is, that the Circuit Court declining the instruction first asked, held "that the Court could not prescribe any absolute rule or measure of diligence, and that it was a question exclusively for the jury to find whether, in the language of the instruction, proper efforts were made by the plaintiffs to ascertain those mechanical improvements of the age, which, without extraordinary diligence, could have been secured; in other words, whether ordinary care devolved it upon the plaintiffs, bankers in Columbia, to employ all the means of security known to art and applicable to their business, was exclusively a question of fact for the jury."

This, we hold, was error, because it submitted to the jury a question of legal determination—whether ordinary care devolved it on the plaintiffs to employ all such securities was not exclusively a question of fact for the jury. If the plaintiffs were bound to the rule implied by the language, then they are chargeable with extraordinary diligence, for this would exact, on the part of the bailee, that care which very prudent persons take

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of their concerns, and *such persons, it is to be supposed, would provide themselves with all the means of security known to art and applicable to their business. The bailees here were only liable for the want of ordinary care, and yet it was left to the jury to decide, whether a requisition which could only apply where extraordinary care is de-

manded should be claimed from a bailee who was only bound to ordinary diligence. It made the jury the judges of the law.

Negligence is a mixed question of law and fact. In the case before the Court, the law required that the plaintiffs should exercise that diligence in the care of the collaterals, which prudent men, under the same circumstances, ordinarily exercise about their own affairs, in the age and country in which they live, and the jury was to determine, on all the evidence before them, whether they had so done.

It is ordered and adjudged that the motion be granted and a new trial ordered.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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THE STATE ex rel. THEODORE D. WAGNER, Appellant, v. JOHN R. STOLL, County Treasurer, Respondent.

(Columbia. April Term, 1871.)

By an Act passed in 1812, a bank was established "in the name, and for the benefit," of the State. The Act pledged the faith of the State for the support of the bank, and its sixteenth Section provided "that the bills or notes of the said corporation * * * shall be receivable at the Treasury of this State, * * * and by all Tax Collectors and other public officers, in payment for taxes and other moneys due the State." In 1843, a general Act in reference to the duties of officers in the collection of supplies was passed, which provided "that all taxes for the use and service of the State shall be paid in specie, paper medium, or the notes of the specie paying banks of the State." The bank being no longer a specie paying bank, certain of its bills, issued in the years 1861 and 1862 were tendered by the relator in payment of his taxes, to the County Treasurer, who refused to receive the same. On application for a mandamus: *Held*,

[Constitutional Law ⇨121.]

That, although Section 16 of the Act of 1812 created a contract between the State and the bill holders of the bank, which the former could not constitutionally impair, yet that this protection extended only to such bills or notes of the bank as were issued during the period that the sixteenth Section of the Act remained of force.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 310; Dec. Dig. ⇨121.]

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[Taxation ⇨527.]

*That it was competent for the Legislature of the State to repeal the sixteenth Section of the Act, and by such repeal to relieve the State from the burthen of the contract in reference to the bills or notes of the bank to be thereafter issued.

[Ed. Note.—Cited in *Trenholm v. Gaillard*, 12 S. C. 72.

For other cases, see Taxation, Cent. Dig. §§ 970-978; Dec. Dig. ⇨527.]

[Taxation ⇨527.]

That the Act of 1843 repealed, by necessary implication, so much of the sixteenth Section of

the Act of 1812 as made the bills or notes of the bank receivable in payment of taxes. (a.)

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 974; Dec. Dig. ⇨527.]

[Statutes ⇨158.]

Though repeals by implication are not favored by the Courts, yet effect will be given to an intention to abrogate existing legal provisions where such intention, though not expressed in direct and positive terms, is apparent by a fair and necessary implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. ⇨158.]

[This case is also cited in *State ex rel. Robb v. Gurney*, 2 S. C. 560, as to facts, and in *Johnson v. Southern Ry.*, 69 S. C. 326, 48 S. E. 260, as to repeals by implication.]

Before Carpenter, J., at Charleston, July, 1870.

This was an application to the Circuit Court for a writ of mandamus, to compel John R. Stoll, County Treasurer of Charleston County, to receive certain bills of the Bank of the State of South Carolina, issued in the years 1861 and 1862, in payment of taxes due by the relator to the State.

The case, as made by the pleadings, was briefly this:

On December 19, 1812, the Legislature of the State passed an Act entitled "An Act to establish a bank on behalf of, and for the benefit of, the State." It provided that a bank should be established "in the name and on behalf of the State of South Carolina, in the manner and on the conditions" therein set forth, to continue until the 1st day of May, 1835, and it pledged "the faith of the State for the support of the said bank, and to supply any deficiency in the funds specifically pledged, and to make good all losses arising from such deficiency." By section 16, it was declared "that the bills or notes of the said corporation, originally made pay-

(a.) There is a question which might have been, but was not, made in this case, and which may not be unworthy of serious consideration. It is this: Assuming that the Act of 1843 repealed the sixteenth Section of the Act of 1812, then what effect, if any, had the Act of 1852 in restoring that Section to the charter of the bank? The Act of 1852 continued the charter generally, without any exception of the sixteenth Section, or reference to the Act of 1843—which, it should be borne in mind, was a general law, and no part of the bank charter. What, then, was the charter thus continued? or (changing the expression) what was the Act thus re-enacted? Was it the charter—the Act—of 1812, with all its provisions? or was it that charter, or Act, as affected or modified by the Act of 1843? That is the question; and, if it is one of actual intent, then did not honesty and fair dealing require of the Legislature, if it intended that the sixteenth Section should be regarded as expunged from the charter, to say so in express terms, so that the bill holder might not be misled as to his rights? If, however, it is a question of construction, apart from the actual intent, as it probably is, then would it not be just as reasonable—even more so—to hold that the effect of the Act of 1852 was to restore the Section to the charter as it was to hold that the Act of 1843 expunged or repealed it? R.

able, or which shall have become payable, on demand in gold or silver coin, shall be receivable at the Treasury of this *State, either at Charleston or Columbia, and by all tax collectors, and other public officers, in payment for taxes, and other moneys due the state."—8 Stat., 24.

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On December, 1833, an Act to recharter the bank was passed, which enacted that an Act entitled "An Act to establish a bank on behalf of, and for the benefit of, the State," passed December 19, 1812, "and all other Acts now of force relating to the conduct and operations of the said bank, be, and they are hereby, re-enacted and continued of force until" the 1st day of May, 1856.—8 Stat., 67.

On December 19, 1843, a general Act, "prescribing the duties of certain officers in the collection of supplies" was passed, which enacted "that all taxes for the use and service of the State shall be paid in specie, paper medium or the notes of the specie-paying banks of the State."—11 Stat., 246.

On December 16, 1852, by an Act entitled "An Act to extend the charter of the Bank of the State of South Carolina," it was provided "that, from and after the expiration of the present charter of the 'said bank,' the same be, and is hereby, extended, until the" 1st day of January, 1871.—12 Stat., 1849.

The tax Acts annually passed by the Legislature often contained directions in reference to the kind of funds in which the taxes of the year should be paid, but the Acts above referred to were all that bore upon the question before the Court.

The relator tendered to the defendant in payment of his taxes, amounting to \$4,264.95, bills of the Bank of the State of South Carolina, issued in the years 1861 and 1862. At that time, and for several years before, the bank had ceased to be a specie-paying bank. The defendant refused to receive the bills, and thereupon this suggestion for a mandamus was filed.

A rule was issued, returnable July 15, 1870, which, on hearing the return thereto and argument of counsel, was dismissed by the Circuit Judge.

The relator appealed to the Supreme Court.

Magrath & Lowndes, for appellant:

Four questions are presented in these cases:

1. Are the bills tendered bills of the bank, within the meaning, intent and letter of the 16th Sec., Act of 1812?

2. If they are such bills, does the Act of 1843 repeal the 16th Sec. of the Act of 1812?

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*3. If the 16th Sec. of the Act of 1812 is not repealed by the Act of 1843, is the receipt of such bills in violation of, and, therefore, prohibited by, the 14th Amendment to the Constitution of the United States?

4. Is such receipt in conflict with the Constitution of the State?

The first objection requires an examination of the Section referred to, and of the bills which have been tendered. If they are not such as are referred to in that Section, the tender is bad.

The Act of 1812 is the charter of the bank. The 16th Sec. requires that "the bills or notes of the said corporation originally made payable, or which shall become payable on demand, in gold or silver coin," (8 Stat., 24.) shall be received by all tax collectors in all payments for taxes.

In 1857, tax collectors were again directed "to receive taxes and dues to the State only in notes of the Bank of the State, or of specie paying banks, or in coin."—12 Stat., 596.

In 1865, and then in 1866, it was provided that the "taxes shall be paid only in gold or silver coin, United States Treasury notes, or notes declared to be a legal tender by the Government of the United States, or notes of national banks or bills receivable of the State; also pay certificates of jurors and constables for attendance on the Courts."—13 Stat., 395.

In 1868, the 16th Section was repealed. [A. A., 1868, p. 22.]

The case of the Graniteville Co. v. Roper, 15 Rich., 138, presented this question to the Court of Errors of this State, and that Court therein made its decision.

The case of Furman v. Nichol presented the same question to the Supreme Court, and that Court therein made its decision, and in that decision declared the law otherwise than as laid down in this case.—8 Wall., 44.

This case, therefore, is not presented lightly to the notice of the Court; for in the decision of the Supreme Court of the United States, ultimate and final jurisdiction of the contract and of its violation, as alleged, is assumed. "This Court," said the Supreme Court of the United States, "decides for itself, whether the construction which the Court below gave to these different statutes was correct or incorrect." The statutes referred to are those "which are claimed as proving the making of the contract, and its violation." "To do otherwise would be to surrender to the State Courts an important trust confided to this Court by the Constitution."

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*The ground taken in the return is that taken by the Court of Errors. And it plainly assumes that there must be not only a legal obligation to that effect, but also a present and immediate convertibility of these notes into coin, to make them a tender in payment of taxes.

That such a construction of this Section is erroneous, will appear by a reference to the decision of the Supreme Court as to the proper construction of this guarantee; by a reference to the circumstances under which the bills of this bank have been always received for taxes; and by the legislation of this State

which estops it from such construction.—*Furman v. Nichol*.

(1.) The construction given by the Supreme Court of the United States will be seen at pp. 59, 60, of 8 Wallace. It is that such a provision in the Section creates a contract with the holder which binds the State; which has for its object the creation of a wide confidence; inducing extended circulation of the bills of the bank, in which the State, through the bank, receives profit.

The construction by the State Court (of Errors), although it (15 Rich., 138.) admits that there is a contract, denies that it creates a guarantee; and adds nothing to any increase of public confidence, because it does not protect the holder in case of any financial embarrassment in the bank. The circumstance, therefore, which the Supreme Court of the United States, (8 Wall., 44.) said was the occasion for the guarantee, and the circumstance which it was intended to prevent—in times of financial embarrassment of the bank, causing a diminution of confidence in the bank and depreciation of its bills—are the very things which, in the judgment of the Court of Errors, makes the contract inoperative.

Of course it will be too apparent that if the contract, admitted to be such, be correctly interpreted by the Court of Errors, it does not deserve to be called a contract: for it would amount to little more than promoting, in the slightest degree, the mere convenience of the holder.

2. But what makes the objection so remarkable, is, that at two distinct periods in the history of the bank, the State recognized the obligation which it now denies.

In 1812, when the State chartered this bank, its capital consisted only of stocks, "without a dollar of specie." At this time all the banks in the Union were suspended, and the credit of the bank rested on the faith of the State to support it. Its notes or bills went into circulation when the bank was born in a state of suspension.—*State v. Bk. So. Ca.*, 1 Spears, 484.

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*In 1857, when all the banks were in a state of suspension, the State again expressly recognized its obligation. (12 Stat., 596.) It is not necessary here to reply to the argument pressed in the Court of Errors that this Act of 1857 expired because not re-enacted. It has been from that day until 1865 unrepealed.

3. We pass now to the Legislature, which we say estops the State from such objection as it now makes. In 1857, in legislating upon the subject of banks, the Legislature defined what it meant by a bank bill. And although, for the purposes of the Act, this definition was given, and is not altogether accurate, it may be introduced here: "'Bank note' shall include all bills, notes, checks, or other obligations of any bank, made payable to bearer,

on demand, or in any form whatever, written, printed, or engraved, so as to be circulated and used as paper currency or money; and 'bank of issue' to include every bank having lawful authority to issue its own bank notes."—A. A. 1857, Sec. 6, 12 Stat., 632.

It will be observed that in this description or definition of a bank bill or note, nothing is said of gold or silver. A bank bill is in its nature an obligation to pay gold or silver. The Act of 1863, which allowed the bank to make a special issue, payable in Confederate money, was altogether special; and the distinct mode of redemption is of itself the evidence of the intended obligation.

For the general characteristics of a bank bill, refer to *Morse on Banks*, 394, 396; *Miller v. Race*, 1 Burr R., 456; *U. S. v. Bank of Georgia*, 10 Wheat. R., 347.

In *Suffolk Bank v. Lincoln*, 3 Mason, 1, Judge Story says: "It is the duty of every bank to pay its bills in specie on demand, if such demand is made at the bank within the usual banking hours." *The State v. Bank of South Carolina*, 1 Spears, 399, 433, 436.

So clear is the recognition of the legal obligation of a bill of a bank, that in this State it has been held that a suspension of specie payments is cause of forfeiture of charter.—*The State v. Bank of State of South Carolina*, 1 Spears, 399.

Now the bank bill of 1861, 1862, is in no wise different from the bank bill of 1850, or 1840. There is no qualification or condition annexed to the promise.

It is, then, a promise to pay in gold or silver. Such is its legal obligation while it is a bank.—*Thorington v. Smith*, 8 Wall., 12.

"It expresses nothing but the corporate engagement to pay a certain sum. Its payment on demand is not indispensable; it would be always implied."—*Morse*, 395.

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*But it will be said the suspension was notice that such bills were not "originally made payable," nor would they, on demand, "become payable in gold or silver."

The suspension was not, in fact, insolvency; not so professed by the bank; not so accepted by the State.

1. In 1857 the State expressly directed these bills to be received, (12 Stat., 596.)

2. The State did not vacate the charter; but, on the contrary, legalized the suspension and re-affirmed the charter. "A declaration by the Legislature that the corporation shall continue, or a subsequent Act of the Legislature, recognizing the existence of a corporation, is a waiver of the forfeiture."

State v. Bank of Charleston, 2 McM., p. 628; *People v. Manhattan Co.*, 9 Wendell, 351.

But, in cases of suspension, the State had in previous years laid down a rule for itself, and also for the banks. In the Act of 1840 it had condoned the offence, and for a stipulated money-penalty relieved the bank

from forfeiture of its charter, (11 Stat., 100.)

What charter was so preserved? What charter could it be but that of 1812? See the Act of 1843, (11 Stat., 250,) in which it is expressly declared that if a bank shall suspend, not having accepted the Act of 1840, (11 Stat., 100,) it shall vacate its charter. It is true that, by the Act of 1840, the State might, as it did, estop itself from all complaint; but although it could bring to bear upon the holder of the bills a very great moral pressure, it could not affect his right to enforce his bill according to its legal obligation.

But the State did much more than this.

In 1860 the State suspended, and, by other enactments, continued until the close of the war the suspension of various provisions in the Act of 1857 and 1858, the 2d Section of the Act of 1840, and the 5th Section of the Act of 1852.

And, finally, the Act of 17th December, 1863, 2d Section, declared that the indulgence in these suspensions should not be enjoyed by any bank which shall declare or pay dividends in gold or silver coin, or shall sell or dispose of its gold or silver coin, except to the State or the Confederate States.

Thus, by this sweeping enactment, did the State absolutely forbid the redemption of every obligation of the bank in gold or silver.

Thus, then, we have the indulgence of the State, for pecuniary considerations, given to these banks for their suspension; that sus-

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*pension afterwards allowed with a remission of the penalty; that followed by a forfeiture of charter, if they or any of them did sell or dispose of their gold or silver, except to itself; and then, because of these things done with its acquiescence, and ultimately with its command, it claims that, because of these, its obligation as a guarantor is discharged. In other words, we have this proposition presented: 1st. The guarantor, for an equivalent in money, consents to the principal postponing the recognition of a legal liability. 2d. The guarantor forces the principal to a postponement of the legal obligation of his contract, and then claims that, because of those acts of the principal, the obligation of the guarantor is discharged.

If, then, the present practical unconvertibility of the bills of this bank be an act to which the State has been, as a guarantor, assenting, it can no more take advantage of that, to discharge its obligation, than could the bank to deny its obligation to the holder. —Morse, 397.

The court will not fail to perceive that when the State consented to the continued exercise by this bank of its corporate powers, it, in that, sustained the credit of the bank. A refusal to pay in specie is not that proof of insolvency which prevents a subsequent bona fide holder of bills from a right set off. And surely no higher evidence could be given,

by the State, of the solvency of the bank than the continuance of it as the fiscal agent of the State, according to the terms and conditions of its charter. And, in addition to this, one of the objects of the guarantee was to prevent the holder of the bills from drawing coin from the bank, by making that bill receivable for taxes and debts due to the State. On these grounds, we submit that the first of the objections presented in the return cannot be sustained.

The second objection is that the 16th Section of the Act of 1812 is repealed by the Act of 1843.

Before that ground is considered it is proper for the Court to give proper weight to so much of the judgment of the Court of Errors as impeaches these bills because they are worthless, and, therefore, rejects them.

It is obvious, at a glance, that, in an objection on this ground, it is assumed that the State qualifies its guaranty, so far as the payment of taxes is concerned, by a condition that they shall not be worthless. The State first repudiates its guaranty—because of which the bills became worthless—and then justifies the repudiation because they are worthless.

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*It is submitted that, in a case where the language of the Section was the same as the 16th Section in this case, the Supreme Court of the United States has given that construction of the Section which overrules that of the Court of Errors, and that such construction is the law of this Court.—8 Wall, 59, 60, 61.

Has, then, the 16th Section been repealed by the Act of 1843?

It is conceded that, up to 1843, the 16th Section of the Act of 1812 was of force.

But, previous to the Act of 1843, there had been once, or oftener, suspension of specie payments; and, previous to 1843, in 1840, the State, as has been seen, legislated on the subject of suspension.

Previous, therefore, to 1843, the State had not considered the neglect or refusal to pay specie the abrogation of its obligation, and in 1840 had imposed a penalty in money, to be paid to itself in case of suspension.

Then comes the Act of 1843, which is said to be a repeal of the Section under consideration.

The Act of 1843 professes to direct Tax Collectors in what funds they shall receive taxes: "All taxes, &c., &c., shall be paid in specie, paper medium, or notes of specie paying banks of this State."—11 Stat., 246.

The argument, in *Furman v. Nichol*, to sustain the allegation in that case of a repeal of the Section in the charter of the Bank of the State of Tennessee is similar to that which in this State expressed the conclusions of the Court of Errors.

In that case, as in this, the Act relied on as the repealing Act directs in what kind of

funds the taxes should be collected. In both cases the omission of the bills of the bank is relied on in support of the exclusion of both.

But the Supreme Court declares that Courts do not favor repeals by implication, and "never sanctions them if the two acts can stand together."—*Furman v. Nichol*, 8 Wall., 44, p. 61; *Dwarris*, 530, 533; *Wood v. U. States*, 16 Peters' R., 342.

And the denial of the repeal, in *Furman v. Nichol*, is rested on these grounds: That there are no words of exclusion—only or other negative words are not used; that the code of that State requires that an Act should be expressly repealed; and that the guaranty was not expressly withdrawn until 1865. "Why, said the Court, withdraw it then, if it was withdrawn in 1858?"

In this case there are no words of negation

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—no special reference *to those bills; and a continuing receipt of these bills after the Act of 1843.

Not until 1865 did the Legislature, in the description of bills receivable for taxes, use the term "only;" nor until 1868 did it expressly repeal the Act of 1812, 16th section. Why then, if it was repealed in 1843?

After 1843, in 1857, when all the banks were in a state of suspension, the Legislature provided specially for the receipt of these bills.

Indeed, so fixed was the idea that the bills were a good tender for taxes, and so absent from all was the suspicion that the Act of 1843 had repealed the 16th Section of the charter of the bank, that in the session of the Legislature in 1865, the President of the bank brings to the notice of the Legislature that the bills of the bank are receivable for taxes, and suggests the necessity of some legislation in regard to the taxes "upon the ground of the public necessities."—*Reports of 1865*, p. 57.

Here, then, is the fact not questioned, that from 1812 to 1865 the bills of this bank have, without interruption, been received for taxes; and yet this Court is called on to declare that the obligation of the State was, in this respect, relieved in 1843; and that, although from that time the taxes were so paid, they were all the while paid without obligation of the State to receive them.

If to this is added the considered opinion of the Attorney General of the State, it would seem that nothing more need be said of the Act of 1843, for he admits the obligation of the State up to 1860.

One word more on the subject of the Act of 1843. We have referred to the Act of 1857. That Act was subsequent to 1843: that Act was not repealed until 1865. Does not that Act create an obligation on the State in relation to all bills issued by the bank, at least between the date of its enactment and of its repeal? If the Act of 1812, Section 16, was repealed, did not the Act of 1857 create a new obligation, which was of force until 1865?

What the State did intend when it wished not to extend the legal obligation of its guarantee, is seen when, in 1863, it allowed an issue redeemable in Confederate Treasury notes.

To that class of bills of the bank, usually denominated new bills, it is further objected that such new bills were issued in aid of the rebellion, and are therefore void. This objection is set forth in the return of *John R. Stoll*; and the Supreme Court, in its order

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*of the 14th December, 1870, declared that the circumstances under which the bills were issued (referring to the new bills, or those issued by the bank subsequent to December, 1860,) were issues of fact, which must be decided. Under the order of the Supreme Court the case was sent back to the Court of Common Pleas of the 1st Circuit, and the verdict of the Jury is certified back to this Court, establishing the fact that the bills which were tendered, in the case of *Wagner v. Stoll*, were the bills of the Bank of the State, and that such bills were not issued in aid of the rebellion, and in order to furnish means for resisting the arms of the United States in supporting said rebellion.

With this verdict it would seem, therefore, that the bills issued in 1861 and 1862, are entitled to stand, in all respects, upon an equal footing with the bills issued prior to December, 1860.

It is conceded that the Government of the United States might have declared that no contract, public or private, between December, 1860, and April, 1865, should have force and effect.

It has not so done—thanks that it has not. It has said such only, whether public or private, shall be void which were made to aid the rebellion.

The question, therefore, in all such cases, is partly of fact, partly of law. The proof of the circumstances under which the contract was made has been submitted to the jury, and the verdict certified to the Supreme Court has established the fact that these bills were not issued in aid of the rebellion.

The issue of these bills by the bank was in the exercise of a lawful power.

The issue of its bills by the bank was a lawful act, done under its charter. The issue created a private contract, to which the guarantee of the State was as binding as would have been that of a private person. The purpose was relief. It was like the issue of its bills by the City Council of Charleston. And the City Council could as well have said to the holder of its bills that they created no legal obligation, as could the bank from which they were issued, or the State, as the guarantor, deny a liability for these bills.

The case of *Morgan v. Keenan*, decided by this Court, gives us a rule in which is the first test to be applied in these cases.

The spirit of that decision is seen also in the case of the State of Texas v. White, and in *Thorington v. Smith*, where the Supreme Court was called on to enforce a contract

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made in Confederate *Treasury notes. Now, these notes, said the Court, were issued to further an unlawful attempt to overthrow the government. "No contracts made in aid of such an attempt can be enforced." "But was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?"

In the same connection may be mentioned the case of the city of Richmond, as decided by Chief Justice Chase. In that case said the Chief Justice, "The controlling question in the case is, for what purpose were these notes issued?"—2 *Law Times*, U. S. Court Reports, 101. "The evidence shows a very leading object was to give aid and support to the rebellion." And the same principle is well set forth in *Hatch v. Burroughs*, Mss. C. C., Geo.

There, then, cannot remain, on this score, the slightest exception to these bills as in violation of the 14th Amendment. No rule for the construction of statutes would bring this case within the letter or the spirit of the Amendment of the Constitution of the United States.

The last objection is that the receipt of these bills is prohibited by the State.

What has been said in regard to the 14th Amendment is so applicable to this point that it need not be repeated.

Chamberlain, Attorney General, and Corbin, for respondent:

We take three main positions in this argument against the obligation of the State to receive the bills tendered by these relators in payment of their taxes to the State:

1st. That no such obligation exists on the part of the State, no contract having ever been entered into by the State to receive the said bills any longer than they are "payable in gold or silver coin," and that the bills now tendered are notoriously not "payable in gold or silver coin."

2d. That whatever the nature or effect of the language of the 16th Section of the Act of 1812, incorporating the Bank of the State, that Section was repealed by the Act of 1843, which directed "that all taxes for the use and service of this State shall be paid in specie, paper medium, or the notes of specie paying banks of this State."

3d. That the State is not in any view compellable to receive these bills in payment of taxes, by mandamus, to the County Treasurer.

1st. The claim now made by the relator is,

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that the 16th Section *of the Act of 1812, chartering the Bank of the State, created a contract between the holders of the bills of

that bank and the State, which contract requires the State forever to receive said bills of the bank "in payment of taxes and other moneys due the State."

We dispute the contract, and deny the obligation. Our position is, that the said 16th Section, by its very terms, made such bills receivable for taxes only so long as the said bills were payable in gold or silver coin.

The Section is as follows:

"That the bills or notes of the said corporation, originally made payable, or which shall become payable on demand, in gold or silver coin, shall be receivable at the Treasury of this State, either at Charleston or Columbia, and by all Tax Collectors and other public officers, in all payments for taxes or other moneys due the State."

Now, what does this language mean?

We contend, with great confidence, that it means simply this: That the bills, while payable in gold, shall be receivable for taxes. When they cease to be payable, then they cease to be receivable for taxes.

In this view, the relator's labored argument on the inviolability of this contract is superfluous, and is, in fact, begging the question.

We say there is no such "contract."

How are we to construe the Section in question?

First. We are to examine the language itself.

Second. We are to try to ascertain the true intent of the State in using that language.

First. The language itself, "originally payable, or which shall become payable on demand," means simply, "originally payable," that is, "convertible into," or "redeemable in," gold or silver coin.

It refers to a fact, the fact that the said bills were convertible at their date, or became subsequently convertible, into gold or silver coin.

No matter what the form of the note, the only obligation undertaken by the State was, that so long as the bank in fact redeemed their bills in gold or silver coin, so long, and no longer, would the State receive them for taxes.

"Payable" means, strictly, as well as in common parlance, "that may or can be paid."

Bills "payable in gold and silver" mean "bills that may or can be paid in gold or silver coin."

The idea is sought to be conveyed, in discussing this question, by the relators, that this clause of the 16th Section of the char-

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ter of *the Bank of the State is a peculiar obligation, a special quality attached to the bills of this bank.

Such is not the fact. On the contrary, the statutes of our State show that all banks chartered before 1812, and most chartered since, contain the same provision.

This is a broad statement, yet it is believed to be strictly true. The charters of all the banks, from 1797 to 1857, and the tax and appropriation Acts from 1787 to 1867, establish the statement.

If, therefore, the 16th Section of the charter of the Bank of the State created a perpetual and absolute "contract," as claimed now, then the same contract exists in the case of all the Banks of the State until 1843. The same language is used, over and over, in the charters of other banks, as will be seen by an examination of the very able and elaborate argument of my predecessor, which is herewith submitted. I beg to ask your Honor's attention to that argument for proof of my assertion that no special contract was made with the Bank of the State.

The tax Acts throw much light on the construction of this clause and the intent of the Legislature.

Thus, in the tax Act of 1794, only such bills as are "redeemable, in the first instance, in gold and silver, at the banks now established in this State" are receivable by Tax Collectors.

This language is repeated, year by year, in the tax Act after the incorporation of the Bank of the State.

What is the inference?

Plainly, that the agreement—the contract, if you please—was, as we have said, simply to receive the bills so long as the bank redeemed them in gold and silver.

Therefore, if these relators demand that the State should receive their bills, they must present bills "payable in gold or silver coin on demand."

The bills now offered by these relators, it is not necessary to say, are not redeemable in gold and silver.

They are not, therefore, receivable for taxes due the State.

2d. But, admitting that the original charter was, as is now claimed by the relators, an absolute contract to receive the bills, whether redeemable in gold or silver or not, whether worthless or not, we say that that charter was modified and repealed in this respect by the Act of 1843. That Act provides as follows: "All taxes for the use and service of the State shall be paid in specie, paper medium, or the notes of the specie paying banks of this State."

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*Here we have a general and absolute rule, adopted by the State. The bills, in order to be receivable, must be the bills of banks paying specie for their bills when presented for payment.

Certainly all bills issued since the passage of this Act are receivable only upon the express condition that the bank issuing them shall redeem them in specie.

In support of these positions we refer your Honors especially to the case of *Woodruff v. Trapnall*, 10 How., 190; and also to the case

of the *Graniteville Manufacturing Co. v. Roper*, 15 Rich., 138.

Woodruff v. Trapnall was an action brought by the state of Arkansas against the plaintiff in error and his sureties upon his official bond, as Treasurer of the State, for the recovery of a certain sum of money alleged to have been received by him, as Treasurer, between the years 1836 and 1838. Judgment was recovered, and execution issued, whereupon the plaintiff in error tendered the full amount of the judgment in the notes of the Bank of the State of Arkansas, which were refused. A petition for a mandamus was asked for, to compel the defendant in error to receive the said bank notes in satisfaction of the judgment.

The 28th Section of the Bank Charter provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas."

Nothing can be more striking than the difference between this provision of the charter of the Bank of Arkansas, and the 16th Section of the Charter of the Bank of this State. In the former case, it is provided that the "bills and notes" shall "be received in payment of all debts;" in the latter case there is a most important and significant condition, or limitation, namely, "bills or notes" originally made payable, or which shall become payable on demand, in gold or silver coin.

The decision in *Woodruff v. Trapnall*, that the contract was an absolute one, requiring the State of Arkansas to receive all bills or notes of the Bank of Arkansas in payment of dues to the State, is by no means a decision that this State is bound to receive all the bills or notes of the Bank of this State, inasmuch as the terms of the charters are seen to be different in important particulars.

In this case the Court, while holding that the State was bound to receive the bills or notes issued, while the 28th Section of the charter was unrepealed, expressly recognizes the right of the State to repeal the Section, and declares that after the repeal of the 28th

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Section, "the emissions of the bank subsequently are without the guarantee."

The Act of 1843, above referred to, directing that all taxes for the use and service of the State shall be paid in specie, paper medium, or the notes of the specie paying banks of the State, was a virtual repeal of the 16th Section of the Act of 1812. And, although the Act of 1843 may be within the constitutional inhibition prohibiting a State from impairing the obligation of a contract, the prohibition can apply only to bills in circulation before the passage of the Act, to which time the guarantee of the State extended.

If, therefore, a tender is made of bills issued and in circulation after 1843, it would not be a compliance with the conditions pre-

scribed by the "specie, paper medium, or the notes of the specie paying banks of the State." This point was made in *Woodruff v. Trapnall*, and the Court held that "the notes issued by the bank after the repeal were not within the contract, and might be refused by the State."—*Graniteville Man. Co. v. Roper*, 14 Rich., 138.

Our conclusion, therefore, is that if the 16th Section of the charter of this bank created an absolute contract, as claimed by the appellants, between the bill holders and the State, requiring the State to receive all the bills of the bank, whether payable or not in gold or silver, this contract was terminated by the repeal of that Section by the Act of 1843.

Third. But waiving the former question, or even admitting the contract as claimed by the relators, the County Treasurer, as a tax officer of the State, cannot be compelled by mandamus to receive these bills.

We have in our own State Reports one case which conclusively bars this proceeding—the case of the State Ex Rel. *Hunt v. Pinckney*, Tax Collector.—3 Strobbart, 400.

This is a case exactly applicable to the present case. It was an application for a mandamus to compel the Tax Collector to receive "special indents" in payment of taxes. Special indents were, by a former law, made receivable for taxes.

The Court in that case uses the following language: "It is not material to the decision of this motion, that the validity and justice of the relator's claim should be investigated, by reference to the terms of credit on which special indents were received by the public creditors, or the provision made for the payment of them by the several Acts under which they were issued, or by the application of the presumptions of law and fact

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against the relator's right, arising *from the lapse of time. Even if the State were unquestionably liable to pay these indents, this Court has no jurisdiction to enforce the payment. If, in any case, this Court can interfere, by mandamus, in behalf of the creditors of the State, to compel payment of his demand it can only be where the Legislature has directed an officer, in possession of funds for that purpose, to discharge a debt, and, in violation of his duty, he refuses to do so.

Nor is it necessary to decide whether under the Act of 1788, the receipt of these indents in payment of taxes was not limited to the taxes of that year, and of those mentioned in the Act. If the State should issue indents or other obligations, and charge the annual taxes with the payment of them, and neglect or refuse to authorize the tax collector to receive such obligations in payment, it would be a public delinquency which could not be redressed by a mandamus to the tax collector to discharge the obligations of the

State by receiving them.—3 Strobbart, 402, 403.

Upon appeal, "the whole Court concurred in the opinion of the Circuit Judge, for the reasons assigned in his report."

There are other decisions and other principles governing the granting of mandamus, which forbid its use by this Court in the present instance. I refer your Honors to some of them:

1. It is to be noted that the writ of mandamus is not a writ of right, but it is in the discretion of the Court to grant it. It is a jurisdiction to be exercised with great caution.—1 Chit. Pr., 791; *Van Rensselaer v. Sheriff*, 1 Cow., N. Y., 501; *People v. Canal Board*, 13 Barb., N. Y., 432; *People v. Supervisors of Westchester*, 15 Ib., N. Y., 607; *Life Ins. Co. v. Wilson's Heirs*, 8 Peters, 291; *Ex parte Fleming*, 4 Hill, N. Y., 581.

2. Mandamus will not lie to compel an officer to do an act which, without its command, it would not be lawful for him to do.—11 Humphries, 306.

3. Superior Court will not grant mandamus to inferior officers to compel them to do an act which may render them liable to an action.—*Rex v. Broderipp*, 5 B. and C., 239, 7 D. and R., 861; *Moses on Mandamus* 53; *Reg. v. Heathcote*, 16 Mod. R., 51.

4. "If an action cannot be commenced against a State, to compel the performance of a contract, without a previous statute authorizing such an action, it would seem to follow that no action can be maintained against an officer of the State to compel a contract on behalf of the State."—*The People v. The Canal Board*, 13 Barbour, (N. Y.,) 432.

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*In conclusion, it is confidently submitted to the Court that these relators are not entitled to the judgment of the Court upon the case made.

1st. Because no such contract, as is alleged, was ever made by the State, but only the limited contract to receive the bills so long as they were redeemed in specie by the bank.

2d. Because the 12th Section of the charter of 1812, out of which the contract, whatever it was, arose, was repealed by the Act of 1843 and all bills issued subsequently were without the guaranty of the said 16th Section.

3d. Because, admitting the contract, mandamus, under the decisions of our own Courts governing that writ, and upon principle and authority generally, will not lie against this respondent.

The State, therefore, prays the discharge of the rule.

If the Court should decide that the case of *Furnan v. Nichol*, 8 Wallace, p. 44, decides adversely to the State the first of the foregoing propositions, it is submitted that that case leaves the second and third of our positions unimpaired.

Aug. 9, 1871. The opinion of the Court was delivered by

MOSES, C. J. By the order of this Court the case was remanded to the Circuit Court, for the purpose of having the issues of fact made by the return heard and decided. These were: First, whether the bills tendered are the bills of the President and Directors of the Bank of the State of South Carolina? And, if so, Secondly, whether they were issued in aid of any insurrection or rebellion against the United States, and in order to furnish means for resisting the arms of the United States in suppressing said insurrection and rebellion? A transcript of the record sent to this Court, shews that both issues were tried by a jury, in the Circuit Court for Charleston County, and a verdict was rendered in each, in favor of the relator. No motion was submitted in that Court for a new trial, or any objection made to the verdict in the argument before us. The facts, therefore, set forth in the suggestion are to be taken as true, both in regard to the genuine character of the bills, and the legitimate purposes for which they were issued.

This leaves alone, for our consideration, the question of law applicable to the facts. In the construction of the sixteenth Section of the Act of December, 1812, to establish a bank on behalf of and for the benefit of the State, (8 Stat. at Large, 24) we are bound to give full force and effect to the judgment of

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the Supreme Court of *the United States in *Furman v. Nichol*, 8 Wall., 44 [19 L. Ed. 370], to the extent of holding that the bills and notes of the said corporation, issued before the repeal of the said Section, are receivable in the payment of taxes. The language of the Tennessee Act and our own, as to the right of the tax, or State debtor to make payment in such bills, is identical. The decision of that Court on the constitutionality of a State law is binding on the Courts of the States, and it is to be accepted as the final arbitrament of the question involved. So far, therefore, as *Furman v. Nichol* holds that a legal obligation rested on the State of Tennessee to receive in payment of taxes the bills of its State bank, issued before the repeal of its charter, whether such bills are capable or not of immediate convertibility into specie, we are to acknowledge it, in this particular as the law of the land, binding on us, although in conflict with the decision of our late Court of Errors in respect to the 16th Section of the Act "to establish a bank on behalf of and for the benefit of the State."

Another proposition, however, remains to be considered, which we do not regard as affected by the decision in *Furman v. Nichol*. Though the guaranty of the State of Tennessee was held to attach to the bills issued by its bank until the Legislature, in some prop-

er way, had notified the public that it was withdrawn, it was for the Court, in that case, to determine when the contract ceased to be binding by reason of the character of the notice given by the State that no such guaranty should attach to the bills which might thereafter issue. There the Court held that the statute on which the State relied was not sufficient to establish a repeal of the Act. Here we are at liberty to consider and decide that question for ourselves. The course and effect of the legislation which induce us to hold that the 16th Section of the Act of 1812 was repealed, are of a different character from that which, in the case referred to, led the Court to conclude that the 12th Section of the Tennessee Act remained unimpaired.

The judgment of the Court in the *Graniteville Manufacturing Company v. Roper*, Tax Collector, 15 Rich., 138, did not rest alone on the availability of the bills tendered for immediate conversion into gold and silver coin. Even assuming that its construction of the said Section was wrong in this regard, yet it brought itself within the exemption laid down in *Trapnell v. Woodruff*, 10 How., 206, (and since recognized in *Furman v. Nichol*.) by showing that the bills tendered were issued after the repeal of the Section. The bills offered there as well as here, were

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issued after 1843, and we *concur in the conclusion of the Court of Errors in that case, "that although the Act of 1843 may be within the constitutional inhibition prohibiting a State from impairing the obligation of a contract, the prohibition can only apply to bills in circulation before the passage of the Act."

Although "Courts do not favor repeals by implication," yet if, by a fair and necessary implication, the intention of the Legislature is apparent, though not expressed in direct and positive terms, that subsequent provisions are to abrogate those already existing, such effect will be given to them as will carry out the proposed purpose. If there is a repugnancy created between two Acts, which cannot be reconciled, the latter is to be construed as repealing the former. If such a construction can be given each as will permit them to stand together, they will both be regarded of force. It is not necessary that the subsequent statute, which is relied on as that which creates the repeal, should be in direct repugnance to all the purposes contemplated by the prior one, if it is obvious that it intended to fix the rule which was thenceforward to govern in the matter to which it was to be applied.—*Davies v. Fairbairn*, 3 How., 636 [11 L. Ed. 760].

The Act of 1843, (11 Stat., 246.) entitled "An Act prescribing the duties of certain officers in the collection of supplies, the payment of salaries, and for other purposes," directed "that all taxes for the use and

service of this State shall be paid in specie, paper medium, or the notes of specie paying banks of this State."

The Act was a general one, not confined to a particular period. Its design was to qualify the obligation which rested on the State to accept, under all circumstances, in payment of dues, not only the notes of the Bank of the State of South Carolina, but of all such other banks as, under their respective charters and various provisions of the annual supply Acts, had the right to demand that their bills should be so received. The Legislature had, from time to time, in the Acts passed annually to raise supplies for the current fiscal year, prescribed the medium in which the taxes for such year should be paid. The Act of 1843 was a general one, and intended to be permanent in its operation, subject to any exception which the General Assembly might make for any particular year. It regulated the mode in which the taxes were to be paid by directing that they "shall be paid in specie, paper medium, or the notes of the specie paying banks of this State." The words employed to denote the purpose of the State were not only decisive, but imperative. The notes tendered by the relator were not of any

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specie *paying Bank of the State. The Act to raise supplies for 1857 (12 Stat., 596.) required "that the Comptroller General shall direct the Tax Collectors and Treasurers to receive the taxes and other dues of the State only in notes of the Bank of the State, or of specie paying banks of this State, or in coin of the United States." This discrimination was only for the year to which it expressly related, for "the Acts to raise supplies," as was said in the Graniteville case, "are annual, and their operation expires with the year." The Act of 1843, which must be regarded as a general one, became operative, and so continued until, by the express direction of the Legislature, suspended in its application to the taxes of any succeeding year. The decision, in *Furman v. Nichol*, as to the repeal of the Section of the Act establishing the Bank of Tennessee by Section 603 of the Code, adopted by the State of Tennessee in 1858, did not proceed alone on the ground that there were in the statute no words of negation, for the Court say: "We are to construe the different Sections of the Code together, in order to arrive at the meaning of the Legislature. In doing this, we find that where Acts of incorporation are not expressly repealed, they are in terms saved from repeal by Section 42 of the Code.

"As there was no attempt in the Code to interfere with the charter of the Bank of Tennessee, it follows that it was saved from repeal, and, of course, that the guaranty contained in the 12th Section of the Act of its incorporation was still continued."

The 42d Section negated the idea of the repeal of any Act of incorporation unless so declared in the Code. No charter, therefore, existing in the State of Tennessee in May, 1858, could be regarded as repealed by any other legislation, because the Code required such repeal to be in conformity with the provisions which it had prescribed. The language is strong, unqualified, and admits of no exception.

"Local, special and private Acts, and Acts of incorporation heretofore passed, are not repealed, unless it be herein expressed."

There was no such restriction qualifying the power of the Legislature to repeal any Section of the Act of 1812 "to establish a bank on behalf of, and for the benefit of, the State."

The judgment of the Court, dismissing the motion, was filed on the ——— day of July of the late term, and this opinion will be filed with it, as containing the grounds upon which it was founded.

WILLARD, A. J., and WRIGHT, A. J., concurred.

[Reversed, *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650.]

2 S. C. *559

*THE STATE ex rel. JAMES ROBB and CHARLES T. LOWNDES, Appellants,
v. WILLIAM GURNEY, County
Treasurer, Respondent.

(Columbia. April Term, 1871.)

The principle of the decision in *Wagner v. Stoll*, (ante, p. 538,) re-affirmed.

Before Graham, J., at Charleston. May, 1871.

The facts of this case were the same as those of *Wagner v. Stoll*, (ante, p. 538,) the only difference being that the notes tendered were issued before the year 1860.

The judgment of the Circuit Court was as follows:

Graham, J. The relators in this case ask a mandamus to the County Treasurer for Charleston County, to compel him to receive, in payment of taxes due from the relators to the State, the bills of the Bank of the State. These bills are of the issues made prior to December 20, 1860.

The relators claim that the 16th Section of the Act of 1812, incorporating the Bank of the State, created an unqualified contract between the holders of the bills of said bank and the State, requiring the State to receive them at all times in payment of taxes.

The return of the respondent sets forth, among other matters, that no contract exists requiring the State to receive the said bills in payment of taxes unless said bills are redeemable at the time of tender "in gold and silver coin." That the 16th Section of the

charter of the Bank of the State supports and establishes this view, which is also sustained by the decision of the Court of Errors of this State, in the case of *The Graniteville Manufacturing Company v. Roper, Tax Collector*, 15 Rich., 138.

The return further sets forth that the present is not a case in which the writ of mandamus is applicable.

Full arguments were made on the hearing by Mr. Magrath, for the relators, and Mr. Chamberlain, Attorney General, for the respondent.

Upon consideration whereof, and of the several questions involved, and especially upon the authority of the case of *The Graniteville Manufacturing Company v. Roper, Tax Collector*, it is now ordered and adjudged that the rule be discharged.

The relators appealed, on the grounds:

1. Because the 16th Section of the charter

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of the President and *Directors of the Bank of the State of South Carolina constituted a contract between the State and the holders of the notes of the bank, which the State was not at liberty to break, and tender of notes issued prior to the repealing Act was good.

2. That the notes of the said bank, tendered by the relator, were such notes of the said bank as the State, by the 16th Section of the charter of the bank, had declared should be received in payment of taxes.

3. That at the time of the issue of the notes of the bank tendered by the relator, no Act of the Legislature of the State had repealed the 16th Section of the Act of 1812, the charter of the said bank.

4. That the notes of the President and Directors of the Bank of the State of South Carolina, issued by the said bank prior to December 20, 1860, were good as a tender to the County Treasurer in payment of taxes due to the State.

5. That mandamus is the proper remedy for the relator in this case to enforce upon the County Treasurer such notes in payment of taxes.

6. Because His Honor, the presiding Judge, should have made the rule absolute, and ordered the mandamus to issue as prayed for.

Magrath & Lowndes, for appellants.
Chamberlain & Corbin, contra.

Aug. 9, 1871. The opinion of the Court was delivered by

MOSES, C. J. The suggestion filed by the relator does not aver that the bills of the Bank of the State tendered to the respondent, the Treasurer of Charleston County, in the payment of taxes, were issued prior to the 19th day of December, 1843, on which day the Act "prescribing the duties of certain officers in the collection of supplies, the

payment of salaries, and for other purposes," was passed.—11 Stat., 246. The case was taken up with that of the State *Ex Rel. Wagner v. Stoll*, and argued together by the same counsel for the appellants, on the same grounds, and on the assumption that the bills tendered in both cases were issued by the bank after the passage of the said Act.

It is, therefore, identical in principle with the said case of *Wagner v. Stoll*, and it is unnecessary to repeat the reasons assigned in that case for the judgment of the Court here, which judgment has been already filed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

[Reversed, *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650.]

2 S. C. *561

*SAMUEL W. MELTON and Wife, Appellants,
v. ISAAC N. WITHERS and Others,
Respondents.

(Columbia, April Term, 1871.)

[*Pleading* ⇨ 290.]

A bill seeking relief, but asking for no preliminary order, need not be verified.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 859–863, 886½; Dec. Dig. ⇨ 290.]

[*Pleading* ⇨ 234.]

If a supplemental bill be filed without leave, the Court will not dismiss it upon demurrer, if good ground for filing it appears.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 594, 596, 599; Dec. Dig. ⇨ 234.]

[*Pleading* ⇨ 274.]

The difference between a supplemental bill filed before demurrer, plea or answer, and an amendment, is nominal merely, and the Court is not bound to consider an objection taken by demurrer to such a bill, that the new matter stated therein should have been brought before the Court by amendment; for the objection, if sustained, could at once be obviated by amending the supplemental bill.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 822; Dec. Dig. ⇨ 274.]

[*Equity* ⇨ 156.]

Where a breach of trust is alleged in a bill to account, it is not demurrable, on the ground of multifariousness, because a party, in possession of assets under the breach, with notice of the trust, is made a defendant.

[Ed. Note.—Cited in *Suber v. Allen*, 13 S. C. 326.

For other cases, see *Equity*, Cent. Dig. § 372; Dec. Dig. ⇨ 150.]

Before Thomas, J., at York, November Term, 1869.

Supplemental bill for account. The stating part was as follows:

"That on the 1st day of May, 1867, your orators filed their original bill in the Court of Equity for York District, against Isaac N. Withers, O. A. Darby and R. C. Darby, his wife, and L. D. Goore, wherein it was stated by your orators that Joshua D. Goore, late of York District, died intestate in the

year 1852, leaving as his distributees and heirs-at-law, his widow, Maria Goore, and his three children, Rachael, then the wife of B. F. Withers, now the wife of O. A. Darby, and your oratrix, Mary H. Melton, wife of your orator, Samuel W. Melton, and L. D. Goore; and that letters of administration on the estate of J. D. Goore were granted to B. F. Withers and the said Maria Goore; that Maria Goore died some time in 1855, leaving the said B. F. Withers surviving as the sole administrator of J. D. Goore; and that the said B. F. Withers, some time in 1857, also died; and that after his death administration on the estate of Maria Goore was granted to your orator, Samuel W. Melton, and also administration de bonis non was granted to your orator on the estate of J. D. Goore; and that after the death of the said B. F. Withers, letters of administration on his estate were granted to Isaac N. Withers, and his wife, R. C. Withers, now R. C. Darby, wife of O. A. Darby.

"And your orators in said original bill stated and charged that the said Maria Goore and B. F. Withers never fully administered the estate of J. D. Goore, that, as administrator de bonis non of the estate of J. D. Goore, your orator has frequently called up-

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wife, as administrators of B. F. *Withers, to account for the administration by their intestate of the said J. D. Goore's estate, and to pay over to your orator the balance belonging to said estate remaining in the hands of B. F. Withers, at the time of his death; and in like manner, to deliver over to your orator all the unadministered property remaining in the hands of the said B. F. Withers at the time of his death; and that the said administrators delivered to him certain unadministered property, and that they had made some small payments on account of said estate to your orator: but that a large amount still remained due, although often requested to pay the same over to your orators.

"And your orators further show that in said original bill it was stated that J. D. Goore died seized and possessed of a large real estate, distributable amongst his said widow, Maria Goore, and his children; and that proceedings were instituted in this Honorable Court for the partition of said estate, and the same had been sold for distribution; that the proceeds of said sales had been partly collected, but that a considerable part remained unpaid; and of said sums so received, partial payments have been made to each of the said heirs. Your orator stated also in his said original bill, that he was willing to account for his administration of the estate of Maria Goore, but that her estate could not be fully administered until the administrators of B. F. Withers had accounted for his administration of the estate

of J. D. Goore; that administration on the said estate of J. D. Goore was granted jointly to Maria Goore and B. F. Withers, but that your orators had been informed and believed that in point of fact the said B. F. Withers received nearly all the moneys charged in the returns of the said administrators, and appropriated the same to his own use, and that they submitted that his estate was alone chargeable with said moneys so received by him.

"And your orators further shew unto your Honor that in the said original bill your orators prayed that the said I. N. Withers, O. A. Darby and R. C. Darby should account for the administration by their intestate of the estate of J. D. Goore, and should discover what sums of money their intestate received for, and on account of, said estate, and when received, and what unadministered assets or property remained in the hands of B. F. Withers at the time of his death; and that such sums of money, if any, should be paid over to your orator as administrator de bonis non of said estate; that the said O. A. Darby and R. C. Darby, his wife, might

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account for any *sums received by them of either the real or personal estate of J. D. Goore, on account of the share of R. C. Darby, as also for all such sums properly received by B. F. Withers, as her husband. That your orator and oratrix should, in like manner, account for all sums by them received on account of the share of your oratrix out of the estate of said J. D. Goore. That said L. D. Goore should also account for sums of money received by him of his share. That the balance yet remaining due of the sales of the real estate of said J. D. Goore might be ascertained; the share of each heir and distributee of the whole estate, real and personal, might be ascertained; and that your orator, Samuel W. Melton, might account for his administration of the estate of Maria Goore, and pay over to her distributees their respective shares; and that your orator might have such other and further relief as the exigencies of the case might require.

"And your orator further shews unto your Honor, by way of supplement to said original bill, that, at the time of the granting of letters of administration on the estate of J. D. Goore to Maria Goore and B. F. Withers, the said B. F. Withers was doing a commercial business, in the town of Yorkville, with one Henning F. Adickes, under the name and firm of Adickes & Withers; that, at the time of the death of J. D. Goore, the said firm of Adickes & Withers was indebted to him in the sum of one thousand dollars, besides interest; and that said firm, from time to time thereafter, borrowed from the said administrator of J. D. Goore large sums of money belonging to said estate, and that for such sums of money the said Adickes

& Withers gave their firm note, which said note your orator is informed, and believes, yet remains unpaid; and that out of the administration funds in the hands of said B. F. Withers, in point of fact, he obtained the means for going into said business, and paid the same into the copartnership concern known as Adickes & Withers; and your orators are informed, and verily believe, that all of the moneys received by the said B. F. Withers, belonging to the estate of the said J. D. Goore, were deposited in the said firm of Adickes & Withers, and that the said firm was in the habit of using the same as their necessities required; that said firm carried on a large business in the town of Yorkville, and were constantly requiring the use of large sums of money, and that the said firm of Adickes & Withers have mixed themselves up to such an extent with the affairs of the estate of the said J. D. Goore that it will be impossible for your orator to

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account for his administration de bonis *non of the estate of J. D. Goore, without making the said Henning F. Adickes a party to these proceedings, and obtaining from him discovery touching these said matters. And it is very uncertain whether the sureties on the administration bond of B. F. Withers, as administrator of J. D. Goore, will be able to respond to any considerable liabilities found to be due by said B. F. Withers, and that your orator will suffer great loss, unless they can have a discovery from said H. F. Adickes."

The prayer of the bill was as follows:

"That the said Isaac N. Withers, O. A. Darby, and R. C. Darby, his wife, L. D. Goore and Henning F. Adickes, may full, true and perfect answers make to all the matters and things hereinbefore stated and set forth; that the said H. F. Adickes shall, upon his corporal oath, discover what amount of money the said B. F. Withers put into the firm of Adickes & Withers; when it was put in; from whom it was obtained; what amounts of money belonging to the estate of J. D. Goore came into the possession of Adickes & Withers, at any time after administration was granted on said estate to Maria Goore and B. F. Withers; whether or not said firm was not in the habit of using the funds belonging to said estate; whether the same were not deposited for safe keeping in the store of the said firm, and what amount belonging to said estate was on deposit at the time of the death of the said B. F. Withers; that the said H. F. Adickes be required to produce, for the inspection of this honorable Court, the books of the firm of Adickes & Withers, and that for any sums of money ascertained to be due by the said H. F. Adickes, as surviving copartner of Adickes & Withers, to the estate of J. D. Goore, that your orator, as his administrator de bonis non, shall have a decree for the same; that the said I. N.

Withers and O. A. Darby and wife, administrators of B. F. Withers, do discover all matters coming within their knowledge going to show the amount of money of the estate of J. D. Goore in the possession of Adickes & Withers, at the death of said B. F. Withers; what moneys they know to have been received and used by said firm, belonging to said estate, during the administration of said estate by their intestate; and that they do answer whether or not they know of any money belonging to said estate of J. D. Goore, received by said B. F. Withers, and, shortly prior to his death, deposited in the store of said Adickes & Withers; and for such other and further relief as to your Honor shall seem fit, and according to equity and good conscience."

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*The defendants, O. A. Darby and wife, and Lawson Goore, H. F. Adickes and I. N. Withers, severally demurred, on grounds reducible to the following propositions:

1. That the supplemental bill is informal.
2. That the matter alleged arose before the filing of the original bill.
3. That the supplemental bill is multifarious.

The decree of His Honor the Circuit Judge is as follows:

Thomas, J. On hearing the bill and demurrers of O. A. Darby and wife, I. N. Withers and H. F. Adickes, and argument of counsel, it appears to the Court that there is no privity of interest between Adickes and the complainants, nor collusion between Adickes and any of the defendants, nor tortious action upon the part of Adickes which will permit his liability directly to complainants; It is, therefore, ordered and decreed, that the demurrers be sustained, and the supplemental bill dismissed, at the cost of complainants.

The complainants appealed on the grounds:

1. Because the bill is not multifarious.
2. Because Henning F. Adickes is a necessary and proper party to the bill.

Smith, Hamilton, Hart, for appellants:

1. The bill is not objectionable for multifariousness.—Story's Equity Pleadings, §§ 534, 539; *Barkley v. Barkley*, 14 Rich. Eq., 24.

2. A bill filed by distributees for an account may make as a party any one who (although otherwise not proper party) has possessed himself of the assets of the estate, or is liable to account therefor by reason of collusion with the administrator, or by otherwise mixing himself up with the affairs of the estate.—Story's Eq. Pl., §§ 178, 227; *Long v. Majestre*, 1 Johns. Ch., 305; *Gedge v. Traill*, 1 R. & M., 281.

3. As to supplemental bills.—Story's Eq. Pl., §§ 332, 334.

Wilson, Clawson, for respondents:

Bill alleges distinct matter against H. F. Adickes, in which defendant, I. N. Withers, is not interested or concerned. Makes suit in-

tricate, prolix and expensive; ergo, multifarious.—Mitf. Ch. Pl., 208 and 215; *Garlick v. Strong*, 3 Paige, 440; *Benson v. Hadfield*, 4 Hall., 39 and 40.

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*Want of privity between the complainants and H. F. Adickes; therefore, no right to institute suit. No collusion charged or proved. Mitf. Ch. Pl., 184; *Elmsly v. McAuley*, 3 Bro. C. C., 624; *Utterson v. Mair* and others, 2 Ves. Jr., 95; 4 Bro. C. C., 270; *Story*, Eq. Pl., § 262.

"Plaintiff must show by his bill some claim of interest by the defendant in the subject-matter of the suit, which can make him liable to plaintiff's demands, or defendant may demur."—Mitf. Pl., 186. "To prevent a demurrer, bill must show not only that defendant has an interest in the subject of suit, but that he is liable to plaintiff's demands."—Mitf. Pl., 188. Adickes has no interest in suit. Only liable to account to administrators of B. F. Withers, who have filed bill already against him.

"If supplemental bill is brought upon matters arising before the filing of the original bill, defendant may demur."—Mitf. Pl., 239; *Baldwin v. Mackmum*, 3 Atk., 817; 2 Madd. R., 387; 17 Ves., 144; *Milner v. Harewood*, 2 Madd. R., 53.

Supplemental bill filed without leave of the Court first obtained, and not vouched by affidavit.—Mitf. Ch. Pl., 67. Really a bill for discovery. Under new Code bill for discovery abolished.—Vide Code, p. 515, § 406.

Aug. 12, 1871. The opinion of the Court was delivered by

WILLARD, A. J. The appeal is from a decree sustaining a demurrer to a supplemental bill, and dismissing the bill. The supplemental bill alleges the exhibiting of the original bill by the complainant, S. W. Melton, as administrator de bonis non of J. D. Goore, who died intestate, and also as administrator of the widow of intestate, who, together with B. F. Withers, administered, in the first instance, the intestate estate, and also in right of his wife, who is joined as complainant, a daughter and distributee of intestate, against the personal representatives of B. F. Withers, who, at the death of the widow, became surviving administrator of the first intestate estate; the other distributees are also joined as defendants.

The bill alleges a breach of trust against the surviving administrator in appropriating the money of his intestate to his own use, and prays an account, &c.

The supplemental bill further charges that the surviving administrator, B. F. Withers, employed the moneys of the estate in mercantile business transacted by him under a co-partnership with H. F. Adickes. It charges Adickes with notice of the breach of

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*trust, and makes him a party defendant with a prayer for relief against him.

All the defendants demurred. The grounds of demurrer are reducible to three propositions: first, that the supplemental bill is informal; second, that the matters alleged arose before the filing of the original bill; third, that it is multifarious.

The Circuit Judge sustained the demurrer on the latter ground.

The informality complained of is, that the bill is not verified, and was not filed with the leave of the Court.

The bill seeks relief, but does not ask for any preliminary order, and is not required to be verified.—1 Daniell's Chancery Pr., 395; *McElwee v. Sutton*, 1 Hill's Ch., 33.

The objection that leave for filing was not obtained is not, in itself, sufficient ground of demurrer. If, however, it appears by the supplemental bill that there was no ground for obtaining leave to file, advantage may be taken of this fact on demurrer. If, upon considering this ground of appeal, it should appear that reason existed for filing the supplemental bill, this Court will not dismiss it.

The questions remaining to be considered are: First, whether the supplemental bill is defective by reason of the fact that the matters brought forward by it occurred before the filing of the original bill; and, second, whether it is multifarious. Strictly speaking, a supplemental bill relates to matters occurring after bill filed, as changes of interest pendente lite, &c. (2 Dan. Ch. Pr., 1594.) Events occurring after bill filed were not subjects of amendment; they were therefore allowed to be brought forward by supplemental bill. (*Stafford v. Howlett*, 1 Paige, 200.) As to matters occurring before the filing of the bill, the proper course is to amend the bill, and on such amendment new parties may be added, in order to render the decree more effectual. But where the bill cannot be amended, as, for instance, where the case has proceeded too far, a supplemental bill, or, perhaps, more accurately speaking, a bill in the nature of a supplemental bill, will be allowed. (Mitf. rd's Pleadings, 49.) In such case, the supplemental bill is an addition to the original bill, and becomes part of it, so that the whole bill is taken as one amended bill. (2 Dan. Ch. Pr., 1611, note 3, and cases there cited.)

In the present case, it would appear that the supplemental bill had been filed before demurrer, plea, or answer to the original bill. In such a case, the difference between an

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amended and a supplemental bill is nominal merely, as the whole case is open. As the defendant's objection did not distinctly raise before the Circuit Court the objection that the new matters should have been brought forward by amendment, instead of by a sup-

plemental bill, we are not bound to consider it. In that case the objection, if sustained, might have been at once obviated by a mere verbal change in the bill. The objection that was in fact taken, viz., that the matters arose before the original bill was filed, is not fatal to a supplementary bill.

The question of multifariousness has been ruled by us in *Ragsdale v. Holmes*, (1 S. C., 91.) We there held that, when a breach of trust is alleged, it is competent to unite, as

a defendant, a third party in possession of assets under such breach, with notice of the trust.

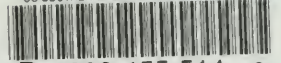
The decree of the Circuit Court must be set aside, and the demurrer overruled, and the case will be remanded to the Circuit Court for further proceedings.

WRIGHT, A. J., concurred.

MOSES, C. J., absent at hearing.

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